Application 012/2015

Anudo Ochieng Anudo v. United Republic of Tanzania

Opinion of the Open Society Justice Initiative

I. INTRODUCTION

1. As experts in the field of international law on the right to nationality and statelessness, we provide this opinion to assist the African Court on Human and Peoples' Rights (the Court) in its deliberations in the above matter, at the Court's request, pursuant to Rule 45 of the Court's Rules. This opinion presents an overview of international law and standards relevant to the case, as well as comparative legal precedents established in regional systems and domestic jurisdictions.
2. This opinion addresses two interconnected international norms that define the state's human rights obligations at issue in this situation: the right to a nationality and the duty to avoid statelessness. Specifically, two points are critical given the facts of this case:
    - *A. Arbitrary deprivation of nationality is prohibited.* The right to nationality and the prohibition on arbitrary deprivation of nationality require that states respect the **prohibition on expulsion of nationals** including through providing **due process** in instances of deprivation and ensuring that due process is respected.
    - *B. Specific safeguards are required to avoid the creation of statelessness.* Statelessness has been widely acknowledged by international and domestic courts and tribunals as a legal situation that undermines **human dignity**. The duty to avoid statelessness similarly demands **strict procedural protections** in cases of deprivation of nationality.
3. Following a brief presentation of the factual and legal background relevant to Mr. Anudo's case, each point is examined in turn.
4. In our submission, Tanzanian authorities have not satisfied the basic requirements of the above norms, violating the right to nationality as expressed in various provisions of the African Charter on Human and Peoples' Rights (African Charter) and the jurisprudence of the African Commission on Human and Peoples' Rights (Commission). The case is a symptom of serious gaps in protection of the right to nationality in Africa which permit arbitrary deprivation of nationality and the creation of statelessness to occur on a wide scale and in most cases with impunity.

II. BACKGROUND

A. Factual Background

5. Mr. Anudo was born in Tanzania in 1979 and holds a Tanzanian birth certificate, which has not been made part of the record. He also held a Tanzanian voter's card, which was confiscated by Tanzanian authorities prior to his expulsion from the country. Mr. Anudo claims that both his mother and father are Tanzanian, and were born in Tanzania. In 2006, Tanzanian authorities issued Mr. Anudo with a Tanzanian passport. This document, too, was ultimately confiscated and cancelled.
6. In 2012, Mr. Anudo approached the Tanzanian authorities in Babati to process his marriage application. The District Commissioner instead launched an investigation into Mr. Anudo's citizenship. In 2014, according to the Tanzanian government a "team" of undisclosed composition was dispatched to the village of Masinono, in the Mara region, where the applicant stated he was born. According to the Respondent's Reply, the investigation revealed that Mr. Anudo's father was born in Kenya and migrated to Tanzania "many years ago" with his parents, and the woman Mr. Anudo claimed was his mother, Dorcas Jacob Rombo, denied that he was her son and stated

that Mr. Anudo's mother had been "married in Kenya where she passed away." Dorcas Jacob Rombo submitted conflicting testimony to the Court that she is in fact Mr. Anudo's mother.[1]

7. The Tanzanian authorities concluded that Mr. Anudo is not a citizen and that he obtained his Tanzanian passport through presentation of false documents. Mr. Anudo denies this.

8. There is no indication in the Court's case file that the Tanzanian authorities took steps to verify whether or not Mr. Anudo was in fact a Kenyan citizen prior to his denationalization and expulsion.

9. Mr. Anudo contends that during a 6-day period of detention immediately prior to his expulsion he was beaten and coerced into falsely claiming to be a Kenyan citizen, then forced to sign a Prohibited Immigrant notice justifying his forced expulsion from Tanzania.

10. Mr. Anudo, through his father, wrote to the Tanzanian Prime Minister to appeal the cancellation of his documents and deportation to Kenya. The Minister's response upheld these actions.

11. Following his deportation to Kenya, Mr. Anudo was arrested and convicted of being unlawfully present there. Mr. Anudo claims that, since his conviction in November 2014, he lives in Sirari, a "no man's land" at the Kenya-Tanzania border.

12. Mr. Anudo is not recognized as a citizen of Kenya or Tanzania, the two states with which he has a possible material link. Thus, following loss of Tanzanian citizenship, he would appear to meet the international definition of a stateless person, one who is not considered a national by any state under the operation of its law.[2]

B. Citizenship Law and Practice in Tanzania

13. The combination of several factors in Tanzania leaves many individuals vulnerable to arbitrary deprivation of nationality: a direct conflict between the nationality law as written and its operation in practice, extremely low birth registration rates, and the lack of appropriate review of nationality determinations. The results of these factors include vulnerability to non-recognition of Tanzanian nationality, whether prospective or, as in Mr. Anudo's case, retroactive. Tanzania has a record of abusing these ambiguities and gaps to denationalize and expel its own citizens.

14. Tanzanian law as written currently provides for acquisition of citizenship by birth on the territory (*jus soli*).[3] In practice, Tanzanian authorities interpret and apply the law as a descent-based system, presenting major challenges in determining Tanzanian citizenship generally.[4] A proposed draft constitution would remove the *jus soli* provisions in favour of citizenship by descent (*jus sanguinis*).[5] As discussed in more detail below, the operation of law – its application in practice – governs any analysis as to an individual's legal status as a citizen or a stateless person.[6]

[1] In our view, the information gathered through the 2014 investigation is inconclusive as to Mr. Anudo's nationality under the operation of either Tanzanian or Kenyan law (see following section).
[2] 1954 U.N. Convention relating to the Status of Stateless Persons, Article 1(1). While Tanzania has not ratified the 1954 Convention, the International Law Commission (ILC) has stated that the Article 1(1) definition "can no doubt be considered as having acquired a customary nature." *See* ILC, *Draft Articles on Diplomatic Protection with Commentaries*, *Yearbook of the International Law Commission*, Vol. 2(2) (2006), at 48-49.
[3] *See* Tanzania Citizenship Act of 1995, Article 5.
[4] *See* Bronwen Manby, *Statelessness and Citizenship in the East African Community*, United Nations High Commissioner for Refugees, *draft*, September 15, 2016 (forthcoming), at 59. Bronwen Manby, *Citizenship Law in Africa* 47 (3d ed. 2016); Bronwen Manby, "Tanzanian constitutional review proposes radical changes to citizenship law", African Arguments 15 April 2014 http://africanarguments.org/2014/04/15/tanzanian-constitutional-review-proposes-radical-changes-to-citizenship-law-by-bronwen-manby/.
[5] *See* Bronwen Manby, *Citizenship and Statelessness in Africa: The Law and Politics of Belonging* 94 (2016).
[6] *See* para. 60, below.

15. Tanzanian law does not permit deprivation of nationality in the case of citizens from birth.[7] Nevertheless, Tanzania has in a number of cases declared that individuals who were previously recognized as Tanzanian nationals from birth were no longer recognized as citizens:

> "Tanzania has attempted to strip troublesome individuals of their citizenship several times in recent years. In 2001, the government declared that four individuals were not citizens, though giving them the option of applying for naturalisation; the move was interpreted as reprisal for independent media criticism of political and economic developments in Tanzania. In August 2006, the government of Tanzania again stripped two journalists of nationality, accused of being 'unpatriotic and enemies of the state'."[8]

16. In September 2013, President Kikwete launched "Operation Kimbunga," a crackdown on illegal immigration targeting "foreigners" for expulsion. Among those expelled were people who claimed to be Tanzanian, including those who held Tanzanian voter cards and birth certificates.[9] The operation was criticized for its discriminatory, arbitrary, and corrupt implementation.[10] The operation deployed low level government officials to identify migrants who were in the country without authorization, relying on these public servants to make citizenship determinations seemingly without any guidance or training in nationality law.[11] The East African Law Society sued the East African Community for failing to intervene and investigate the allegations, resulting in a judgment against Tanzania from the East African Court of Justice in March 2016.[12]

17. The 2009 Tanzanian Law of the Child Act recognizes the child's right to a name and a nationality.[13] Tanzania is a party to the African Charter on the Rights and Welfare of the Child (ACRWC).[14] Article 6 of the Charter also requires that states guarantee children's right to nationality including ensuring 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". The African Committee of Experts on the Rights and Welfare of the Child held that these protections require states to ensure "*that every child has a nationality when he is born*."[15]

18. The low birth registration rate (only 16.3% of those under five years old) and pervasive ambiguity of legal status generally in Tanzania is evident in the allegations made by the government here

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[7] Tanzania Citizenship Act of 1995, Articles 7, 13-17; *see also* Bronwen Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* Table 8, 176 (2016). *See* African Commission on Human and Peoples' Rights, *The Right to Nationality in Africa* 34 (2014); Bronwen Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* 111, 169, 176 (Table 8) (2016).

[8] Bronwen Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* 218 (2016).

[9] *See, e.g.* Legal and Human Rights Centre and Zanzibar Legal Services Centre, *Tanzania Human Rights Report 2013* 197 et seq. (March 2014), available at: http://www.humanrights.or.tz/downloads/tanzania-human-rights-report-2013.pdf; "Expelled immigrants stranded as 'countries of origin' deny their citizenship," The East African, September 21, 2013.

[10] Legal and Human Rights Centre and Zanzibar Legal Services Centre, *Tanzania Human Rights Report 2013* 197 et seq. (March 2014), available at: http://www.humanrights.or.tz/downloads/tanzania-human-rights-report-2013.pdf; Bronwen Manby, *Statelessness and Citizenship in the East African Community*, United Nations High Commissioner for Refugees, *draft*, September 15, 2016 (forthcoming), at 60.

[11] Bronwen Manby, *Statelessness and Citizenship in the East African Community*, United Nations High Commissioner for Refugees, *draft*, September 15, 2016 (forthcoming), at 60.

[12] East African Law Society v. Secretary General of the EAC, Case No. 7/2014, Judgment of 22 March 2016, available at: http://eacj.org/?cases=east-african-law-society-vs-the-secretary-general-of-the-east-african-community.

[13] Law of the Child Act No. 21 of 2009, Section 6.

[14] Tanzania ratified the Charter on March 16, 2003.

[15] *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v. Kenya*, Comm. 002/2009, African Committee of Experts on the Rights and Welfare of the Child, March 22, 2011, para. 53 (emphasis in original).

that Mr. Anudo is not in fact Tanzanian by birth.[16] These same factors contributed to the arbitrariness and abuses accompanying Operation Kimbunga, as well as earlier instances of denationalization via accusations of fraud.

19. Tanzanian law affords minimal procedural safeguards in challenging nationality and immigration decisions. In cases of deprivation of nationality from *naturalized* citizens, an aggrieved person has the right of inquiry, with a committee of inquiry to be appointed by the Minister.[17] There is no recourse to judicial review. Because the law does not provide for deprivation of nationality in the case of citizens by birth, no process for appeal is specified, leaving Tanzanians from birth with less recourse than naturalized citizens when it is decided that their citizenship has been recognised in error; or if it is decided that they have never acquired citizenship. Section 23 of the Tanzania Citizenship Act 1995 states that a decision by the Minister is final and cannot be reviewed by a court.

20. Article 26 of the Immigration Act establishes that where the Minister uncovers fraud or misrepresentation in the acquisition of *permission to stay* in Tanzania, such permission and any documents attesting to it are considered void *ab initio*. Article 30 states that the burden of proving Tanzanian nationality rests exclusively on the party laying claim to such status. In respect of the decision to declare someone a Prohibited Immigrant, under Article 10(f) of the Tanzanian Immigration Act, the Minister's decision is final.

III. LEGAL STANDARDS LIMITING DENATIONALIZATION

21. International law limits unilateral (non-voluntary)[18] denationalization in two principle ways: (A) by requiring states to respect and protect the right to nationality and (B) by establishing the duty to avoid statelessness, including the articulation of specific safeguards in the exercise of unilateral denationalization resulting in statelessness.

A. The Right to Nationality and Prohibition on Arbitrary Deprivation of Nationality

22. This section provides an overview of African and international human rights law on protecting the right to nationality, and then discusses in more detail (*i*) the prohibition on expulsion of nationals and (*ii*) the relevant due process protections to be considered.

23. States must comply with international law in defining and applying domestic nationality laws.[19] International law treats nationality as a right entitled to protection within the framework of international human rights law, beginning with the inclusion of the right to nationality and the prohibition against arbitrary deprivation of nationality in Article 15 of the Universal Declaration

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[16] Under five birth registration rate according to UNICEF was 16.3% for 2002-2012, *see* UNICEF, Statistics by Country, United Republic of Tanzania, available at: https://www.unicef.org/infobycountry/tanzania_statistics.html. This is among the lowest in Africa. *See also* Bronwen Manby, *Statelessness and Citizenship in the East African Community*, United Nations High Commissioner for Refugees, *draft*, September 15, 2016 (forthcoming), at 59 ("The fact that until very recently most Tanzanians had no identification documents, and that rates of birth registration are still extremely low means that the ambiguity over legal status is profound.").

[17] Tanzania Citizenship Act of 1995, Article 15.

[18] Mr. Anudo claims he was forced to sign documents while in detention and under duress stating or serving as proof that he is not Tanzanian and consenting to classification as a Prohibited Immigrant. This opinion treats his loss of citizenship as unilateral deprivation, as opposed to voluntary renunciation, as the Tanzanian government did not rely on any such statements by Mr. Anudo in its presentation of the case. Nevertheless, in paras. 51-52, below, we present relevant materials that might guide the Court in considering the weight and credibility to assign to any assertion that Mr. Anudo voluntarily renounced his Tanzanian citizenship.

[19] The terms "citizenship" and "nationality" are used interchangeably in this opinion, as they are in international legal discourse, defined as the legal relationship between an individual and a state. *See, e.g.*, Bronwen Manby, *Citizenship Law in Africa* ix (3d ed, 2016).

of Human Rights (UDHR).[20] The African Commission has developed an important body of jurisprudence on the right to nationality in Africa, bringing these protections within the Charter's ambit. On 23 April 2013, the African Commission published its Resolution on the Right to Nationality.[21] The Resolution states that:

> "[T]he right to nationality of every human person is a fundamental human right implied within the provisions of Article 5 of the African Charter on Human and Peoples' Rights and essential to the enjoyment of other fundamental rights and freedoms under the Charter."

24. Citizenship is the most durable status available under international law;[22] it is not a privilege that may be taken away at will. On the contrary, denationalization may occur only in extremely rare cases and is further restricted where it results in the creation of statelessness (see next section).[23]

25. "Deprivation of nationality" covers situations where individuals who have previously been recognized as citizens of a state are subsequently stripped of recognition of that nationality, whether this is by invocation of formal procedures provided under the law, or in violation of that law.[24] It also covers cases in which individuals are arbitrarily deprived of nationality as a result of actions taken by administrative authorities.[25]

26. Many states find no need to permit deprivation of nationality at all in their internal law.[26] As noted above, Tanzanian law, on its face, does not permit deprivation of nationality from citizens by birth, such as Mr. Anudo. The only circumstance in which a citizen from birth may lose citizenship under Tanzanian law is where the person acquires or holds another citizenship as an adult, since Tanzanian does not permit dual nationality. Since Kenya has determined that Mr. Anudo is not a Kenyan citizen, this possibility does not arise.

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[20] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 15. That provision states that "everyone has the right to a nationality" and (Article 15(2)) "no on shall be arbitrarily deprived of … nationality." *See also* Article 24 of the International Covenant on Civil and Political Rights, Article 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, Articles 7 and 8 of the Convention on the Rights of the Child, Article 20 of the American Convention on Human Rights and Article 6 of the African Charter on the Rights and Welfare of the Child. *See generally* U.N. Human Rights Council, Human rights and arbitrary deprivation of nationality: report of the Secretary-General, 14 December 2009, A/HRC/13/34; U.N. High Commissioner for Refugees (UNHCR), *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")*, March 2014.

[21] African Commission on Human and Peoples' Rights, *234: Resolution on the Right to Nationality*, 23 April 2013, available at: http://www.refworld.org/docid/51adbcd24.html.

[22] Leslie Esbrook, *Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool*, 37 U. Pa. J. Int'l L. 1273 (2016) p.1305-1306.

[23] *See, e.g.*, Award of the Eritrea-Ethiopia Claims Commission in *Partial Award (Civilian Claims)*, 44 ILM 601 (2005), para. 60 ("[I]nternational law limits States' power to deprive persons of their nationality.")

[24] *See, e.g.*, Bronwen Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* 43 (2016) ("[A] retrospective finding that a person was not a national and was issued nationality documents in error, or arbitrary application of rules relating to loss by operation of law, are equally subject to rules prohibiting arbitrary deprivation of nationality").

[25] *See Report of the Secretary-General on Human Rights and arbitrary deprivation of nationality*, UN Doc. A/HRC/13/34, 14 December 2009, para. 23 (deprivation of nationality "covers all forms of loss of nationality, including those that arbitrarily preclude a person from obtaining or retaining a nationality, particularly on discriminatory grounds, as well as those that automatically deprive a person of a nationality by operation of law, and those acts taken by administrative authorities that result in a person being arbitrarily deprived of nationality.").

[26] R.Y. Jennings & A. Watts, eds., *Oppenheim's International Law* 880 (9th ed. 1991) ("In so far as deprivation of nationality results in statelessness, it must be regarded as retrogressive, and the fact that some states find no need (subject to certain exceptions) to provide for deprivation of nationality suggests that no vital national interest requires it.").

27. The Inter-American Commission took a robust interpretation on the limitations of the deprivation of nationality under the American Convention:

> "... this right [to nationality] is properly considered to be one of the most important rights of man, after the right to life itself, because all the prerogatives, guarantees and benefits man derives from his membership in a political and social community – the State – stem from or are supported by this right.[…] It is generally considered that since nationality of origin is an inherent attribute of man, his natural right, and is not a gift or favour bestowed through the generosity or benevolence of the State, the State may neither impose it on anyone by force, nor withdraw it as punishment or reprisal.
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> "The deprivation of nationality ... always has the effect of leaving a citizen without a land or home of his own, forcing him to take refuge in an alien country. That is, it inevitably impinges on another jurisdiction, and no state may take upon itself the power to adopt measures of this sort. ... [T]he Commission believes that this penalty -- anachronistic, outlandish and legally unjustifiable in any part of the world -- is a thousand times more odious and reprehensible when applied in our own Americas, and should forever be banned from being applied by governments everywhere."[27]

The Prohibition of Expulsion of Nationals

28. It is widely recognized that deprivation of nationality frustrates international relations by creating a responsibility to another State over an individual who is not recognised by that State as its own, especially where deprivation is a prelude to expulsion and renders the victim unreturnable.[28] International law prohibits expulsion of nationals. The International Law Commission's *Draft Articles on expulsion of aliens* state:

> "A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her."[29]

29. Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR),[30] to which Tanzania is a party,[31] prohibits arbitrary deprivation of an individual's right to enter his "own country," a provision that is not subject to derogation. In its General Comment No. 27 on Freedom of Movement, the Human Rights Committee (UNHRC) explained that Article 12(4) severely restricts contracting states' ability to engage in denationalization leading to expulsion:

> "The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country."[32]

30. The UNHRC in *Stewart v. Canada*, in relation to the protection granted by Article 12(4), established that the principle of non-expulsion of nationals should be understood broadly, maintaining that "his own country" is a concept that applies to individuals who are nationals as well as to certain categories of individuals, who while not nationals in a formal sense, are also not

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[27] Third Report on the Situation of Human Rights in Chile, IACHR OEA/Ser/L/V/II.40 Doc 10, 11 February 1977, at. 80-1.
[28] R.Y. Jennings & A. Watts, eds., *Oppenheim's International Law* at 944-45.
[29] *Expulsion of aliens: Texts and titles of the draft articles adopted by the Drafting Committee on second reading*, International Law Commission Sixty-sixth session, UN General Assembly, A/CN.4/L.797, May 24, 2012.
[30] *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, *entered into force* March 23, 1976.
[31] Tanzania ratified the ICCPR on June 11, 1976.
[32] UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, U.N. Doc. CCPR/C/21/Rev.1/Add.9, November 2, 1993.

"aliens" within the meaning of Article 13. This would depend on "special ties to or claims in relation to a given country. [33]

31. A chief concern underlying Article 12 is the reality that states can, simply by declaring an individual a non-national, expel him or her and deny international responsibility, in circumvention of the entire framework of human rights protection. The Committee addresses this loophole by emphasizing that the right of return to one's "own country" extends

> "at the very least, [to] an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law . . . ."[34]

32. Article 12(2) of the African Charter mirrors ICCPR 12(4): "Every individual shall have the right to leave any country including his own, and to return to his country."[35] Article 12(4) of the Charter makes clear that non-nationals may only be expelled "by virtue of a decision taken in accordance with the law."

33. The African Commission on Human and Peoples' Rights recently found a violation of Article 12 in a case against Côte d'Ivoire, in which it noted that ethnic minorities were denied free movement due to the non-recognition of their Ivoirian nationality, even in cases where they possessed national identity documents.[36]

34. In the same case, the Commission also addressed the underlying causes of non-recognition, in connection with its consideration of claimed violations of Article 5 (right to recognition of legal status):

> "[T]he lack of precision of a law on nationality may promote the imputation of an alternative nationality, which could be addressed within the context of violating not only the provisions of Article 5 of the Charter but also of the relevant international law."[37]

35. The conclusion builds on past jurisprudence, notably *Modise v. Botswana*, in which the Commission found a violation of Article 5 where Botswana denationalized the complainant for acquiring another nationality "without showing any proof" that this was indeed the case.[38]

36. Comparatively, under the law of the European Union, namely the EU Directive on the Return of EU Citizens[39] and the EU Directive on Common Standards of Return,[40] expulsion orders must operate in strict respect of the principle of proportionality, based exclusively on the personal conduct of the individual concerned and where there is a genuine and present danger affecting a fundamental interest of society. [41]

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[33] UN Human Rights Committee, *Stewart v Canada*, Merits, Communication No 538/1993, November 1, 1996, para 12.3-12.5

[34] UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, U.N. Doc. CCPR/C/21/Rev.1/Add.9, November 2, 1993

[35] The Charter permits derogation for national security, law and order, public health or moral reasons.

[36] *Open Society Justice Initiative v. Cote d'Ivoire*, Comm. 318/06, Decision of February 25, 2015, para. 168.

[37] *Open Society Justice Initiative v. Cote d'Ivoire*, Comm. 318/06, Decision of February 25, 2015, para. 115.

[38] *John K. Modise v. Botswana*, Comm. No. 97/93, African Commission on Human and Peoples' Rights, 6 November 2000; *Open Society Justice Initiative v. Cote d'Ivoire*, Comm. 318/06, Decision of February 25, 2015, para. 111.

[39] Council Directive 2004/38

[40] Council Directive 2008/115.

[41] Council Directive 2004/38 art 27(2).

Due Process

37. Where a state claims that the individual concerned is a non-national, as in the case of Mr. Anudo, minimum standards of due process must be followed, [42] "including the right to challenge on an individual basis both the reasons for expulsion and the allegation that a person is in fact a foreigner."[43]

38. The African Commission in *Amnesty International v. Zambia* held that there was a violation of the African Charter where the State failed to provide the individual with the opportunity to challenge the expulsion order,[44] did not carry out a proper judicial inquiry on the basis set out in domestic law,[45] and denied one of the applicants to the right to fair hearing.[46]

39. Mr. Anudo's situation showcases an unfortunate and well-documented protection gap in how African states address fraud in relation to nationality from birth, leading to the absence of basic procedural safeguards. Bronwen Manby, in her extensive study of African nationality law and practice, observes:

> "[T]he nationality legislation of almost all African countries provides for deprivation of citizenship acquired by naturalisation in case of fraud, but rarely is fraud mentioned in regard to the recognition of nationality from birth."[47]

40. In such cases, the state sometimes argues that "no formal deprivation procedure" or other hallmarks of due process need apply because citizenship should be considered void *ab initio.*[48] As noted above, Tanzania has engaged in such a practice in other cases, particularly involving journalists considered to be critical of the government.[49] In *Legal Resources Foundation v. Zambia*, the Commission found that retroactive non-recognition of citizenship, in this case extending decades into the past, violated Charter guarantees of participation in government, non-discrimination, and equality before the law:

> "[T]he movement of people in what had been the Central African Federation (now the States of Malawi, Zambia and Zimbabwe) was free and, by Zambia's own admission, all such residents were, upon application, granted the citizenship of Zambia at independence. Rights which have been enjoyed for over 30 years cannot be lightly taken away. To suggest that an indigenous Zambian is one who was born and whose parents were born in what came (later) to be known as the sovereign territory of the State of Zambia may be arbitrary and its application of retrospectivity cannot be justifiable according to the Charter."[50]

41. Guidance by the United Nations Office of the High Commissioner of Refugees (UNHCR), resulting from an expert meeting in Tunis in 2013 (the *Tunis Conclusions*), addresses a related concern raised by the facts of Mr. Anudo's case – the practical reality that fraud may be made impossible to refute (or to prove to an acceptable standard) given a fundamental failure of administration on the part of the state in respect of registration and documentation of identity:

> "Another area of concern is the often poor quality of 'feeder' or supporting documents from civil registration systems and other administrative registries in many countries which serve as proof for issuance of identity documents and passports. These documents often contain

[42] *See* Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, 40 Queen's L. J. 1, 15 (2014).
[43] Bronwen Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* 46 (2016).
[44] Amnesty International v. Zambia, Comm. No. 212/98 (1999). paras 36- 38
[45] Amnesty International v. Zambia, Comm. No. 212/98 (1999). para. 41.
[46] Amnesty International v. Zambia, Comm. No. 212/98 (1999). paras 52-54, 61.
[47] Bronwen Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* 170 (2016).
[48] Bronwen Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* 179, 217 (2016).
[49] *See* paras. 15-20; Bronwen Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* 218 (2016).
[50] *Legal Resources Foundation v. Zambia*, African Commission on Human and Peoples' Rights, Communication 211/98 (2001), para 71.

minor errors or discrepancies relating to the identity of individuals. These realities need to be taken into account in assessing cases of alleged misrepresentation or fraud."[51]

42. As this guidance suggests, the "realities" at play demand more careful review in order to mitigate the heightened risk of arbitrary deprivation of nationality, where the state accuses an individual of fraudulent acquisition of citizenship from birth or asserts that citizenship has previously been recognised in error. In the case of Tanzania, however, there is no procedure in such cases whatsoever.

43. Tanzanian nationality law has little to offer in the way of procedural protections in any case.[52] In its comprehensive study of *The Right to Nationality in Africa*, the Commission noted in particular the lack of recourse to challenge nationality determinations in Tanzania, calling the situation "a cause for concern."[53]

44. The Commission has stressed that a clear procedure and the possibility of judicial review must be available, pursuant to the requirements of Article 7 of the Charter:

> "While the decision as to who is permitted to remain in a country is a function of the competent authorities of that country, this decision should always be made according to careful and just legal procedures, and with due regard to the acceptable international norms and standards."[54]

45. The *Tunis Conclusions* set out basic principles that should be considered in assessing the adequacy of procedural safeguards in the context of denationalization, none of which would appear to be available in Tanzania:

> "Procedural safeguards are essential to prevent abuse of the law. As a result of developments in international human rights law, such procedural guarantees apply in all cases of loss and deprivation of nationality… These principles – derived from the prohibition of arbitrary deprivation of nationality – must be observed in all cases whether or not loss or deprivation could result in statelessness.
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> "… [L]oss and deprivation of nationality may only take place in accordance with law and accompanied by full procedural guarantees, including the right to a fair hearing by a court or other independent body. It is essential that the decisions of the body concerned be binding on the executive power. The person affected by deprivation of nationality has the right to have the decision issued in writing, including the reasons for the deprivation. Deprivation decisions are only to enter into effect at the moment all judicial remedies have been exhausted."[55]
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> […]
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> "Participants [also] indicated that in light of Article 15 of the UDHR and, in the European context, Recommendation 99(18) of the Council of Europe and the European Court of

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[51] UN High Commissioner for Refugees (UNHCR), *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")*, March 2014, at para. 59, available at: http://www.refworld.org/docid/533a754b4.html.
[52] *See* paras. 19-20, above.
[53] African Commission on Human and Peoples' Rights, *The Right to Nationality in Africa* 36 (2014)
[54] *John K. Modise v. Botswana*, Comm. No. 97/93, African Commission on Human and Peoples' Rights, 6 November 2000, para. 84; *see also, Legal Resources Foundation v. Zambia*, para. 41 (raising due process issues); *Malawi African Association and Others v. Mauritania*, paras. 82-83*; Union Inter-Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola*, Decision of 11 November 1997, Comm. No. 159/96, para. 11, available at: http://www1.umn.edu/humanrts/africa/comcases/159-96.html .
[55] UN High Commissioner for Refugees (UNHCR), *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")*, March 2014, paras. 25-26, available at: http://www.refworld.org/docid/533a754b4.html.

Justice's ruling in the case *Rottmann v. Freistaat Bayern*, deprivation procedures must apply the principle of proportionality."[56]

46. Just as the UN Human Rights Committee clarified that non-citizens with significant ties to a country fall within the ambit of ICCPR Article 12 (*see* para. 30-31, above), the African Commission has made clear that Article 7's "right to an appeal to competent national organs" must be made available to non-citizens and that alleged non-citizenship "by itself does not justify" deportation.

47. EU law requires that when an expulsion is to happen a review procedure must be carried out, one that allows the examination of both fact and law, and individualized due process, ensuring the measure is not disproportionate.[57]

48. Article 26(1) of the *Draft Articles on Expulsion of Aliens* of the International Law Commission sets out a list of procedural rights from which any alien subject to expulsion must benefit, irrespective of whether that person is lawfully or unlawfully present in the territory of the expelling State.[58] The sole exception — to which reference is made in paragraph 4 of the article — is that of aliens who have been unlawfully present in the territory of that State for a brief duration.[59]

49. The Inter-American Court of Human Rights has considered that proceedings that may result in the expulsion of an alien must be individualized, not discriminate on the basis for of nationality, color, race, sex, language, religion, political opinion, social origin, or other condition, and that the persons subject to them must have the following basic guarantees:[60]

> "(a) to be informed expressly and formally of the charges against them and the reasons for the expulsion or deportation. This notice must include information on their rights, such as: (i) the possibility of explaining their reasons and contesting the charges against them, and (ii) the possibility of requesting and receiving consular assistance, legal advice and, if appropriate, translation or interpretation services; (b) if an unfavorable decision is taken, the right to request a review of their case before the competent authority and to appear before this authority in that regard, and (c) to receive formal legal notice of the eventual expulsion decision, which must be duly reasoned pursuant to the law." [61]

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[56] UN High Commissioner for Refugees (UNHCR), *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")*, March 2014, at para. 60, available at: http://www.refworld.org/docid/533a754b4.html.

[57] Council Directive 2004/38 Art .31.

[58] These procedural rights are: a) the right to receive notice of the expulsion decision; b) the right to challenge the expulsion decision, except where compelling reasons of national security otherwise require; c) the right to be heard by a competent authority; d) the right of access to effective remedies to challenge the expulsion decision; e) the right to be represented before the competent authority; and f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.

[59] The commentaries of the Draft Articles do not provide guidance on how to ascertain what is considered to be a brief duration. However, the statement of the Chairman of the Drafting Committee mentions that the text of article 26 originally established a six month threshold, but this was later changed for a more flexible concept of "brief duration". *See also* International Law Commission, Expulsion of Aliens: Statement of the Chairman of the Drafting Committee, 6 June 2014, p. 20, *available at*: http://legal.un.org/ilc/sessions/66/pdfs/english/dc_chairman_statement_expulsion_of_aliens.pdf.

[60] IACtHR, *Nadege Dorzema et al. v. Dominican Republic*, Judgment 24 October 2012 para. 175, and *Pacheco Tineo Family v. Bolivia*, Judgment 25 November 2013, para. 133.

[61] IACtHR, *Expelled Dominicans and Haitians v. Dominican Republic*, Judgment, 28 August 2014 para 356. *See also*, expert opinion of Pablo Ceriani Cernadas, in *Expelled Case* ref. 396 "[t]he nature of an expulsion is evidently punitive and thus the need to ensure all the procedural guarantees in order to respect and guarantee the rights that may be at risk in each case. In addition, based on the principle of legality, which makes it obligatory to regulate the proceedings to be followed in such cases by law, a key element is the adoption of the mechanisms to be applied in each individual case in order to examine in detail the offense attributed to the person, the evidence and other elements of the case and, evidently, to ensure the person's right of defense."

50. Provision of due process also safeguards against loss of nationality where coercion or duress is present. In the United States, for example, Japanese Americans interned at a "relocation center" during World War II were given the "option" to renounce their American nationality through an amendment to the Nationality Act.[62] Ultimately, the renunciation requests were challenged on the ground that they were issued in a context of intense coercion. In his opinion in *Abo v. Clark*, Judge Louis E. Goodman observed:

> "[It was] shocking to the conscience that an American citizen be confined without authority and then, while so under duress and restraint, for his Government to accept from him a surrender of his constitutional heritage."[63]

51. Mr. Anudo states that he was under duress when he signed documents that may have been relevant to his denationalization and subsequent expulsion.[64] Without a fair hearing, Mr. Anudo was not afforded an opportunity to challenge the voluntariness of his actions. It is likely that an independent body would not have accepted the signatures as valid.

52. Tanzania's Citizenship and Immigration Acts give undue discretionary power to the executive to determine eligibility for citizenship from birth or by naturalisation, without any oversight by independent judicial authorities. This executive discretion is in violation of basic principles of due process endorsed by multiple African treaties, including the African Charter on Human and Peoples' Rights and the African Union Constitutive Act as well as the Treaty of the East African Community, which endorses the fundamental principle of "good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".[65]

B. The Duty to Avoid Statelessness

53. Denationalization may be arbitrary whether or not it results in statelessness. However, where a risk of statelessness is present additional protections are required given the profoundly negative impact on the individual concerned. The duty to avoid statelessness has been characterized by international experts as a rule of international custom.[66] Mr. Anudo's case engages Tanzania's duty to avoid statelessness, which entails additional scrutiny, including access to a fair hearing before a court or an independent body.

Statelessness Harms Human Dignity

54. As the *Tunis Conclusions* note, the proportionality principle should be applied as a facet of due process required in the context of denationalization; it is therefore important to highlight the degree to which statelessness is considered to infringe individual rights.[67]

55. Numerous courts and tribunals, and prominently the African Commission, have recognized the pernicious impact that statelessness has on an individual. The experience is repeatedly described

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[62] *See* Eric L. Muller, *Japanese American Cases – A Bigger Disaster Than We Realized*, 49 How. L. J. 417, 455 (2006).
[63] *Abo v. Clark*, 77 F. Supp. 806, 812 (N.D. Cal. 1948), *rev'd in part on other grounds*, *McGrath v. Abo*, 186 F.2d 766, 770 (9th Cir. 1951). Nearly all renunciations were ultimately invalidated. *See* Eric L. Muller, *Japanese American Cases – A Bigger Disaster Than We Realized*, 49 How. L. J. 417, 457 (2006) (92% of the 5409 applications for restoration of citizenship were successful). The total number of renunciations at Tule Lake was around 6,000. *Ibid*. at 454.
[64] *See* para. 9, above.
[65] Treaty of the East African Community, Article 6(d).
[66] *See* Council of Europe, *Explanatory Report to the European Convention on Nationality*, European Treaty Series No. 166 (1997), at para. 33; UN High Commissioner for Refugees (UNHCR), *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")*, March 2014, at para. 2.
[67] *See* para. 45, above.

as an offense against human dignity. In the *Modise* decision, for example, the African Commission concluded that living as a stateless person was "degrading treatment."[68] In *Open Society Justice Initiative v. Cote d'Ivoire*, the Commission identified a "supreme and dependent relationship" between the right to dignity and the right to legal status, stating that "the failure to grant nationality as a legal recognition is an injurious infringement of human dignity." According to the Commission, "the very existence of the victim . . . is vitally compromised" when his or her legal status is extinguished.[69]

56. The African Committee of Experts on the Rights and Welfare of the child found in the *Kenyan Nubian Children* decision that the Kenyan government's discriminatory treatment of children of Nubian descent was "a violation of the recognition of the children's juridical personality, and is an affront to their dignity and best interests."[70] These principles were emphasised in the Committee's General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, adopted in 2014.[71]

57. Other regional bodies are in accord with the view of the African treaty bodies. In a case involving the denial of nationality to two school-girls in the Dominican Republic, the Inter-American Court of Human Rights recognized the importance of nationality as a prerequisite for the recognition of an individual's legal identity, stating that:

> "the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals."[72]

58. The European Convention on Human Rights does not contain an express provision guaranteeing the right to nationality or specific protections relevant to the reduction of statelessness or the protection of stateless persons in Europe. This is a significant failing of the regional protection system in Europe.[73] The European Court of Human Rights has, through case-law, gradually recognized that certain state actions infringing the right to nationality might trigger Convention protections, notably under Article 8, which safeguards private and family life.[74] The Court has recognized that arbitrary denial of nationality can interfere with Article 8 rights because of the close link between nationality and identity. The judgments in *Genovese v. Malta* and *Mennesson v. France* further underscore the importance of nationality as an aspect of an individual's "social identity" within the meaning of Article 8.[75] In particular, the Court has recognized the severe negative impact that statelessness has on the enjoyment of human rights.[76] The Council of Europe has also recognized that "certain provisions [of the ECHR] may apply also to matters related to nationality questions. Amongst the most important ones are: Article 3…" on the basis that "actions that lower a national or alien in rank, position or reputation and are designed to debase or humiliate can be a violation of Article 3."[77]

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[68] *Modise v. Botswana*, Comm. 97/93, para. 92.
[69] *Open Society Justice Initiative v. Cote d'Ivoire*, Comm. 318/06, Decision of February 25, 2015, para. 146.
[70] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on Behalf Of Children Of Nubian Descent in Kenya) V. Government of Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision No 002/Com/002/2009, para. 80.
[71] General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/02 (2014).
[72] Inter-American Court of Human Rights, *Case of the Yean and Bosico Girls v. Dominican Republic*, Judgment of September 8, 2005, para 180.
[73] *See* Mantu, *Contingent Citizenship*, 70.
[74] *Genovese v. Malta*, ECtHR, Judgment of October 11, 2011, at para. 30; *Kurić and others v. Slovenia*, ECtHR [GC], Grand Chamber Judgment of June 26, 2012, at para. 356.
[75] *Genovese v. Malta*, ECtHR, Judgment of October 11, 2011, at para. 33; *Mennesson v. France*, ECtHR, Judgment of June 26, 2014, at para. 97.
[76] *Kurić and others v. Slovenia*, ECtHR [GC], Grand Chamber Judgment of June 26, 2012, at para. 337.
[77] Council of Europe, *European Convention on Nationality Explanatory Report*, (1997) ETS No. 166, paras. 16, 18.

Additional Safeguards Required to Prevent Statelessness

59. In order to prevent statelessness, states must understand what it is and be able to identify when an individual is at risk of becoming or is in fact stateless. Where deprivation of nationality would leave the individual concerned stateless, international standards require judicial review that respects due process of law.

60. States cannot avoid these obligations by recourse to a facial analysis of another country's laws: statelessness is a mixed question of law and fact and must be determined not only on the basis of legal provisions but also the practice of competent state authorities.[78] A determination with implications of such magnitude for the impacted individual requires specialized skills and training and should not be delegated to low level state actors without adequate resources. Discretion in making decisions should be carefully guided in the first instance, as the Commission has recognized.[79]

61. Tanzania's Immigration Act, section 30, states that the burden of proving citizenship falls exclusively on the individual.[80] Coupled with the grant of exclusive discretion to the Minister in determining eligibility for citizenship, such a provision could amount to an insurmountable bar to substantiating Tanzanian citizenship in any given case. Such a provision also appears unfair in light of the extremely low rate of birth registration in Tanzania, even as the country has signed up to the commitment in the ACRWC to ensure every child the right to a name and a nationality.

62. The basic international legal standards in respect of the duty to avoid statelessness in cases of deprivation are elaborated in the 1961 Convention on the Reduction of Statelessness. The 1961 Convention "aimed to respond to the far too extensive discretion of states that enabled them to denationalize citizens during World War II."[81] UNHCR considers that the 1961 Convention offers a set of *minimum* steps to reduce statelessness.[82] The African Commission has relied on both Statelessness Conventions as "the standards with much relevance and precision" on issues of nationality and statelessness, taking judicial consideration of these instruments pursuant to Articles 60 and 61 of the Charter.[83]

63. Unilateral deprivation of nationality is treated in Article 8 of the 1961 Convention. That provision, a compromise measure reflecting the variation in national law at the time of the Convention's negotiation and adoption, allows states with existing deprivation powers, in certain strictly limited circumstances, to retain those provisions by submitting a declaration upon accession indicating such an intention. Only 11 of the 68 Contracting States to the 1961 Convention made a declaration of retention.[84] The fact that deprivation powers were used sparingly in practice served one justification for permitting deprivation of nationality within the framework of the Convention text at all.[85]

64. Article 8(4) explicitly requires that in the limited cases where deprivation resulting in statelessness is permitted, it must be done in accordance with law and the individual concerned is

[78] *See* UNHCR, *Handbook on Protection of Stateless Persons* (2014), at para. 23.
[79] *Open Society Justice Initiative v. Cote d'Ivoire*, Comm. 318/06, Decision of February 25, 2015, para. 114.
[80] Tanzania is one of a number of states with this formulation, although often the rule is set out in the nationality code. *See* African Commission on Human and Peoples' Rights, *The Right to Nationality in Africa* 36 (2014).
[81] Patti Tamara Lenard, *Democracies and the Power to Revoke Citizenship*, 30 Ethics & International Affairs 73, 75 (2016).
[82] UNHCR, *Preventing and Reducing Statelessness, the 1961 Convention on the Reduction of Statelessness* 3 (2010).
[83] *Open Society Justice Initiative v. Cote d'Ivoire*, Comm. 318/06, Decision of February 25, 2015, para. 116. Tanzania has not signed the 1961 Convention.
[84] *See* U.N. Treaty Collection, Depositary, Status of Treaties, 1961 U.N. Convention on the Reduction of Statelessness, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&clang=_en.
[85] *See, e.g.*, A/Conf.9/SR.16, at 2 (delegate from United Kingdom) (noting that the United Kingdom had used its existing power only ten times in the preceding 12 years).

entitle to a fair hearing before a court or independent body. The *Tunis Conclusions*, cited above at para. 45, contain important guidance from UNHCR concerning the interpretation of this requirement. These protections should apply in any case of loss or denationalization. Where a risk of statelessness is present, they are imperative.

IV. CONCLUSION

65. Over fifty years ago, delegates negotiating the 1961 Convention voiced concerns regarding the implications of denationalization in international relations: "A country should not have the right to rid itself of undesirable persons by denationalizing and subsequently expelling them,"[86] for example, as " … the more notorious the criminal, the more readily he could be deprived of his nationality, and either become stateless or be foisted on some other country."

66. In our view, the present case raises the same concerns anew in the context of citizenship in the continent. The unsettling subtext however, is that some states in Africa have frequently and flagrantly resorted to the imputation of "undesirability" on vulnerable individuals, including their own citizens: a state of affairs requiring, urgently, a solution that reflects the principles established in international and regional human rights law, as set out above.

67. Mr. Anudo's connections to Tanzania are stronger than to any other country and he appears, if the facts stated are correct, to be a Tanzanian citizen from birth. The decision that he was previously recognized as Tanzanian in error has not been subject to review by any independent authority. Under these compelling grounds, in our view, Tanzania is in violation of its obligations to respect the principles of the African Charter on Human and Peoples Rights.

2 March 2017

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[86] A/Conf.9/C.1/SR.12, at 8 (delegate from Turkey); A/Conf.9/C.1/SR.14, at 3 (delegate from Pakistan).