

**OUT OF THE SHADOWS  
TOWARDS ENSURING THE RIGHTS OF STATELESS PERSONS AND PERSONS  
AT RISK OF STATELESSNESS IN KENYA**

Kenya National Commission on Human Rights in partnership with the United Nations High Commissioner for Refugees<sup>1</sup>

July 2010

---

<sup>1</sup>The views expressed in this study do not necessarily reflect the official view of the United Nations High Commission for Refugees.

## TABLE OF CONTENTS

<b>LIST OF ABBREVIATIONS.....</b>	<b>iv</b>
<b>ACKNOWLEDGEMENTS.....</b>	<b>v</b>
<b>FOREWORD.....</b>	<b>vi</b>
<b>EXECUTIVE SUMMARY.....</b>	<b>1</b>
<b>CHAPTER ONE: INTRODUCTION.....</b>	<b>4</b>
Background of the Study.....	4
Causes of Statelessness in Kenya.....	6
Literature Review.....	7
Methodology and Objectives of the Study.....	9
Outline of the Work.....	11
<b>CHAPTER 2: OBTAINING KENYAN NATIONALITY AND IDs: PROCESS AND PRACTICE.....</b>	<b>12</b>
Right to Nationality: Kenyan Constitutional Framework.....	12
Obtaining an ID: A Daunting Process.....	15
<b>CHAPTER 3: RIGHT TO FREEDOM OF MOVEMENT.....</b>	<b>21</b>
Legal Framework.....	21
Current Status.....	22
Exception to the Rule.....	26
<b>CHAPTER 4: THE RIGHT TO EDUCATION.....</b>	<b>28</b>
Legal Framework.....	28
Current Status .....	29

<b>CHAPTER 5: ECONOMIC ENTITLEMENTS: ACCESS TO THE EMPLOYMENT MARKET AND PROPERTY.....</b>	<b>31</b>
The Right to Work.....	31
International and Domestic Provisions.....	31
Current Status.....	31
The Right to Property.....	35
<b>CHAPTER 6: FINDINGS AND RECOMMENDATIONS.....</b>	<b>39</b>
Finding One.....	39
Finding two.....	39
Finding three.....	41
Finding four.....	41
Finding five.....	42
Finding six.....	42
<b>CHAPTER 7: CONCLUSION: ANY END IN SIGHT?.....</b>	<b>44</b>
POSTSCRIPT.....	44
BIBLIOGRAPHY.....	46
APPENDIX ONE: RESEARCH ASSISTANTS.....	51
APPENDIX TWO: LIST OF PARTICIPANTS AT THE PEER REVIEW WORKSHOP.....	52
APPENDIX THREE: LIST OF INTERVIEWS WITH NON-OFFICIALS.....	53
APPENDIX FOUR: LIST OF INTERVIEWS WITH OFFICIALS.....	56
APPENDIX FIVE: CONSENT LETTER AND SURVEY QUESTIONS WITH OFFICIALS AND INDIVIDUALS.....	57

## LIST OF ABBREVIATIONS

1. **ACRWC** – African Charter on the Rights and Welfare of the Child
2. **BANJUL CHARTER** – African Charter on Human and People’s Rights
3. **CEDAW** – Convention on the Elimination of All Forms of Discrimination Against Women
4. **CERD** – Convention on the Elimination of All Forms of Racial Discrimination
5. **CRC** – Convention on Rights of the Child
6. **CRPD** – Convention on the Rights of Persons with Disabilities
7. **F** – Female
8. **ICCPR** – International Covenant on Civil and Political Rights
9. **ICESCR** – International Covenant on Economic, Social and Cultural Rights
10. **ID** – Identity document
11. **IDPs** – Internally Displaced Persons
12. **KNCHR** – Kenya National commission on Human Rights
13. **M** – Male
14. **M-PESA** – Mobile money
15. **NGO** – Non Governmental Organization
16. **NRB** – National Registration Bureau
17. **OAU** – Organization of African Unity
18. **Stateless Persons Convention** - Convention relating to the Status of Stateless Persons
19. **UDHR** – Universal Declaration of Human Rights
20. **UN** – United Nations
21. **UNHCR** - United Nations High Commissioner for Refugees

## ACKNOWLEDGEMENTS

This report was prepared by Dr. Edwin Abuya, who is a consultant and law lecturer at the University of Nairobi. Dr. Abuya has written extensively in the field of refugee law and related issues.

The study was commissioned by the Kenya National Commission on Human Rights (KNCHR) in partnership with the United Nations High Commissioner for Refugees (UNHCR). A team constituted by Lawrence Mute (Commissioner), Antonina Okuta (Senior Human Rights Officer) and Christine Njeru (Human Rights Officer), all of the KNCHR, and Igor Ivancic (Senior Protection Officer), Louise Aubin (Assistant Representative Protection) and Salaton Leteipan (Assistant Protection Officer) of the UNHCR, supervised and guided the research study.

Primary data was collected for the study by a team of 11 research assistants (see Annex 1). A draft of the report was reviewed at a forum convened on 28 January 2010 and constituted by 15 participants from the state and civil society sectors (see Annex 2).

The KNCHR and UNHCR are grateful to all these individuals for their invaluable inputs into this study. Thanks are also due to Jackie Madegwa, Monicah Kareithi and other interns who provided support for this study. This work would not have been complete without the collective efforts of all these individuals.

## FOREWORD

It is estimated that approximately 12 million people around the world are stateless. That figure includes 6.6 million in the 58 countries for which reliable statistics exist.<sup>2</sup>

Statelessness at the global level has been defined by two international instruments: the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The two treaties, while being ratified by only a limited number of States<sup>3</sup>, are complemented by international and regional human rights treaties setting out obligations for a much greater number of State Parties.<sup>4</sup> These treaties, together with the 1954 and 1961 Conventions, form part of an international legal regime establishing minimum standards of treatment of stateless persons. As part of their sovereign power, under general international law, States set rules for acquisition, loss and change of nationality. However, sovereign States, in the matters of nationality, are still bound by international treaties and norms of international customary law.

The United Nations High Commissioner for Refugees' (UNHCR) global protection mandate includes a responsibility for stateless persons. The UNHCR Statute<sup>5</sup> and 1951 Convention relating to the Status of Refugees<sup>6</sup> both refer to stateless persons who also meet the criteria of the refugee definition. With the development of the 1954 and 1961 Statelessness Conventions, UNHCR's mandate with regard to issues of statelessness has been extended through Conclusions of the Executive Committee of the High Commissioner's Programme (Ex-Com)<sup>7</sup> and Resolutions of the UN General Assembly.<sup>8</sup> The most recent reaffirmation and evolution of UNHCR's mandate with regard to statelessness is expressed in the UNGA Resolution from 2006 endorsing UNHCR Executive Committee Conclusion No. 106 (LVII) from 2006 on Identification, Prevention

---

<sup>2</sup> See UNHCR web site; [www.unhcr.org/pages/49c3646c26.html](http://www.unhcr.org/pages/49c3646c26.html)

<sup>3</sup> As of 15 February 2010, there were 65 State Parties to the 1954 Convention and 37 State Parties to the 1961 Convention.

<sup>4</sup> Such as the Universal Declaration of Human Rights ('UDHR'); International Covenant on Civil and Political Rights ('ICCPR'); International Convention on elimination of all forms of Racial Discrimination ('CERD'); Convention on Elimination of Discrimination against Women ('CEDAW'); Convention on the Rights of the Child ('CRC'); International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families ('CMW'); Convention on the Rights of Persons with Disabilities ('CRPD'); African Charter on the Rights and Welfare of the Child ('ACRWC'); American Convention on Human Rights; and European Convention on Nationality.

<sup>5</sup> See UNHCR Statute; Chapter II, Section 6 A (ii).

<sup>6</sup> See 1951 Convention Relating to the Status of Refugees; Article 1 A (2).

<sup>7</sup> See UNHCR web site at [www.unhcr.org](http://www.unhcr.org).

<sup>8</sup> See UNGA resolution 3274(XXXIV); UNGA resolution A/RES49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995 endorsing the Executive Committee Conclusion no. 78 (XLVI)-1995.

and Reduction of Statelessness and Protection of Stateless persons.<sup>9</sup> The Executive Committee Conclusion ‘urges UNHCR, in cooperation with governments, other United Nations and international as well as relevant regional and non-governmental organizations, to strengthen its efforts in this domain by pursuing targeted activities to support the identification, prevention and reduction of statelessness and to further the protection of stateless persons.’

It is in this spirit that UNHCR globally, and in Kenya in particular, seeks to partner with relevant stakeholders in furthering its mandate and work regarding the identification, prevention, reduction and protection in the context of statelessness.

The Kenya National Commission on Human Rights (KNCHR) is an independent national human rights institution established by the Government of Kenya through the Kenya National Commission on Human Rights Act.<sup>10</sup> Its core mandate is to further the protection and promotion of human rights in Kenya.

In 2007 the KNCHR undertook a study on and launched its publication titled “An Identity Crisis: A Study on the Issuance of the National Identity Cards in Kenya”. This study was framed in response to a number of complaints received by the KNCHR alleging discrimination of some ethnic communities or certain parts of Kenya in the issuance of Identity Cards. Some of the study’s key findings and recommendations focused on the nationality of certain ethnic groups in Kenya. Other studies over the last years which examined nationality legislations in Africa, and related administrative practices and the position of particular ethnic groups in that context have also noted the problem of asserting nationality for certain groups in Kenya.<sup>11</sup>

It is against this background and in the spirit of fulfilling their respective mandates that the KNCHR and the UNHCR collaborated in commissioning this study on nationality problems in Kenya and on particular groups which may be at risk of statelessness. While the study does not purport to provide absolute or comprehensive answers to all nationality and statelessness issues in the Kenyan context, it identifies and studies some of the probable and root causes of nationality problems and provides orientation for further research and advocacy or litigation. Among its recommendations, the study calls upon the Government of Kenya to ascertain the full scope (identification) of statelessness in Kenya and to take comprehensive measures to prevent and reduce the incidence of statelessness and to protect the stateless and those at risk of

---

<sup>9</sup>See UNGA resolution A/RES/61/137 of 19 December 2006, endorsing the Executive Committee Conclusion 106 (LVII) of 2006.

<sup>10</sup> Act No. 9 of 2002

<sup>11</sup>See for instance Bronwen Manby; “Struggles for Citizenship in Africa”; “Citizenship Law in Africa” a comparative study by: Africa Governance Monitoring and Advocacy Project and Open Society Initiative.

statelessness in Kenya.

We trust that this study will inform the work of state agencies, non-state actors as well as ourselves.

Lawrence Mute  
Commissioner  
Kenya National Commission on Human Rights

Liz Ahua  
Representative  
United Nations High Commissioner for Refugees

Nairobi, Kenya, June 2010



## EXECUTIVE SUMMARY

This research study examines the issue of statelessness within the Kenyan context. Drawing on fieldwork, it evaluates the human rights violations faced by stateless persons or those at risk of statelessness in the country. The study shows that these persons face difficulties in their quest to enjoy fundamental rights and freedoms relating to work, movement, education, property and health. The study makes specific policy, legal and administrative recommendations to various state and non state actors that could alleviate these challenges as well as reduce the occurrence and the population of stateless persons or persons at risk of statelessness.

The following are the study's key findings and recommendations:

**Finding one:** the legal and administrative framework is not adequate to deal with the issue of statelessness in the country

Key recommendations are that:

(a) Kenya should accede to and domesticate the Stateless Persons Convention and the Convention on the Reduction of Statelessness to protect stateless persons and to prevent as well as reduce the occurrence of statelessness.

(b) Kenyan law should both define 'statelessness' and specify the rights of stateless persons as well as those at risk of statelessness. It should specify clearly the document which confirms conferment of citizenship.

**Finding two:** nationality laws in Kenya discriminate against various categories of persons and lack safeguards against statelessness

Key recommendations are that:

(c) The Proposed Constitution of Kenya, 2010, provides a better framework within which the rights of stateless persons or those at risk of statelessness may be better protected.

(d) Parliament should review Kenyan laws on citizenship in order to remove the discriminatory provisions that exist in regard to acquisition of citizenship.

**Finding three:** The committees established to vet persons before issuance of identity cards are not founded under statute, and they are discriminatory in nature and prone to abuse

Key recommendations are that:

(e) A law should be enacted that outlines the mandate, scope, composition and procedures, including appropriate appeal mechanisms, of vetting committees.

(f) The transparency and accountability of chiefs and village elders who sit on vetting committees should be strengthened.

(g) Village elders should be paid an allowance for sitting on the vetting committees.

**Finding four:** applicants lack adequate information on the procedures for issuance of ID cards and they experience bureaucratic delays

Key recommendations are that:

(h) Steps must be taken to expedite issuance of identity documents for all Kenyans. The registration process should be decentralised to the province rather than remaining only at the national level.

(i) The Government should stipulate and communicate the time within which such documents will be processed. Undue delays should be communicated to applicants.

(j) Awareness-raising on application, replacement and alteration procedures for identity documents should be undertaken both by the government and by civil society organisations.

**Finding five:** the number of stateless persons in Kenya is unclear and this should be determined

Key recommendations are that:

(k) Data on statelessness should be included in future national census. In the meantime, targeted surveys should also be explored to determine the number of stateless persons and persons at risk of statelessness in Kenya. Closer cooperation between the Government, United Nations agencies and civil society actors should be cultivated to identify the scope of statelessness in the country. Affected communities should be specifically identified and appropriate interventions tailored.

**Finding six:** There is need for sensitization that stateless persons and those at risk of statelessness are entitled to rights and an environment that confirms their nationality

Key recommendations in this regard are that:

(l) The positive contributions which stateless persons or those at risk of statelessness provide to nation-building should be highlighted particularly by non-state actors. Awareness-raising in this regard should be undertaken.

(m) The issue of statelessness as a humanitarian concern as well as a human rights issue should be acknowledged and profiled by KNCHR as well as by United Nations mandate holders, such as the UNHCR. These organizations should work towards ensuring sound assessments that would advance protection of the human rights of stateless persons and persons at risk of statelessness. Such assessments should inform the agencies' programmes to enhance advocacy efforts on behalf of stateless persons and those at risk of statelessness, especially when it comes to their ability to access services. New partnerships should be explored and formed with the range of actors and government service providers to bridge any gaps of a humanitarian nature that may be affecting stateless persons and those at risk of statelessness. Being a stateless person is like having no hands.

---

<sup>12</sup>Interview with Aissatou, North Eastern Province, 17 September 2009. (To preserve anonymity, pseudonyms are used in this work.)

## CHAPTER ONE: INTRODUCTION

### Background of the Study

Nationality provides the link between an individual and international as well as domestic laws. Every individual has a right to a nationality in order for him or her to enjoy all the rights that are due to citizens. A stateless person is defined by Article 1 of the 1954 Convention relating to the Status of Stateless Persons ('Stateless Persons Convention') as one 'who is not considered as a national by any State under the operation of its law'.<sup>13</sup> As of January 2009, there were 12 million stateless persons in the world — those who do not possess any nationality (stateless persons in law) or have no State that they could turn to for protection (stateless persons in fact).<sup>14</sup> Unlike citizens, stateless persons often have very limited rights in the countries or territories that they find themselves in. Stateless persons 'often live in a precarious situation on the margins of society'.<sup>15</sup>

In order to alleviate the suffering of persons at risk of statelessness, multiple legal instruments have been adopted at the international and regional levels. Efforts to formally protect stateless persons can be traced back to 1948 at the promulgation of the Universal Declaration of Human Rights ('UDHR').<sup>16</sup> Article 15 of the UDHR declares that every person shall be entitled to a 'nationality'. It further prohibits states from

---

<sup>13</sup> See article 1(1) of the Convention Relating to the Status of Stateless Persons, 6 June 1960, 360 U.N.T.S. 117 (entered into force 6 June 1960).

<sup>14</sup> See UNHCR, 'Stateless People Figures', available at <http://www.unhcr.org/pages/49c3646c26.html> (accessed 21 August 2009) and the 2008 Global Refugee Trends, available at the UNHCR public website. By contrast to stateless persons, a refugee is any person who has been forced to leave his or her home state owing to armed conflict and/or persecution. See the OAU Convention on the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10 September 1969) (entered into force 20 June 1974). An internally displaced person is one who has been forced to move from his or her habitual place of residence 'in order to avoid the effects of armed conflict, situations of generalized violence [or] violations of human rights, and who has not crossed an internationally recognized border'. See preambular paragraph 2 of the Guiding Principles on Internal Displacement, UN doc E/CN.4/1998/53/Add.2 of 11 February 1998. Notably, these categories of persons are not excluded from the international protection regime offered by the Stateless Persons Convention. There are many refugees and IDPs who are simultaneously stateless but in the case of stateless refugees the more favourable conditions of the 1951 Convention Relating to the Status of Refugees apply to them. Excluded from the protective refugee regime are those who have committed crimes against peace, war crimes or crimes against humanity and serious non-political crimes outside their country of residence as well as those who have been guilty of acts contrary to principles and purposes of the United Nations. See article 1(2)(c) of the Stateless Persons Convention. Persons who do not have effective nationality and do not enjoy national protection of state(s) with which they have genuine links are considered to be *de facto* stateless.

<sup>15</sup> UNHCR, 'Stateless People in Figures', *ibid.*

<sup>16</sup> Universal Declaration of Human Rights ('UDHR'), UNGA Res 217 A, GAOR, 3d Sess., 183 plen. Mtg., art 22 UN Doc. A/810 (1948).

arbitrarily depriving any person of his or her nationality or denying such person the right to 'change' his or her nationality. In order to deal with the plight facing stateless persons in particular, the international community passed the Stateless Persons Convention in 1954. This was followed by the 1961 Convention on the Reduction of Statelessness ('Convention on the Reduction of Statelessness').<sup>17</sup> Collectively, these legal instruments seek to protect stateless persons, prevent new cases from arising and reduce their global population.

Regional treaties, including the European Convention on Nationality<sup>18</sup> and Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession,<sup>19</sup> have been developed to reinforce protection at the regional level. These treaties reflect developments in international law that have occurred since the two universal treaties on statelessness were adopted.

International human rights treaties such as the International Covenant on Civil and Political Rights ('ICCPR'),<sup>20</sup> Convention on the Rights of the Child ('CRC'),<sup>21</sup> Convention on the Elimination of All Forms of Discrimination Against Women<sup>22</sup> ('CEDAW'), Convention on the Elimination of All Forms of Racial Discrimination (CERD), African<sup>23</sup> Charter on the Rights and Welfare of the Child ('ACRWC')<sup>24</sup> also asserts the right to nationality. Other human rights treaties such as the International Covenant on Economic, Social and Cultural Rights,<sup>25</sup> ('ICESCR'), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>26</sup> and the African (Banjul)

---

<sup>17</sup> *Convention on the Reduction of Statelessness*, 15 March 2006, C.E.T.S. 200.

<sup>18</sup> *European Convention on Nationality*, 6 November 1997, CETS No. 166 (entered into force 1 March 2000).

<sup>19</sup> *Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession*, 30 August 1961, 989 U.N.T.S. 175 (entered into force 13 December 1975).

<sup>20</sup> See articles 2, 3, 24 and 26 of the *International Covenant on Civil and Political Rights ('ICCPR')*, GA Res. 2200(XXI) UN GAOR, 21st Sess., Supp. No. 16, 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 March 1976).

<sup>21</sup> See articles 7 and 8 of the *Convention on the Rights of the Child ('CRC')*, GA Res.44/25 of 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990).

<sup>22</sup> See article 9 of the *Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW')*, G.A. Res.34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (entered into force 3 September 1981).

<sup>23</sup> See Article 5 (d) (iii) of *Convention on the Elimination of All Forms of Racial Discrimination ('CERD')*. Adopted by the UN General Assembly Resolution 2106 (xx) of 21 December 1965, UNTS 9464, vol. 660, page 195

<sup>24</sup> See article 6 of the *African Charter on the Rights and Welfare of the Child ('ACRWC')*, OAU Doc. CAB/24.9/49, entered into force 29 November 1999.

<sup>25</sup> *International Covenant on Economic, Social and Cultural Rights*, adopted by UN Gen Ass. on 16 Dec. 1966, 999 UNTS (entered into force 3 January 1976) ('ICESCR') article 6.

<sup>26</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N.T.S. 1465, adopted by UN General Assembly resolution 39/46 of 10 December 1984, (entered into force 26 June 1987).

Charter on Human and Peoples' Rights<sup>27</sup> ('Banjul Charter') generally extend human rights protection to everyone within the State's jurisdiction, including stateless persons.

Whilst Kenya is not party to the Stateless Persons Convention and the Convention on the Reduction of Statelessness, it is party to the ACRWC,<sup>28</sup> CRC,<sup>29</sup> ICCPR,<sup>30</sup> CEDAW<sup>31</sup> and the Banjul Charter.<sup>32</sup> The ratification of these treaties is an unequivocal commitment by the Government to promote and protect fundamental international human rights.

Passage of law by itself though is insufficient. Practical steps must be taken to ensure that the promises contained in these instruments are translated into accessible and enjoyable rights. This study examines the extent to which law meets practice, as well as inherent legislative gaps.

### Causes of Statelessness in Kenya

The causes of statelessness in Kenya can be grouped into two broad categories: legal and administrative. Kenyan national laws pertaining to the acquisition, restoration, retention and loss of citizenship have gaps which allow or fail to prevent statelessness. Acts of Parliament, such as the Constitution and the Kenya Citizenship Act,<sup>33</sup> contain provisions relating to the renunciation of citizenship and the deprivation of citizenship that do not include safeguards to protect individuals from being rendered stateless. The law does not contain adequate guarantees to ensure that children who would otherwise be stateless can acquire Kenyan nationality. The current Constitution also does not provide adequate protection to children. A number of provisions also discriminate on the grounds of gender. For those born in Kenya, the law is gender neutral when it comes to acquisition of nationality by descent. As Kenyan legislation has not developed adequate provisions in relation to the statelessness problem, the current legal framework cannot prevent new cases of stateless-

---

<sup>27</sup>African (Banjul) Charter on Human and Peoples' Rights ('Banjul Charter'), adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, (entered into force 21 October 1986).

<sup>28</sup>Ratified 25 July 2000. See <http://www1.umn.edu/humanrts/instree/afchildratifications.html> (26 October 2009).

<sup>29</sup>Ratified 30 July 1990. See [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (accessed 25 October 2009).

<sup>30</sup>Acceded 1 May 1972. See [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (accessed: 25/10/2009).

<sup>31</sup>Acceded 9 March 1984. See [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (accessed 25 October 2009).

<sup>32</sup> Ratified 23 January 1992. See <http://www1.umn.edu/humanrts/instree/ratz1afchr.htm> (accessed 26 October 2009).

<sup>33</sup>Cap. 170,

There are also administrative causes of statelessness in Kenya, which demonstrate that there is a difference between law and actual practice. A sample of respondents interviewed showed that individuals may be at risk of becoming stateless as a result of the faulty operation or under-regulated nature of Kenya's administrative practices concerning citizenship. For instance, there are no adequate regulations that guide the vetting process that certain ethnic groups in Kenya are subjected to.

## Literature Review

A body of literature has developed that evaluates various aspects of statelessness. In existence are works that examine the legislative history of the Statelessness Convention<sup>34</sup> and the Convention on the Reduction of Statelessness.<sup>35</sup> Data generated by these studies are useful for a number of reasons. The evolution of the law offers insights into the social and political context from which the concept of protecting stateless persons developed. This account could also enable one to appreciate current challenges facing the international protection regime. Moreover, a historical analysis provides insight into measures that could be taken to meet the plight facing stateless persons. The lessons of history serve to remind us from where we came and of the road ahead, as well as the possible consequences of the measures taken.<sup>36</sup>

Legal protection of stateless persons remains a central issue.<sup>37</sup> Like any individual, persons who are stateless have needs that must be met for them to enjoy the rights due to any human being. A wide range of literature in this area of study has thus focused on issues surrounding the formal protection of stateless persons. Several questions have been raised in this regard. These include: Who is a stateless person?<sup>38</sup> What causes statelessness?<sup>39</sup> Do those who have been categorized as stateless have any rights?<sup>40</sup>

---

<sup>34</sup>See, for instance: Nehemiah Robinson, 'Convention Relating to the Status of Stateless Persons: Its History and Interpretation', available at <http://www.unhcr.org/refworld/docid/4785f03d2.html> (accessed: 22 August 2009); Carol Batchelor, 'Stateless Persons: Some Gaps in International Protection', (1995) 7 *International Journal of Refugee Law* 231.

<sup>35</sup>See Paul Weis, 'The United Nations Convention on the Reduction of Statelessness, 1961', (1962) 11 *International and Comparative Law Quarterly* 1073.

<sup>36</sup>Edwin Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective', (2007) 19 *International Journal of Refugee Law* 51 at 53.

<sup>37</sup>UNHCR Executive Committee Conclusion No. 106 (LVII) – 2006, refers to the four areas of activities that comprise a comprehensive response to the statelessness phenomenon. These are activities related to the identification, prevention, protection and reduction of statelessness.

<sup>38</sup>See, for example: UNHCR, 'Nationality and Statelessness: A Handbook for Parliamentarians', available at <http://www.unhcr.org/protect/PROTECTION/436774c62.pdf> (accessed: 20 August 2009) at 17-20; Linda Kerber, 'Toward a History of Statelessness in America', (2005) 57 *American Quarterly* 727; Paul Magocsi, 'Mapping Stateless Peoples: The East Slavs of the Carpathians', (1997) 39 *Canadian Slavonic Papers* 301.

<sup>39</sup>See, for example: Richard Bernstein, 'Hannah Arendt on the Stateless', (2005) 11 *Parallax* 46; William Samore, 'Statelessness as a Consequence of the Conflict of Nationality Laws', (1951) 45 *American Journal of International Law* 476.



If yes, which rights and why?<sup>41</sup> What measures have been taken at the international and local levels to alleviate the suffering of stateless persons?<sup>42</sup> Attention has also been paid to the plight facing specific categories of stateless persons such as children<sup>43</sup> (persons below the age of 18) and women.<sup>44</sup> Research has also grappled with issues surrounding durable solutions for stateless persons.<sup>45</sup>

However, most of the data that has been generated so far has focused on theoretical aspects. In other words, there are very few works that draw on field work. Granted,

---

<sup>40</sup> Laura van Waas, 'Nationality and Rights', in Brad Blitz and Maureen Lynch, *Statelessness and Benefits of Citizenship: A Comparative Study* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2009) at 19-36 at 19-25; Rachel Settlege, 'No Place to Call Home: Stateless Vietnamese Asylum-Seekers in Hong Kong', (1997-1998) 12 *Georgetown Immigration Law Journal* 187 at 193-198; David Weissbrodt and Clay Collins, 'The Human Rights of Stateless Persons', (2006) 28 *Human Rights Quarterly* 245; Curtis Doebbler, 'A Human Rights Approach to Statelessness in the Middle East', (2002) 15 *Leiden Journal of International Law* 527.

<sup>41</sup> Andrew Brouwer, 'Statelessness in the Canadian Context: A Discussion Paper', available at <http://www.unhcr.org/refworld/docid/405f07164.html> (accessed: 23 August 2009) at 21-37; Refugees International, 'About Being Without: Stories of Statelessness in Kuwait', available at <http://www.unhcr.org/refworld/country,,RI,,KWT,4562d8cf2,47a6eb910,0.html> (accessed: 20 August 2009); Ludvig Beckman, 'Citizenship and Voting Rights: Should Resident Aliens Vote?', (2006) 10 *Citizenship Studies* 153.

<sup>42</sup> Refugees International, 'Nationality Rights for All: A Progress Report and Global Survey on Statelessness', available at [http://www.refugeesinternational.org/sites/default/files/RI%20Stateless%20Report\\_FINAL\\_031109.pdf](http://www.refugeesinternational.org/sites/default/files/RI%20Stateless%20Report_FINAL_031109.pdf) (accessed: 25 August 2009) at 11-16; Robyn Linde, 'Statelessness and Roma Communities in the Czech Republic: Competing Theories of State Compliance', (2006) 13 *International Journal on Minority and Group Rights* 341.

<sup>43</sup> Jo Boyden and Jason Hart, 'The Statelessness of the World's Children', (2007) 21 *Children and Society*; Refugees International, 'Futures Denied: Statelessness Among Infants, Children and Youth', available at [http://www.refintl.org/sites/default/files/Stateless\\_Children\\_FINAL.pdf](http://www.refintl.org/sites/default/files/Stateless_Children_FINAL.pdf) (accessed: 22 August 2009).

<sup>44</sup> The Arakan Project, 'Issues to be Raised Concerning the Situation of Stateless Rohingya Women in Myanmar (Burma)', available at [http://www.burmalibrary.org/docs6/CEDAW\\_Myanmar\\_AP\\_Submission-Final-Web.pdf](http://www.burmalibrary.org/docs6/CEDAW_Myanmar_AP_Submission-Final-Web.pdf) (accessed: 30 August 2009); Alice Edwards, 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women', available at <http://www.unhcr.org/refworld/docid/4a8aa8bd2.html> (accessed: 27 August 2009) at chapter four.

<sup>45</sup> UNHCR, 'Evaluation of UNHCR's Programme to Prevent and Reduce Statelessness in Crimea, Ukraine', EPAU/2004/03 (March 2004), available at <http://www.unhcr.org/405ab4c74.html> (accessed: 18 August 2009); Gabor Gyulai, 'Forgotten Without Reason: Protection of Non-Refugee Stateless Persons in Central Europe', available at <http://www.unhcr.org/497099902.pdf> (accessed: 28 August 2009) at 29-34; Amnesty International, 'Nationality, Expulsion, Statelessness and the Right to Return', available at <http://www.unhcr.org/refworld/country,,AMNESTY,,BTN,4562d8cf2,3b83b6df7,0.html> (accessed: 31 August 2009); Tang Lee, 'Refugees from Bhutan: Nationality, Statelessness and the Right to Return', (1998) 10 *International Journal of Refugee Law* 118; Sumit Sen, 'Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia-Part 1', (1999) 11 *International Journal of Refugee Law* 625. See also Part-2 of Sen's article in (2000) 12 *International Journal of Refugee Law* 41.

there are personal accounts.<sup>46</sup> Attention has been paid to the plight facing stateless persons in Africa<sup>47</sup> in general and in particular Kenya.<sup>48</sup>

## Methodology and Objectives of the Study

This study presents results of field work conducted in Kenya from August to November 2009. The research study has five main objectives:

- (a) To identify the causes of statelessness in Kenya;
- (b) To highlight and evaluate the main challenges confronting the confirmation and acquisition of citizenship in Kenya;
- (c) To review the difficulties facing stateless persons and persons at risk of statelessness living in Kenya;
- (d) To propose strategies for meeting the problems that stateless persons and persons at risk of statelessness experience; and
- (e) To identify stakeholders who could be engaged in finding solutions to the plight facing stateless persons and persons at risk of statelessness.

The study considered as a person at risk of statelessness individuals who could not obtain an ID document and who consider themselves to be Kenyan and have a historical link with Kenya. Such individuals were identified in particular communities based on information drawn from previous research work and anecdotal evidences.

The field work took place in five (of the eight) provinces in Kenya: Nairobi, Nyanza, Western, Coast and North Eastern. These were selected on the basis that, apart from Nairobi, they are border provinces. Discussions with Human Rights organizations suggested that there were a number of stateless persons or persons at risk of statelessness living in these provinces. Nairobi was chosen as it is the central administrative city in Kenya. Previous research also suggested that there are a number of stateless persons or persons at risk of statelessness living in this province.<sup>49</sup> Eleven research assistants were recruited to assist with data collection in the study sites. The objectives of this study and methods of data collection were discussed with them during a one-day training session in Nairobi, which was run by the consultant, the KNCHR and the UNHCR.

---

<sup>46</sup>Ekuru Aukot, 'Am I Stateless Because I am a Nomad?', (2009) 32 *Forced Migration Review* 18.

<sup>47</sup>Refugees International, *supra*, note 42; Bronwen Manby, *Citizenship Law in Africa: A Comparative Study* (Open Society Institute: New York, 2009).

<sup>48</sup>Abraham Sing'oei, 'Promoting Citizenship in Kenya: The Nubian Case', in Brad Blitz and Maureen Lynch, *Statelessness and Benefits of Citizenship: A Comparative Study* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2009) at 37-49; Adam Adam, 'Kenyan Nubians: Standing up to Statelessness', (2009) 32 *Forced Migration Review* 19.

<sup>49</sup>See Adam, *supra*, note 48; Sing'oei, *supra*, note 48.



In terms of identification of respondents, Non-Governmental Organizations ('NGO') representatives working with persons at risk of statelessness first approached communities. They explained the objectives of this study to the heads of communities that they worked with and volunteers were requested to come forward. Those who agreed to be interviewed also introduced other respondents to the researchers. Some Government officials were also introduced by these NGO officials, while others were approached directly. One hundred and thirty six respondents were interviewed (N = 136), comprising 93 male (68%) and 43 female (32%).<sup>50</sup> The interviews were confidential and conducted at a time and place suitable to the respondents. All interviewees were adults. The interviews were conducted in English, Swahili or in local languages using the services of interpreters. Respondents were drawn from persons without national identity documents ('IDs'), who were presumed to be stateless or at risk of statelessness (n = 67), holders of national IDs, who were presumed to be nationals (n = 31) as well as officials of the Kenyan government (n = 23) and representatives from NGOs dealing with persons at risk of statelessness (n = 15).

Discussions<sup>51</sup> with persons at risk of statelessness and those who had obtained Kenyan IDs covered topics such as their experience of the process of obtaining these documents, their expectations, whether they understood the processes they were taken through in acquiring ID's, whether they thought they were treated fairly, the challenges they faced and if these challenges were dealt with to their satisfaction. Interviews with persons at risk of statelessness also covered the challenges they face owing to their status, their coping mechanisms, their relationship with the local community and officials, and long term solutions to their plight. Interviews with NGO representatives and Government of Kenya officials canvassed a similar set of issues, but concentrated on obtaining views about the extent of statelessness in the country, the merits of the current procedures for obtaining Kenyan IDs, the challenges faced by stateless persons and persons at risk of statelessness in Kenya and the legal or policy changes needed to improve the current system. In addition to field work, a review meeting with stakeholders was held in Nairobi to enrich the report. 15 Attendees provided feedback on the draft report of this study. Further meetings were held with the core research team comprising the consultant and KNCHR and UNHCR personnel.

The findings of this study, as they are based on the sample size, do not represent a comprehensive reflection of the statelessness situation in Kenya. However, they do provide valuable insight into challenges that persons at risk of statelessness in Kenya face. As such, the study seeks to contribute to existing literature on nationality law and practice through findings drawn from empirical work. It provides a human rights context to the issue of statelessness. This study does not cover every aspect of statelessness in

---

<sup>50</sup> Details of the interviewees are available in annex one and two.

<sup>51</sup> See annex four for the open-ended questions that were used in this study.

Kenya. Rather, it provides a conceptual framework of some of the key issues raised by the survey, it identifies the main challenges confronting persons at risk of statelessness living in Kenya and begins an evaluation of the recommendations for reform.

### **Outline of the Work**

Chapter one of this study has set the overall background and context of the study. Chapter two reviews the various modes and procedures of acquiring citizenship in Kenya, both in theory and in practice. Chapters' three to six examine the challenges faced by persons at risk of statelessness residing in the country. In particular they focus on the following fundamental rights: movement (chapter three), education (chapter four) and access to the labour market and property (chapter five). Chapter six outlines the findings of this study. It also makes specific policy and legal recommendations that could contribute towards ameliorating the plight of persons at risk of statelessness in Kenya. Chapter seven is the study's conclusion.

## CHAPTER TWO: OBTAINING KENYAN NATIONALITY AND IDs: PROCESS AND PRACTICE

### Right to Nationality: Kenyan Constitutional Framework

The right to nationality is well-established in international law. Beginning with the UDHR,<sup>52</sup> subsequent international and regional treaties, in particular the ICCPR,<sup>53</sup> CRC,<sup>54</sup> the Convention on the rights of Persons with Disabilities ('CRPD')<sup>55</sup>, CERD<sup>56</sup> and the CEDAW<sup>57</sup> as well as the ACRWC,<sup>58</sup> contain provisions that seek to promote the realization of this entitlement. International law, however, provides only the substance of this right. Procedural aspects, particularly those surrounding definition of nationals and acquisition of nationality, are governed by domestic legislation on citizenship and registration of persons.

Multiple procedures govern the process of obtaining Kenyan citizenship. The current Constitution prescribes three modes by which a person can obtain Kenyan citizenship at birth,<sup>59</sup> by registration and by naturalization. Chapter VI of the Kenyan Constitution, which sets out the principles relating to citizenship, starts out by describing who was to be considered as a Kenyan citizen at the time of independence in 1963. Any person who was born in Kenya to parents who are citizens of the United Kingdom and its colonies or protectorates as of 11 December 1963, were to be considered as a Kenyan citizen, provided one of his or her parents was born in the country.<sup>60</sup> An individual born overseas was also a citizen, provided the person's fathers 'becomes, or would but for his death have become a citizen of Kenya at independence.'<sup>61</sup> Persons with a connection to Kenya were also eligible to apply for citizenship, as long as they applied by 13 December 1965.<sup>62</sup> If an eligible person failed to apply for registration by the designated date, then the chance of acquiring citizenship was altogether lost not only by the applicant but also by any child, if both parents are non-nationals.

<sup>52</sup>See article 12 ('everyone has the right to a nationality').

<sup>53</sup>See article 24 ('every child has the right to a nationality').

<sup>54</sup>See article 7 (children have 'the right to acquire a nationality. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless').

<sup>55</sup> See Article 18 ('States parties shall recognize the rights of persons with disabilities to ... a nationality ...').

<sup>56</sup>See Article 5 (d) (iii)

<sup>57</sup>See article 9 ('granting women equal rights with men to acquire, change or retain nationality').

<sup>58</sup>See article 6 ('every child has the right to acquire a nationality').

<sup>59</sup>In the Kenyan context acquisition of citizenship by birth is based on descent (*jus sanguini*).

<sup>60</sup>Section 87 of the Constitution.

<sup>61</sup>*Ibid* section 87(2).

<sup>62</sup>*Ibid* section 88.

Acquisition of citizenship at birth applies to persons born in the country after Kenya gained its independence on 12 December 1963. For one to qualify for citizenship on this ground one of the parents must be a citizen. section 89 of the Constitution provides that: 'Every person born in Kenya after 11th December, 1963 shall become a citizen of Kenya if at the date of his birth one of his parents is a citizen of Kenya.'

Additional requirements exist for those born to foreign fathers. In the first place, the person must demonstrate that his or her father does not 'possess immunity from suit of legal process as is accorded to the envoy of a foreign state accredit[ed] to Kenya'.<sup>63</sup> Additionally, the applicant must show that his or her father is not a citizen of a country which is at war with Kenya.<sup>64</sup>

Citizenship by descent applies particularly to individuals born out of the country after independence. As with others born overseas, the Constitution places certain limitations on this category of persons. Again, the focus is on the applicant's father. The Constitution declares that only Kenyan fathers can transmit citizenship under this head. According to section 90: 'A person born outside Kenya after 12th December 1963 shall become a citizen of Kenya at the date of his birth if at that date his father is a citizen of Kenya.'<sup>65</sup>

Therefore, children born to Kenyan mothers overseas are ineligible for Kenyan citizenship by descent.

Citizenship can also be acquired by registration.<sup>66</sup> To be eligible, a person needs to show that one of the parents is a citizen of Kenya<sup>67</sup> and the other is a national of a commonwealth country or a specified African State.<sup>68</sup> Certain prescribed residency requirements must also be met.<sup>69</sup> Foreigners married to Kenyans can also register for citizenship. However, the Constitution places limits on this mode of gaining citizenship by providing that only women who are married to Kenyan nationals are eligible to apply,<sup>70</sup> meaning that foreign men married to Kenyan women cannot apply for citizenship on this ground. This state of affairs presents serious problems for children born of such relationships outside Kenya.<sup>71</sup>

---

<sup>63</sup>*Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Emphasis added.*

<sup>66</sup> *For applicable forms, see the first schedule to the Kenyan Citizenship Act.*

<sup>67</sup> *Section 92(2) of the Constitution.*

<sup>68</sup> *Ibid.* For a list of these countries, see section 95 of the Constitution.

<sup>69</sup> *Section 92(1) of the Constitution.*

<sup>70</sup> *Ibid* section 91.

<sup>71</sup> *However, section 3 of the Citizenship Act, which governs gaining citizenship by registration, does not discriminate between children born of foreigners overseas and those born in the country, as long as they satisfy residency, language and character tests.*

Last, citizenship can be acquired by naturalization. An applicant must satisfy the Immigration Minister that he or she:

- ❖ is at least 21 years old;
- ❖ has been ordinarily and lawfully resident in Kenya for the period of twelve months immediately preceding the lodgement of the application;
- ❖ has been ordinarily and lawfully resident in Kenya for a period of, or for periods amounting in the aggregate to, not less than four years in the seven years immediately preceding the twelve months mentioned above;
- ❖ is of good character;
- ❖ has an adequate knowledge of the Swahili language; and
- ❖ Intends, if naturalized as a citizen of Kenya, to continue to reside in the country.<sup>72</sup>

Unlike citizenship obtained by birth, the Immigration Minister can revoke citizenship acquired by registration or naturalization. For this power to be exercised, the Government must demonstrate:

- ❖ that the citizen has been disloyal or disaffected towards Kenya through his or her actions or words;
- ❖ that that citizen has, during any war in which Kenya was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was to his or her knowledge carried on in such a manner as to assist an enemy in that war;  
that, within the period of five years commencing with the date of the registration or naturalization, a sentence of imprisonment of or exceeding twelve months has been imposed on that citizen by a court in any country;
- ❖ that that citizen has, since becoming a citizen of Kenya, been ordinarily resident in countries other than Kenya for a continuous period of seven years and during that period has neither-
  - been at any time in the service of Kenya or of an international organization of which Kenya was a member; nor
  - registered annually at a Kenyan consulate his [or her] intention to retain [Kenyan] citizenship; or
- ❖ that the registration or naturalization was obtained by means of fraud, false representation or the concealment of any material fact.<sup>73</sup>

---

<sup>72</sup>*Ibid* section 93 (Emphasis added).

<sup>73</sup>*Ibid* section 94.

## Obtaining an ID: A Daunting Process

The Kenyan legal framework does not provide for a single document which is proof of Kenyan nationality. Neither the Constitution, Kenya Citizenship Act nor the Registration of Persons Act<sup>74</sup> recognizes the ID card as proof of Kenyan citizenship.

For an individual to be eligible to apply for an ID, he or she must satisfy certain criteria. The person must be at least 18 years of age.<sup>75</sup> In addition, he or she must meet citizenship requirements.<sup>76</sup> Applications are lodged with the National Registration Bureau (NRB) in the area where a person resides or works. Applicants must fill out a form, which requires the following details: their full names, sex, date and place of birth, declared tribe or race, occupation, place of residence and postal address.<sup>77</sup> Practice suggests that a copy of the father's ID is also required as well as a letter from the local chief or village elder of the area where the individual resides. However, according to the NRB, applicants can produce 'either of the parent's [IDs] during the identification process to prove that his/her father/mother is a citizen'.<sup>78</sup> The NRB also disputes the requirement that a letter from the chief or sub-chief is required, stating that applicants 'must' not 'produce an introductory letter for registration to be undertaken'.<sup>79</sup>

Applicants must also affix their finger and thumb or, where these are missing, their palm or toe impressions on the form.<sup>80</sup> Completed forms are then sent to central authorities in Nairobi for verification. Applications that meet all the requirements are accepted and applicants issued with an ID.<sup>81</sup> Those applications that are unable to satisfy the criteria are rejected. Although decisions are communicated in writing, no reasons are provided.

A Kenyan ID is a rectangle card bearing the logo of the Government of Kenya, and contains:<sup>82</sup>

- ❖ the holder's photograph;
- ❖ biographical data full name, finger and thumb or palm or toe impression, gender, date and place of birth as well as signature;
- ❖ signature of the registration official; and
- ❖ Date and place of issue of the document.

<sup>74</sup>Cap. 107

<sup>75</sup>Section 6 of the Registration of Persons Act.

<sup>76</sup>*Ibid* section 2. See also rule 4(2)(b) of the Registration of Persons Rules 1949.

<sup>77</sup>Section 5 of the Registration of Persons Act. See also the first schedule to this Act.

<sup>78</sup>Letter from NRB dated January 26, 2010 (on file with the consultant).

<sup>79</sup>*Ibid*. Note, however, that the application form for an ID requires the Chief and Assistant Chief to certify that an applicant is known to him or her. See the second schedule to the Registration of Persons Act.

<sup>80</sup>Section 5 of the Registration of Persons Act.

<sup>81</sup>*Ibid* section 9.

<sup>82</sup>See also section 9 and the first schedule of the Registration of Persons Act.

The Registration of Persons Act is silent with regard to appeals procedures which failed applicants may use, while the Citizenship Act states that the decisions of the [Immigration] ‘Minister’ are ‘final’ and ‘not subject to appeal or review’.<sup>83</sup> He or she is also not required to give ‘any reason’ for his or her decision.

Rejected applicants who ultimately are unable to ascertain their Kenyan nationality face the risk of becoming stateless if they do not possess any other nationality or other State to turn to.

Although the process of obtaining an ID appears straight forward in theory, the reality paints a different picture. Experience shows that it is not as ‘smooth’ as the Government claims.<sup>84</sup> Half of the officials (19) and individuals (34) who participated in this study expressed concerns with the procedures that Kenya uses to process ID applications. Some of the issues raised included corruption in the system, delays and tedious formalities. Criticisms were also levelled against the Vetting Committees.

Vetting Committees were established in border districts to screen applications for IDs that were lodged in these areas,<sup>85</sup> ‘where the same ethnic community spills over into the neighbouring country’.<sup>86</sup> The committee also has a presence in Nairobi and Kisumu to scrutinize applications lodged by Nubians and Muslims, respectively.<sup>87</sup> Notably, these committees were not created by statute. Rather, the institution came about as a result of Government administrative interventions first introduced into the application process in 1988, owing to security concerns particularly about individuals coming from Somalia. The committee was established to scrutinize applications lodged by ethnic Somalis in order to ensure that only genuine (read: Kenyan) citizens particularly by birth and descent received IDs.<sup>88</sup>

Thirty four officials and nineteen individuals that participated in this study had issues with the Vetting Committee in particular and the process of acquiring IDs in general. The way the Vetting Committee discharges its mandate and its composition raise concerns. On composition, the committee is made up of the area’s District Officer (who is also its chairperson), chief or assistant chief, appointed community elders who have to take an

---

<sup>83</sup>Section 9.

<sup>84</sup>Government of Kenya, *Presentation to Nairobi Province Vetting Committee Members (19 January 2005) (on file with the consultant)*.

<sup>85</sup>According to the NRB, *supra*, note 78, ‘These committees were established in all areas with a concentration of persons from border communities for ease of identification’.

<sup>86</sup>NRB, *supra*, note 78.

<sup>87</sup>Interview with Fatima, Nyanza Province, 18 September 2009; Interview with Kazoni, Nairobi Province, 1 October 2009.

<sup>88</sup>Interview with Kazoni, Nairobi Province, 1 October 2009.

oath of office, and representatives from the National Security Intelligence Service, Criminal Investigation Department, Civil Registration and the Immigration Department. As mentioned above, individuals wishing to apply for an ID are required to produce a letter from the area chief or his or her assistant. The purpose of this letter is to verify that the applicant is resident in the area where he or she claims to reside in. Also included is information on the applicant's family history. The local administrator is required to state the circumstances under which he or she knows the applicant. This process is based on the assumption that local administrators have sound knowledge of all the people residing in their area. The letter from the local administration forms part of the application pack that the Vetting Committee uses to assess an individual's application for an ID.

If the local administrator vouches for a person the chances of the person's application succeeding before the Vetting Committee may be high considering that it (local administration) sits in the committee. Conversely, an applicant's chances diminish significantly if he or she is unable to obtain a positive recommendation letter. This process is problematic in the sense that it creates an avenue for corruption, as high premium is placed on recommendation letters. Several respondents claimed that these letters were sold for a fee.<sup>89</sup> According to some, there was corruption in the system.<sup>90</sup> There was, however, little guarantee that an applicant would receive an ID even if he or she offered a kickback to an official. Zama confessed that she 'gave out a bribe [to the local chief to write a supporting letter] but still no identification came out'.<sup>91</sup> In the words of Waly:

*The chief is a liar as is the sub-chief. Why do they want bribes even though they see that we have children who were born here yet they cannot get an ID.*<sup>92</sup>

Those individuals who were unable or unwilling to part with a bribe faced a lot of difficulty. Marianne articulated her annoyance in the following words:

*My problems arose when my children need IDs because of our Islamic background. The authorities claim they are non-Kenyan. They [authorities] always ask for bribes for the names to be accepted.*<sup>93</sup>

The fact that chiefs sit on the Vetting Committee may be problematic especially in situations where an individual had earlier on refused to produce a bribe. If the chief caves in finally (for persistent applicants) and writes this letter, it is arguable that the

---

<sup>89</sup>Interview with Fatima, Nyanza Province, 18 September 2009; Interview with Kganadi, Western Province, 19 September 2009.

<sup>90</sup>Interview with Jeff, Nyanza Province, 14 September 2009; Interview with Ismael, North Eastern Province, 14 September 2009.

<sup>91</sup>Interview with Zama, Nyanza Province, 16 September 2009.

<sup>92</sup>Interview with Waly, Coast Province, 15 September 2009.

<sup>93</sup>Interview with Marianne, Nyanza Province, 14 September 2009.



official may not be fully impartial at the hearing of the application. As this letter carries a lot of weight in the assessment process, it is of utmost importance for an applicant to receive all the support that he or she can get before the Vetting Committee. During interviews with some officials and ID applicants it was apparent that the attitude of the committee was that individuals appearing before it were foreign nationals masquerading as Kenyans. Lerato<sup>94</sup> and Mushinga,<sup>95</sup> whose grandparents were born in Mozambique and Zanzibar, respectively, but whose parents were born in Kenya, stated that when they tried to acquire national IDs they were told they were not Kenyans. Mushinga was 'told to go to Zanzibar'.<sup>96</sup> Others claimed that officials referred to them as 'aliens and thieves'.<sup>97</sup> In sum, as Lerato observed, 'the Government does not know or identify us'.<sup>98</sup> In effect, applicants faced a huge task discharging the burden of proof.

There were also serious delays in the processing of IDs, as the majority of applicants (34; 34%) and officials (19; 82%) underscored. Whilst the process should on average take about one month in rural areas<sup>99</sup> and 18 days in Nairobi,<sup>100</sup> it was not unusual to find applications that had taken several years to be determined. For instance, Aissatou and Thabo applied for IDs in 1997 and 1998 respectively. As of October 2009, they had neither received the document nor official communication on the status of their applications, despite the numerous trips they had made to the office where they had lodged their applications.<sup>101</sup> Shauku's experience shows the challenges that some face when trying to acquire an ID. Both his parents and grandparents were born in the country. His father held a Kenyan ID. However, his great grand-parents had been born in a foreign country. He first applied for an ID in 2003. All the documents that were required were submitted. When he appeared before the Vetting Committee, he was told that he was not Kenyan because on the application form he had indicated his father's tribe to be that of his grandparents' country:

*I filled out my father's original tribe, namely, \_ [of \_ (country)]. The committee advised I return to my father's home country, which I had never been to, and to apply for any official document that that country issues. The fact that I had produced a letter of support from the chief, death certificates of my parents and a copy of my paternal uncle's Kenyan ID did not assist my application in any way.*

---

<sup>94</sup>Interview with Lerato, Coast Province, 15 September 2009.

<sup>95</sup>Interview with Mushinga, Coast Province, 15 September 2009.

<sup>96</sup>Interview with Mushinga, Coast Province, 15 September 2009.

<sup>97</sup>Interview with Piet, Coast Province, 19 September 2009.

<sup>98</sup>Interview with Lerato, Coast Province, 15 September 2009.

<sup>99</sup>Interview with Santos, Coast Province, 16 September 2009.

<sup>100</sup>Letter from NRB, *supra*, note 78

<sup>101</sup>Interview with Aissatou, North Eastern Province, 17 September 2009; Interview with Thabo, Coast Province, 14 September 2009.

<sup>102</sup>Interview with Shauku, Coast Province, 16 September 2009.

Nonetheless he persisted and the committee eventually agreed to accept his application. His documents were processed and sent subsequently to Nairobi for verification. This application was rejected in 2006 on the ground that the tribal code was 'illegal'.<sup>103</sup> In other words, the Government could not issue an ID as the tribe that he had mentioned was not one that was recognized as an official tribe in Kenya. Upon inquiry on the way forward, Shauku was advised by a Registration Official to lodge a fresh application. He was advised to put down his mother's tribe, which was a local tribe. In keeping with this advice, he lodged a fresh application in 2006. Shauku continued:

*In October 2006 I was called to appear before the Vetting Committee. I thought I was being called to collect my [ID]. However, this was not the case. My happiness was short-lived as I was arrested by law enforcement officials and taken to the cells. I tried to ask why I was being arrested, but they refused to answer my questions. Later on I was charged with the following counts [: (I) procuring execution of a document on false pretence, contrary to section 355 of the Penal Code; (II) giving false information to a public servant, contrary to section 129(a) of the Penal Code; (III) attempting to procure registration by false pretences, contrary to section 320 of the Penal Code; and (IV) being unlawfully present in Kenya, contrary to section 13(2) of the Immigration Act]. The case proceeded to full trial. Fortunately, the Magistrate ruled in my favour. I was acquitted in February 2008 on all grounds, save for ground I. Even so, as of [September 2009], I had not been issued with an ID, despite the court's finding that I am a Kenyan citizen by birth [on the basis of section 89 of the Constitution]. I have taken the court's decision to the Registration Officials, but they are yet to act. I am still waiting. Hopefully, one day by the grace of Allah I will obtain this document.*<sup>104</sup>

Shauku's experience demonstrates the difficulties that persons born of parents of foreign descent face when applying for IDs. This study met several applicants who had altered intentionally some of their biographical details. Those with 'wrong' tribal codes or names would change them:

*My child had a rough time getting an ID. The [chief] asked me to lie about my tribe, but I did not. ... There are some of my brothers who said they were \_ [a local tribe] and not \_ [a foreign tribe]. .... I did not betray my tribe.*<sup>105</sup>

*The sub-chief tried to get a bribe off me so that I could be allowed to change my name to get an ID.*<sup>106</sup>

Those with Islamic-sounding names would replace them with English names or not disclose these names altogether so as not to arouse any suspicion. Officials were aware of this mode of operation. Drawing on experience, Santos, a Registrar of Persons, and Amadu, a Government Administrator, informed this study that some applicants lied in their applications by altering their names.<sup>107</sup>

---

<sup>103</sup>*ibid.*

<sup>104</sup>*ibid.*

<sup>105</sup>Interview with Alfonso, Coast Province, 17 September 2009.

<sup>106</sup>Interview with Waly, Coast Province, 15 September 2009.

<sup>107</sup>Interview with Santos, Coast Province, 16 September 2009; Interview with Amadu, Coast Province, 17 September 2009.

While some eventually obtained IDs, Shauku's experience highlights the risks of this strategy. Upon discovery one faced prospects of prosecution and imprisonment. This experience also underscores the fact that not all applicants are processed expeditiously.

Due process considerations require procedures to be amenable to review or appeal by an independent and impartial tribunal. Reasons should also be given for any decision.<sup>108</sup> These aspects are valuable to any process as they promote the right to a fair hearing. In any legal system an aggrieved party should have an opportunity to plead his or her case before another decision-maker. The fact that appeal or review rights exist could also make the original decision-maker act judiciously, as he or she knows that the possibility of their decision being scrutinized by a tribunal exists. In the context of the ID acquisition process it is curious that several respondents were unaware of whether or not they could challenge, for instance, the decision of the Vetting Committee. Interestingly, most officials whom the study met were clueless on this aspect. One could appeal the decision of the Vetting Committee to an appellate body established at the provincial level. Even so, hardly any appeals were filed, as most of the rejected applicants were unaware of this avenue for ventilating their claims.

---

<sup>108</sup>*On the importance of reasons, see Edwin Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective', (2007) 1 International Journal of Refugee Law 51 at 91-92.*

## CHAPTER THREE: RIGHT TO FREEDOM OF MOVEMENT

### Legal Framework

Freedom of movement is a fundamental right for the individual. When undermined, it would be difficult for a person to realize other fundamental rights such as work, freedom of expression, freedom of association and education. This right has a profound impact on a person's life and livelihood.

Article 13 of the UDHR guarantees 'everyone' the freedom to move 'within the borders' of any state. Obligations to respect, protect and promote this right are also found in other international human rights instruments such as the ICCPR,<sup>109</sup> the Banjul Charter<sup>110</sup> and the CEDAW.<sup>111</sup> Soft law, such as the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live<sup>112</sup> ('Declaration on Foreign Nationals') contains similar provisions.<sup>113</sup>

Consistent with international law, the domestic legal framework of Kenya recognizes this entitlement via section 81(1) of the current Constitution:

*No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.*

Although the wording of this section seems to suggest that the right of movement is available to citizens only, this is hardly the case. The remainder of section 81 suggests that any person who is in the country is entitled to this freedom,<sup>114</sup> subject to certain conditions. Everyone who is in the country is entitled to movement rights. As the South African Constitutional Court (O'Regan J) has underlined, constitutions 'must be interpreted in a way that will promote rather than hinder the achievement of the protection of human rights'.<sup>115</sup>

The right to freedom of movement places both a positive and a negative obligation on States. The former requires them to undertake measures that will promote and protect

---

<sup>109</sup>Article 12.

<sup>110</sup>Article 12.

<sup>111</sup>Article 15.

<sup>112</sup>Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live, G.A. res. 40/144, annex, 40 U.N. GAOR Supp. (No. 53) at 252, U.N. Doc. A/40/53 (1985) ('Declaration on Foreign Nationals').

<sup>113</sup>*Ibid* article 2(a).

<sup>114</sup>See section 81(1)(a)-(d) as well as (f) and (g), which place limitations on the freedom of movement within and out of the country, and makes reference to 'any person', not Kenyan citizens.

<sup>115</sup>*Kaunda v President of the Republic of South Africa* (2005) 4 SA 235 at 304.

the realization of this entitlement by every person in the country. States are also prohibited, under the terms of the negative obligation, from unjustified interference with this freedom. However, movement rights are not absolute. International human rights and domestic laws impose certain restrictions on its enjoyment. The ICCPR<sup>116</sup> and the Banjul Charter<sup>117</sup> allow States to restrict an individual's enjoyment of this freedom in specified circumstances, namely, where its national security, public order, public health and/or morals are threatened. The Kenyan Constitution contains a similar list.<sup>118</sup> Under the constitution the burden is on the State to prove that public order or security is threatened.

## Current Status

One of the greatest hurdles that stateless persons and persons at risk of statelessness face in Kenya is the freedom to move freely within the country, despite constitutional and international law guarantees. As noted previously, their lack of documentation has wide consequences. Unlike nationals and lawfully resident foreigners, stateless persons or persons at risk of statelessness do not have any official document that they could use to identify themselves. Failure to hold any document exposes them to intimidation, extortion, arbitrary arrest and detention by law enforcement officials.<sup>119</sup> Although officially there are no restrictions on the freedom of movement of individuals in Kenya, practice shows that law enforcement officials often target the locations where those who do not hold IDs are known to reside. Any person found without an ID may be detained for periods ranging from a few hours<sup>120</sup> to several months.<sup>121</sup> Some could be charged in court for being in the country unlawfully. The following narratives capture this state of affairs:

*Travelling is a problem. I cannot go from Garissa to Dadaab. .... I have been harassed by police. There are too many police barriers between Garissa and Dadaab. I have been detained for not having documentation.*

*I have been arrested several times, before turning 18 and after turning 18. After I turned 18 once I was arrested and stayed in remand for about one month. I was released under section 87A of the Criminal Procedure Code when the court found that I was born in Kenya.*

---

<sup>116</sup>See article 12.

<sup>117</sup>See article 12.

<sup>118</sup>See section 81(3).

<sup>119</sup>Similar trends have been noted elsewhere in the context of refugees. See Edwin Abuya and Dulo Nyaoro, 'Victims of Armed Conflict and Persecution in South Africa: Between a Rock and a Hard Place', (2009) 32 *Hastings International and Comparative Law* 1 at 14.

<sup>120</sup>Interview with Albert, Nairobi, 15 September 2009 ('[In 2008] I travelled to Garissa and on my way back on a road block, the police requested for IDs, which I did not have. They took me to the cells where I stayed for less than an hour before the bus driver pleaded my case').

<sup>121</sup>Piet, for example, was detained for one year. Theodore also 'spent some time in jail'.

<sup>122</sup>Interview with Aissatou, North Eastern Province, 17 September 2009.

<sup>123</sup>Interview with Ali, Nairobi Province, 15 September 2009.

*I have been detained due to the lack of an ID. I was taken to [a] police station for a day. I explained that I was still in school [and they released me].<sup>124</sup>*  
*In [former President] Moi's era they [police] used to chase us at night and take us to the cells ... I know many people who were detained during [this] era. The "crime" was having no ID.<sup>125</sup>*

There are two strategies that stateless persons or persons at risk of statelessness in Kenya have adopted to deal with the current situation. As they must travel, the first measure that some have taken is to offer officials bribes. According to Pumi, 'we sweet talk the people who are in charge'.<sup>126</sup> Others were more direct:

*Yes, I have been detained due to the lack of documentation. I was detained for eight days. Finally, I had to bribe my way out.<sup>127</sup>*  
*I have been arrested several times by the police. Each time I had to bribe my way out.<sup>128</sup>*  
*I must carry money to bribe police at roadblocks.<sup>129</sup>*  
*Prior to 2003 I used to be harassed by police who would demand money from me and my friends to avoid the cells.<sup>130</sup>*

Respondents in this study suggest that the going rate for a bribe ranges from KShs 200 (USD\$ 3)<sup>131</sup> to 500 (USD\$ 6).<sup>132</sup> This option could prevent a person from going to prison and ensure that he or she proceeds with the journey. However, it promotes corruption. The police have the responsibility of ensuring that the law is observed at all times, not violated.<sup>133</sup>

The lack of an ID consequently forces some to limit their movement. As some explained:

*We fear to travel because our Muslim names put us in problems with Government officials. I do not travel much out of [town].<sup>134</sup>*

*I am afraid to travel for fear of detention.<sup>135</sup>*  
*I am forced to restrict my movement to areas that I am known and where I feel safe.<sup>136</sup>*

---

<sup>124</sup>Interview with Mosidisi, Coast Province, 15 September 2009.

<sup>125</sup>Interview with Modibo, Coast Province, 14 September 2009.

<sup>126</sup>Interview with Pumi, Western Province, 16 September 2009.

<sup>127</sup>Interview with Alain, North Eastern Province, 16 September 2009.

<sup>128</sup>Interview with El-Mouhoub, North Eastern Province, 14 September 2009.

<sup>129</sup>Interview with Abdel, North Eastern Province, 14 September 2009.

<sup>130</sup>Interview with Christo, Nairobi Province, 15 September 2009.

<sup>131</sup>Interview with Paulo, North Eastern Province, CC September 2009.

<sup>132</sup>Interview with Doumbia, North Eastern Province, 19 September 2009.

<sup>133</sup>According to section 14 of the Police Act (1961), law enforcement officials are charged with the following responsibilities: '

*Maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.'*

*Interview with Esha, Nyanza Province, 18 September 2009.*

<sup>135</sup>Interview with Sebuleni, North Eastern Province, 14 September 2009.

This is the second coping mechanism that some have adopted, especially those who are reluctant to offer bribes. This affirms the assertion that some stateless persons or persons at risk of statelessness ‘operate outside the formal arrangement’.<sup>134</sup> Whilst they would have loved to travel freely round the country, many have resorted to travelling within their local areas. If they require an item that is unavailable locally, they send someone who has an ID to purchase it on their behalf. One used other people ‘to get goods’ for her business.<sup>138</sup> This situation is not ideal as it reduces their ability to access essential commodities easily. Additionally, this mode of purchasing items is quite expensive considering that the sender is required to meet travel and other related costs. For a person who is struggling to make ends meet, finding yourself in a situation such as this could be very difficult.

The fact that stateless persons are not recognized as citizens of any country make it difficult for them to travel internationally. In Kenya, as with most countries, only citizens are eligible to apply for a passport,<sup>139</sup> which is the common document that is used to facilitate international travel. Section 2 of the Immigration Act defines ‘passport’ in the following terms:

*[A document] issued to a person by or on behalf of the government of the State of which he is a subject, or a valid passport or other valid travel document or document of identity issued to a person by an authority recognized by the Government of Kenya.*

For stateless persons or persons at risk of statelessness the fact that they are ineligible or find it difficult to apply for this travel document creates a barrier for those wishing to travel abroad for leisure,<sup>140</sup> employment, health, education and/or religious reasons. Over one third (27; 40 %) of respondents at risk of statelessness stated that they felt trapped in the country. Not only were they unable to move freely internally, but it was impossible for many to depart the country, particularly by air. As the borders of Kenya are porous, it is possible for a person travelling by land to leave the country. However, if he or she is arrested overseas, Kenya would not be able to grant him/her

---

<sup>136</sup>Interview with Christo, Nairobi Province, 15 September 2009.

<sup>137</sup>Interview with Kazoni, Nairobi Province, 1 October 2009.

<sup>138</sup>Interview with Aissatou, North Eastern Province, 17 September 2009.

<sup>139</sup>See also section 81(1) of the Constitution (providing that Kenyan citizens have exit and re-entry rights into the country).

<sup>140</sup>Eric, for instance, stated that he was unable to ‘travel abroad for football matches’ (Interview with Eric, Coast Province, 15 September 2009).

<sup>141</sup>For further discussion of this theme, see Edwin Abuya, ‘Revisiting Liberalism and Post-Colonial Theory in the Context of Asylum Applications’, (2006) 24 *Netherlands Quarterly of Human Rights* 193 at 220-221.



diplomatic protection. Courts have underlined that diplomatic protection is generally only available to citizens.<sup>142</sup> In addition, one risks being denied re-entry into the country.

Whereas one would expect a person with a Kenyan ID to be issued with a passport, this is not always the case. For those who come from border communities or communities whose country of origin is contested, the holding of an ID is not of itself sufficient. Practice demonstrates that more is required. Kazoni, who is a member of the Nubian community, shared his experience in the following words:

*I received my ID in 1990. In 1992 I applied for a passport. It was a nightmare. The officials first asked me for my great grandparents' birth certificate. I produced my birth certificate, but they refused. They also rejected my ID. Rather, they insisted on my great grandparents' [documentation]. How could I get it when they were born in the 1930s? Some of the Immigration Officials whom I knew advised me to change my name from Kazoni. I refused. I was not prepared to sell my identity. I received a scholarship to study for a Masters course [overseas] in 1996. However, I could not go as I did not have a passport. I had to lose this chance. In 1997 I got a job offer with [a foreign based] company. Again, the outcome was the same. In August 2000, I got a contract with [a company based in the Middle East]. The [relevant Government] Ministry approved my contract and wrote a letter to the Immigration Department. This time round I was asked to produce my parents' ID, my birth certificate and my ID. For the first time they also allowed me to pay for the application. In January 2001 I was called for an interview. Interestingly, it was conducted by an official from the intelligence arm of the Government, not immigration. The interview lasted about one hour. I had to carry all my academic certificates. I finally received my passport in April 2001. But I lost this job as I was supposed to [report] in October 2000.*<sup>143</sup>

This experience raises several issues. It shows the difficulties that some communities face when acquiring Kenyan travel documents. The fact that a person holds an ID does not guarantee an individual a passport. Rather, members of some communities are still subjected to long processes, including vetting. There are many questions that one could pose in this regard. Are these applicants vetted because the Government does not trust documents that it has issued? Or was it because different departments in the same Government have different policies on matters relating to or touching on citizenship? Kazoni's experience shows that actual possession of an ID card is not sufficient proof of citizenship.

Clearly, the procedures are not the same for everyone. The tendency is for members of particular communities and religious persuasions to be asked to present additional documents. Indeed, requesting some applicants to produce the IDs of their great grandparents thereby placing them in a different position within the existing administrative procedures may amount to violation of the anti-discrimination provisions

<sup>142</sup> Kaunda, *supra*, note 115 at 258. But see articles 3(2) and 8 of the International Law Commission 'Draft Articles on Diplomatic Protection' (2006) providing that protection should extend to non-citizens, including stateless persons.

<sup>143</sup> Interview with Kazoni, Nairobi Province, 1 October 2009.



of the Kenyan Constitution <sup>144</sup> and international human rights law. <sup>145</sup> Other Kenyan identity card holders are hardly required to produce their great grandparents' IDs. This precondition is also unreasonable and onerous for applicants. It is doubtful whether other applicants would be able to produce these documents, if requested.

The experience also underscores the many opportunities that some have to forego owing to Government bureaucracy.

### Exception to the Rule

In the course of the research a particular administrative practice relating to people originating from Pemba Island (Tanzania) surfaced. This community resides in the Coast Province and arrived in Kenya in the early 60s. Their relationship with the other communities was, overall, cordial. Their children studied in local schools and spoke the local language, including Swahili and English. Many had integrated well into the country. They could even travel outside of the country. A Government administrator <sup>146</sup> noted:

*Those from the Island of Pemba who wish to travel home for any reason have no problems. Often they would come to my office to seek authorization. I usually issue a letter, with details of the person's name, their dependants (if any) that are accompanying the individual and the number of days that he or she intends to be away. The individual would have to present this letter to Kenyan Immigration Officials in order to be allowed to leave and re-enter the country. However, one has to be back on or before the date stated on the authority letter.* <sup>147</sup>

The arrangement is commendable as it guarantees persons of Pemban origin a certain level of freedom to move. However, this initiative could be criticized at a number of levels. Primarily, the right to travel is limited only to one part of a country. Second, it is rather curious that permission to travel to Pemba has to be lodged with the local administrator, not the Immigration Department, which is charged with the responsibility

---

<sup>144</sup>See section 82. Subsection 3 of this section defines 'discrimination' as 'affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex ....'

<sup>145</sup>See article 7 of the UDHR. See also article 26 of the ICCPR (providing that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status') and the preamble to the Banjul Charter (setting out one of its objectives as removing all forms of 'discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions').

<sup>146</sup>It should be noted that the research did not interview any respondent originating from Pemba Island to confirm if they are citizens of Kenya or any other country. The actual situation of this particular group warrants further examination to ascertain what nationality they hold.

<sup>147</sup>Interview with Salim, Coast Province, 18 September 2009.

of controlling entry and exit into the country.<sup>148</sup> The requirement that individuals travelling to Pemba cannot extend their stay while in Pemba is also problematic particularly if one has an emergency. Arguably, if one remains out of Kenya beyond the duration allowed, he or she will be prohibited from re-entering the country unless the person applies for a visa, which is unlikely to be issued unless he or she has a travel document.

<sup>148</sup>*Section 11 of the Immigration Act.*

## CHAPTER FOUR: THE RIGHT TO EDUCATION

### Legal Framework

The right to education is important to the life of any human being. A good education enhances the chances of a person to secure employment. A proper education equips an individual with essential tools for use in his or her life. As the ACRWC underlines, the education of a child should be geared towards promoting and developing his or her ‘personality, talents and mental and physical abilities’ to the ‘fullest potential’.<sup>149</sup> International law stresses that a child’s education should be directed at preparing the individual: ‘For responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups’<sup>150</sup>. Moreover, countries with high numeracy and literacy skills are more likely to prosper economically.<sup>151</sup>

Recognizing the value education plays in the lives of individuals and nations, international law contains provisions that seek to protect this right. Articles 13, 26 and 17 of the ICESCR, UDHR and the Banjul Charter, respectively, guarantee every person the right to education. As with movement rights a positive obligation is placed on States to promote the realization of education rights by every person in their territory. A negative obligation is also placed on States. Towards this end, they are prohibited from taking any steps that will erode the enjoyment of this entitlement. Subsequent human rights treaties have fleshed this right out. While recognizing this entitlement, the CRC<sup>152</sup> and the ACRWC<sup>153</sup> urge States to make basic education free and compulsory to every person residing in their territory. States are also encouraged to make secondary education accessible and available to all.<sup>154</sup>

Domestic law in Kenya recognizes the right to education. Provisions regulating education are found in the 1968 Education Act<sup>155</sup> and Children Act of 2001. The Children Act in particular reiterates the provisions of international law as reflected in the CRC and the ACRWC. Section 7 of this statute provides:

---

<sup>149</sup>Article 11.

<sup>150</sup>Article 29 of the CRC.

<sup>151</sup>For the link between universal education and development, see United Nations Development Programme, Human Development Report 2009 available at [http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf) (accessed 21 March 2010) at 199-202.

<sup>152</sup>Article 28(1).

<sup>153</sup>Article 11(3).

<sup>154</sup>See article 11(3)(b) of the ACRWC and 28(1) of the CRC.

<sup>155</sup>See this statute generally.

(1) Every child shall be entitled to education the provision of which shall be the responsibility of the Government and the parents.

(2) Every child shall be entitled to free basic education which shall be compulsory ....

## Current Status

Various schools in areas where persons at risk of statelessness were known to reside in Kenya were visited. Consistent with international and domestic law provisions, no fee was charged at both the elementary and secondary levels. In the words of a local administrator:

*We treat them [stateless persons or persons at risk of statelessness] equally. Any person who would like to attend school is given an opportunity and education is provided free. There is no discrimination. In fact my children attend the same school with some of them. Mind you, some of their children perform better than the local kids. Interestingly, they place more emphasis on education than some local people.*<sup>156</sup>

Over one-third (24; 36%) of the respondents at risk of statelessness affirmed that their children attended school without any difficulty. Aside from the various levies that most schools in Kenya charge, they did not pay any school fees.<sup>157</sup> The respondents at risk of statelessness placed a lot of emphasis on education as it was seen as a way of escaping the poverty that has gripped them.<sup>158</sup> Overall, the practice in Kenya of allowing persons at risk of statelessness to access primary and secondary education institutions is a step in the right direction, and one that is consistent with the provisions of international and domestic laws.

However, a similar conclusion could not be reached for post-secondary education and training. Despite desire and determination to advance their studies, many persons at risk of statelessness faced huge barriers. In particular, several post-secondary education institutions required IDs before they could enrol students. The lack of documentation made it impossible for many persons at risk of statelessness to access institutions to pursue their studies, unlike those with Kenyan or foreign issued IDs. Shauku's sentiments underline the challenges that persons at risk of statelessness face in their attempt to access post-secondary education:

*Poverty levels are so high here, and without a good education there is no way that the people in this village will realize any meaningful form of development. How will they catch up with the rest of the country if they do not get a decent education? I would very much like to go to university or college to study Education in order to be able to return and assist the people in this village. However, I do not have any ID that I could show the authorities. The documents that were issued in school—transcripts and*

---

<sup>156</sup> Interview with Boubacar, Coast Province, 18 September 2009.

<sup>157</sup> School fees are not paid in public primary schools in Kenya. However, different levies are imposed on all parents by schools. The amount of levy varies from school to school.

<sup>158</sup> Interview with Salim, Coast Province, 18 September 2009.

records of attendance—can not suffice. Neither can my birth certificate alone. If Allah wills, one day I will make it to the university or college. <sup>159</sup>

Tsepo notes the consequences of not getting a good education:

*I just want to insist on the Government to look into our case as we really need proper documentation. We are now getting old and are worried about the future of our children as they sometimes cannot progress to higher levels of education and they just have to end up like us, carpenters.* <sup>160</sup>

The fact that stateless persons or persons at risk of statelessness lack international travel documents raises the bar further. As already noted, many cannot travel overseas. Hence, their chances of accessing education opportunities outside of Kenya are very limited.

Although persons at risk of statelessness are allowed to attend elementary and secondary school, this study found that some do not. Sadly, most end up having basic education only. Of the 67 persons at risk of statelessness that this study interviewed, one-third (23; 34%) had not received any formal education. Over one-half (37; 55%) had attained elementary education and just under one-fifth (10; 15%) had secondary school qualification. Some (11; 16%) had received additional training. None had been to University. This shows that a lot of work still needs to be done in order to ensure that persons at risk of statelessness realize the right to education. The fact that of the sample surveyed none of the persons at risk of statelessness had been to University is rather disturbing. Not only is it harmful to the individuals concerned, but the nation stands to lose as well. The next chapter discusses this theme further.

---

<sup>159</sup>Interview with Shauku, Coast Province, 16 September 2009.

<sup>160</sup>Interview with Tsepo, Nairobi Province, 15 September 2009.

## CHAPTER FIVE: ECONOMIC ENTITLEMENTS: ACCESS TO THE EMPLOYMENT MARKET AND PROPERTY

This chapter looks at the ability of stateless persons and persons at risk of statelessness to access the employment market and to own property in Kenya. It demonstrates some of the difficulties they face in the quest to realize these rights.

### The Right to Work

#### International and Domestic Provisions

International human rights law recognizes the right of individuals to work. Article 23 of the UDHR declares that every person has the ‘right to work, to free choice of employment ... and to protection against unemployment.’ International treaties, including the ICESCR,<sup>161</sup> and the Banjul Charter<sup>162</sup> recognize this right. While reiterating the position of the UDHR, the ICESCR goes a step further by requiring state parties to undertake ‘appropriate measures to safeguard this right’.<sup>163</sup> States are required to adopt ‘policies’ and ‘programmes’ that will guarantee the realization of this right by all inhabitants.<sup>164</sup> In other words, Governments must take steps that will ensure that the right to employment is enjoyed at all times. They must also take measures that will ensure that the enjoyment of this right by workers is not hindered. Some recent constitutions, such as the South African Constitution (1996)<sup>165</sup> and the 2004 Constitution of Afghanistan<sup>166</sup> recognize the right of individuals to choose freely their occupation. In Kenya, the 2007 Employment Act governs issues surrounding employment in the country. Among others, it declares and defines the fundamental rights of employees. Under the right to employment, States are required to create an enabling environment that will facilitate the realization of the right to formal and self employment.

#### Current Status

Over one-half (38; 57%) of the respondents at risk of statelessness underscored the value of employment to their lives and livelihoods. Employment would give an individual a wage, which the person could use to meet his or her basic needs. Government also

---

<sup>161</sup>Adopted by UN Gen Ass. on 16 Dec. 1966, 999 UNTS (entered into force 3 January 1976) (‘ICESCR’) article 6.

<sup>162</sup>Article 15.

<sup>163</sup>Article 6.

<sup>164</sup>Article 6.

<sup>165</sup>Article 22.

<sup>166</sup>Article 48.

would gain economically in the form of the several taxes that are levied on employees such as income tax.<sup>167</sup>

Notwithstanding these advantages, persons at risk of statelessness face vast challenges accessing the labour market in Kenya, owing to the lack of IDs that is a prerequisite for formal employment. Citizens, refugees living in Kenya<sup>168</sup> and other foreigners who hold IDs are able to seek employment although with some applicable restrictions. Non-citizens seeking employment in Kenya are required first to obtain a work permit.<sup>169</sup> For persons at risk of statelessness the fact they are unable to show potential employees any ID makes it very difficult for them to enter into the formal labour market. The high unemployment rate in Kenya,<sup>170</sup> coupled with the limited education, training, skills and experience on the part of persons at risk of statelessness, have rendered this category of persons less competitive in the local job market. Their prospects of securing employment overseas are also very limited owing to restrictions on their movement and low qualifications.

Despite these challenges, the reality is that stateless people and those at risk of statelessness, like anyone else, must earn a living in order to feed themselves and/or their families. Some were able to secure employment. Shauku, for instance, was employed at the local school as a teacher. He shares his experience in the following words:

*I cannot just sit the whole day. Allah has given me hands and a mind to think. Although the Kenyan Government has created barriers to my access to employment by not giving me an ID, I can still do something to earn a living and support my siblings. At the moment I am employed as a teacher in the local school by the School Board. I am not sure how long my services will be required. Unlike those who are employed by the Government, my status is not permanent. However, the experience and skills that I will learn in this job will be useful to my future life.*

Those who are employed formally like Shauku are very few. Many of the persons at risk of statelessness lamented that they could not ‘be employed’<sup>172</sup> or get ‘an honest job’,<sup>173</sup> owing to the lack of an ID.

---

<sup>167</sup>See generally the Income Tax Act, 1974.

<sup>168</sup>See section 14(a) of the Refugees Act, 2006.

<sup>169</sup>See the first schedule to the Immigration Act.

<sup>170</sup>Estimated at 40 per cent in 2008. See Central Intelligence Agency, *The World FactBook* <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> (accessed 20 March 2010).

<sup>171</sup>Interview with Yassin, Coast Province, 14 September 2009 (An ID would facilitate ‘the freedom of movement and to look for employment’). According to Eric: ‘I would like to be a football star, but not having an ID keeps me from this. There is someone who wanted to take me for trials [overseas], but I need an ID’ (Interview with Eric, Coast Province, 15 September 2009).

<sup>172</sup>Interview with Sada, North Eastern Province, 17 September 2009.

<sup>173</sup>Interview with Aissatou, North Eastern Province, 17 September 2009.

In order to earn a living, some persons at risk of statelessness run private businesses. Those whom this study interacted with are self-employed as matatu (minibus) drivers,<sup>174</sup> carpenters,<sup>175</sup> traders,<sup>176</sup> kiosk (shop) owners,<sup>177</sup> interpreters,<sup>178</sup> mechanics,<sup>179</sup> hair dressers,<sup>180</sup> sculptors,<sup>181</sup> tailors,<sup>182</sup> farmers,<sup>183</sup> masons and fisher-folk.<sup>184</sup> Others survive on odd jobs.<sup>185</sup> Even so, it is not all persons at risk of statelessness who are lucky to engage in formal or self employment. Some could hardly gain access to the labour market. Christina shared her experience thus:

*My children cannot get IDs because they have Muslim names. I have eight children above 18 years and only three hold an ID. They [the ones without documentation] can not apply for jobs. They just sit.*<sup>186</sup>

When asked what the main challenges were owing to his status, Onik responded: 'I cannot be employed'.<sup>187</sup> The prospects of some engaging in crime are real:

*My children cannot obtain IDs because they have Muslim names. They cannot get jobs and therefore they turn to illegal means of getting income ...*<sup>188</sup>

NGO officials also made this point.<sup>189</sup>

Fortunately, support has come to some unemployed persons at risk of statelessness from relatives based overseas. Remittances by relatives overseas constitutes the largest financial inflow to a number of unemployed persons at risk of statelessness. Kazoni observes as follows:

*One of the reasons why many Nubians would like to obtain IDs is because it is one of the requirements for obtaining a passport. Once a Nubian succeeds in obtaining a passport, the next step is to look for an opportunity to work overseas, particularly in the Gulf region. Very few bother to seek employment in Kenya as they are sick of the discrimination they face in the country. They would rather go and sweat it out overseas. I know many Nubians in Kenya survive on remittances from friends and relatives overseas.*<sup>190</sup>

---

<sup>174</sup>For instance, Ganesh.

<sup>175</sup>For instance, Tsepo, Hasan.

<sup>176</sup>For instance, Ismael, Lerato, Nadira, Hadji.

<sup>177</sup>For instance, Aissatou, Ines, Aisha.

<sup>178</sup>For instance, Theodore.

<sup>179</sup>For instance, Kader.

<sup>180</sup>For instance, Mosidisi.

<sup>181</sup>For instance, Malema.

<sup>182</sup>For instance, Albert, Kwesi.

<sup>183</sup>For instance, Nonto, Zama, Amelia, Sifiso, Jacob, Todil, Waly, Modibo.

<sup>184</sup>Interview with Salim, Coast Province, 18 September 2009.

<sup>185</sup>For instance, Sebuleni, Kganadi, Walter, Alain, El-Mouhoub, Doumbia, Schalk.

<sup>186</sup>Interview with Christina, Western Province, 18 September 2009.

<sup>187</sup>Interview with Onik, North Eastern Province, 17 September 2009.

<sup>188</sup>Interview with Bintu, Nyanza Province, 14 September 2009.

<sup>189</sup>Interview with Cheikh, Nyanza Province, 15 September 2009.

<sup>190</sup>Interview with Kazoni, Nairobi Province, 1 October 2009.



Although remittances have rescued a number of persons at risk of statelessness from poverty, it is not a long term solution. If this mode of support is to bear any dividend, these resources would need to be invested in long term projects. The current global financial turmoil, which has caused the reduction of the level of remittances,<sup>191</sup> further reduced the level of support received by persons at risk of statelessness residing in Kenya.

One possibility is that persons at risk of statelessness should seek support from financial institutions. The challenge here though is that lending institutions require generally an ID to open an account and/or advance money. Lack of access to loans from banks and other financial institutions was a major source of concern. Just under one-half (31; 46%) of the persons at risk of statelessness who participated in this study stated that it was impossible to obtain any form of support from financial institutions in Kenya. In the words of Omar:

*I am not able to put my money in a bank because I have no ID. I cannot save on behalf of my children even when I have a kibarua (casual job).<sup>192</sup>*

Eric also observed that, although her mother is hardworking, her 'efforts were thwarted because she [could] not save'.<sup>193</sup> According to some, banking and financial services are for 'Kenyans'.<sup>194</sup> Seven officials (16%) who had interacted with persons at risk of statelessness affirmed this state of affairs. They 'can not access micro finance and loans', according to officials working with human rights NGOs.<sup>195</sup> Unfortunately, even local support groups, which normally lend money to members, require an ID to join:

*It [refusal to be given an ID] is a human rights abuse. We would like development but cannot achieve it. We cannot join any of the women's groups as we do not have an ID. Women groups get support from the Government, but we don't benefit from such support because we cannot be allowed to be members [of such groups] since we have no ID cards. I cannot join women savings and credit cooperative societies or organizations and get loans.*

---

<sup>191</sup> See Dilip Ratha, Sanket Mohapatra and Ani Silwal, *Outlook for Remittances Flows 2009-2011: Remittances Expected to Fall by 7-10 percent in 2009*, available at: <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/Migration&DevelopmentBrief10.pdf> (accessed 30 October 2009).

<sup>192</sup> Interview with Omar, Coast Province, 14 September 2009.

<sup>193</sup> Interview with Miriam, Coast Province, 15 September 2009.

<sup>194</sup> Interview with Eric, Coast Province, 15 September 2009.

<sup>195</sup> Interview with Davide, Coast Province, 18 September 2009; Interview with Fauz, Coast Province, 18 September 2009.

<sup>196</sup> Interview with Nonto, Coast Province, 15 September 2009.

<sup>197</sup> Interview with Miriam, Coast Province, 15 September 2009.

<sup>198</sup> Interview with Hadji, Coast Province, 14 September 2009.

Joining a local support ‘group’ was one of the main challenges that Lerato faced owing to her status.<sup>199</sup> Further, Zama noted that she could not apply for a loan from the women’s group ‘because of lack of identification’.<sup>200</sup> Support groups play a vital role in the life of many people in Kenya. Unlike financial institutions, which usually require collateral, the requirements for borrowing from these groups are usually lenient. Similarly, the rate of repayment of a loan is normally lower compared to most financial institutions. Moreover, these groups act as centres for socializing and exchanging ideas between members.

The fact that respondents at risk of statelessness are unable to open bank accounts or apply for loans from banks or local support groups has serious consequences on their lives and livelihoods. Persons in employment—self or formal—face a lot of difficulty managing their finances. For those who are paid in cash, some have to store it in their houses. Christo, for instance, saves money ‘in a box at home’, because he is ‘unable to access banking services’.<sup>201</sup> This is not ideal considering the risks involved particularly fire and theft. Payment by cheque, which is the usual mode of compensation in business and/or employment circles, would not work as they do not hold accounts with financial institutions. This reality has forced some to use their friends and/or relatives. According to Miriam, ‘For M-PESA I give my friends’ mobile numbers’.<sup>202</sup> Some use their ‘friends IDs to collect money’.<sup>203</sup> Ali relies on ‘people who know [him] to vouch for [his] honesty and integrity to seal deals’.<sup>204</sup>

## The Right to Property

*My great-great-grandfather was brought to Kenya by Arab slave traders. I was told that they passed through Zanzibar on their way to the country. They were settled in the Coastal province where they worked for the Arabs in their farms. At the end of slavery and slave trade the Arabs had to leave. They gave the surviving slaves the farms on which they used to work. In this area in particular the land that was bequeathed is about 1,300 acres. Every family has its own portion, although the title is in the name of one person, whom I believe is long dead. I am waiting for the Government to sub-divide the property. Although I am now very old, I will still be able to do something with the land.*<sup>205</sup>

*Of the 1,300 acres in this farm, my family owns about 40 acres. At the moment my uncle manages the property on our behalf. I look forward to the day the land will be divided so that we could have our own title deed.*<sup>206</sup>

---

<sup>199</sup> Interview with Fernando, Coast Province, 14 September 2009.

<sup>200</sup> Interview with Zama, Nyanza Province, 16 September 2009.

<sup>201</sup> Interview with Christo, Nairobi Province, 15 September 2009.

<sup>202</sup> Interview with Miriam, Coast Province, 15 September 2009. *M-Pesa is a system of transferring money through the mobile service provider.*

<sup>203</sup> Interview with Eric, Coast Province, 15 September 2009.

<sup>204</sup> Interview with Ali, Nairobi Province, 15 September 2009.

<sup>205</sup> Interview with Mnisi, Coast Province, 16 September 2009.

<sup>206</sup> Interview with Shauku, Coast Province, 16 September 2009.

These narratives raise issues surrounding ownership and transfer of property. Domestic and international laws both recognize this entitlement. Section 75 of the Kenyan Constitution prohibits the Government from compulsorily acquiring an individual's property such as land, unless certain conditions are satisfied. In the context of international law, the UDHR declares that every person 'has the right to own property alone' or jointly.<sup>207</sup> It prohibits Governments from depriving people of their property arbitrarily.<sup>208</sup> The right to own property is also recognized by the CEDAW,<sup>209</sup> the Banjul Charter,<sup>210</sup> and the 1966 CERD).

Generally speaking, Kenyan law does not limit the ownership of property such as land only to nationals. Nationals and non-nationals alike can buy and sell land. However, this rule only applies to the extent that the land in question is not agricultural land.<sup>211</sup> The law prohibits non-Kenyans and foreign owned companies from dealing in agricultural land. Section 9(1) (c) of the Land Control Act provides that the Land Control Board, the body responsible for implementing this statute, shall:

*refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange or partition to a person who is not- (i) a citizen of Kenya; or (ii) a private company or co-operative society all of whose members are citizens of Kenya; ....*

---

<sup>207</sup>Article 17.

<sup>208</sup>*Ibid.*

<sup>209</sup>See articles 15 and 16.

<sup>210</sup>See article 14 (*The right to property shall be guaranteed*).

<sup>211</sup>Section 2 of the Land Control Act defines 'agricultural land' as:

- (a) land that is not within -
  - (i) a municipality or a township; or
  - (ii) an area which was, on or at any time after the 1st July, 1952, a township under the Townships ordinance (now repealed); or
  - (iii) an area which was, on or at any time after the 1st July, 1952, a trading centre under the Trading Centres Ordinance (now repealed); or
  - (iv) a market;
- (b) land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act, other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non-agricultural purpose;

Thus, upon subdivision of the 1,300 acres, Mnisi would be able to deal with his portion in any manner that he deems fit. He could sell it to a third party, lease it or use the land as security for a loan as he holds an ID. By contrast, as Shauku is not recognized as a citizen, he would not be able to deal in the land, unless the president waives the citizenship requirement.<sup>212</sup>

Piet and Dlamini describe the challenges persons at risk of statelessness face in relation to owning immovable property such as land:

*I cannot own my own shamba (farm). People are reluctant to sell their land to us. [Maybe] they want us to bribe them.*<sup>213</sup>

*We live like visitors yet we have been in [Kenya] for over 30 years. The farms were divided and I paid for a plot, but I do not have a title deed as I do not have an ID.*<sup>214</sup>

When asked what his future hopes and aspirations were, Todil stated: to own ‘a farm as I am now old and would like to stay on a farm with my partner’.<sup>215</sup> Eleven (16%) of the persons at risk of statelessness that were interviewed expressed concerns with Kenya’s land ownership and transfer system. Just over one-third (8; 24%) of the officials who participated in this study also criticized this regime. For persons at risk of statelessness the situation is quite serious. In the first place, some farmers were forced to rent land.<sup>216</sup> While through this option these individuals may be able to continue farming, and thereby earn an income, it is not ideal in the sense that renting is not a permanent solution. If the owner decides not to renew the agreement, there is very little a tenant could do, provided adequate notice has been given. Further, unlike Mnisi, those who are stateless cannot offer their land as security in order to obtain loans from banks and micro-finance institutions. As mentioned earlier, the lack of access to external financial support has serious consequences for the lives and livelihoods of persons at risk of statelessness. Moreover, being deprived of the right to own property prohibits individuals from engaging in certain trades such as land buying and selling in their own names.

The situation is a bit different for those wishing to bequeath their property, including agricultural land. Under the terms of the Law of Succession Act (1981) every person is eligible to make a will, as long as he or she meets certain age and psychological requirements.<sup>217</sup> Notably, there is no citizenship test to be met. Thus, if Shauku’s father

---

<sup>212</sup> Section 24 of the Land Control Act.

<sup>213</sup> Interview with Piet, Coast Province, 15 September 2009.

<sup>214</sup> Interview with Dlamini, Coast Province, 14 September 2009.

<sup>215</sup> Interview with Todil, Coast Province, 15 September 2009.

<sup>216</sup> Interview with Sada, Coast Province, 15 September 2009; Interview with Piet, Coast Province, 19 September 2009.

<sup>217</sup> See section 5 of the Law of Succession Act (‘any person who is of sound mind and not a minor may dispose of all or part of his free property by will’). But, according to Thomas, one of the challenges facing

(who held a Kenyan ID) left a will, Shauku would be able to have the land transferred to him through the legal process.<sup>218</sup> However, as he does not hold a Kenyan ID Shauku would not be able to deal<sup>219</sup>—that is, sell, sub-divide, transfer, lease, mortgage, exchange, partition or dispose of the land in any other way<sup>219</sup>—in the land, unless he successfully petitions the president for an exemption. As of now, if the land is transferred to his name via inheritance, he would only be able to transmit it to a third party under the terms of the Kenyan Law of Succession Act.

---

*stateless persons is 'women can not inherit their husbands' property'. Interview with Thomas, Western Province, 16 September 2009.*

<sup>218</sup>*Section 5 of the Law of Succession Act outlines the procedures to be followed.*

<sup>219</sup>*See section 6 of the Land Control Act.*

## CHAPTER SIX: FINDINGS AND RECOMMENDATIONS

This study makes the following findings and recommendations:

### **Finding One: the Legal and administrative framework is not adequate to deal with the issue of Statelessness in the country**

Kenya has not ratified the Stateless Persons Convention and the Convention on the Reduction of Statelessness to protect stateless persons and prevent as well as reduce the occurrence of statelessness. It is however party to the ACRWC, CRC, ICCPR, CEDAW and the Banjul Charter. With regard to the CRC and the Convention Relating to the Status of Refugees, Kenya has translated their provisions into national law through the Children's Act and Refugees Act.

Considering that the provisions of treaties do not apply automatically in dualist (unlike monist) states, new legislation or change of legislation would be required to translate the provisions of these treaties into domestic law.<sup>220</sup> In addition to defining 'statelessness', this legislation should also contain provisions that grant fundamental rights and freedoms to protected persons. Drafters should draw on legal history,<sup>221</sup> provisions of international human rights law and the bill of rights that is contained in the national constitution. Comparative experiences could also come in handy.<sup>222</sup> There is also need for the law to specify clearly the document that accords citizenship in Kenya.

### **Finding two: nationality laws in Kenya discriminate against various categories of persons and lack safeguards against statelessness**

The requirement in the current constitution that only Kenyan fathers can transmit citizenship to their children if born overseas is discriminatory. The law needs to be changed in order to deal with the impact of this requirement. Few concrete steps have been taken to operationalize section 96 of the Constitution,<sup>223</sup> which mandates

---

<sup>220</sup>See *Okunda v Republic (1970) EA 457 at 460* ('The provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya').

<sup>221</sup>*Robinson, supra, note 34; Batchelor, supra, note 34; Weis, supra, note 34; Linda Keber, 'Towards a History of Statelessness in America,' (2005) 57 American Quarterly 727.*

<sup>222</sup>*Christopher Richter, 'Statelessness in Australian Refugee Law: The (Renewed) Case for Complementary Protection, (2005) 24 University of Queensland Law Journal 545; Julia Hess, 'Stateless and the State: Tibetans, Citizenship, and the Nationalist Activism in a Transnational World', (2006) 44 International Migration 79; Robyn Linde, 'Statelessness and Roma Communities in the Czech Republic: Competing Theories of State Compliance', (2006) 13 International Journal on Minority and Group Rights 341; Bronwen, supra, note 47.*

<sup>223</sup>According to the Immigration Department, a draft bill has already been submitted to the Attorney-General for onward transmission to Parliament. The suggested proposals (on file with this study's

Parliament to: 'Provide for due acquisition of citizenship of Kenya (whether by registration or naturalization) by persons who are not eligible or who are no longer eligible to become citizens [under the Constitution and citizenship laws].'

Constitution and citizenship laws of Kenya have not been amended to make provision for the acquisition of citizenship by any individual born in the country, who would otherwise be stateless.<sup>224</sup> Section 90 of the Constitution provides that a person born outside Kenya shall become a Kenyan citizen if at the date of birth his or her father is a citizen of Kenya. It is of concern that this section may have been interpreted by some to mean that children born in Kenya out of unions between Kenyan women married to foreign nationals do not qualify for Kenyan citizenship.<sup>225</sup> The constitutional requirement that Kenyan nationality can be gained by foreign women who are married to Kenyan men only should also be removed. Courts have contended that the effect of such a requirement is to 'punish' a citizen for 'marrying' a foreigner.<sup>226</sup>

The Government should undertake legal measures that will protect any child from becoming 'stateless'.<sup>227</sup> Parliament should amend section 90 of the Constitution to make any child born of a Kenyan parent eligible for citizenship. The Constitution should also provide that every child who would otherwise be stateless be considered for Kenyan citizenship.<sup>228</sup>

Stakeholders, including NGOs, faith based organizations, labour organizations, legal aid agencies and lawyers' organizations, academics and experts, and media houses should continue pursuing the cause of constitutional and legislative change. These institutions 'all have a major influence on any statelessness situation'.<sup>229</sup>

The Proposed Constitution of Kenya, 2010, whose provisions outlaw discrimination of citizens, if adopted at the referendum of 4 August 2010, will go a long way in addressing some of the challenges identified in this study.<sup>230</sup>

---

*consultant) are designed to deal 'substantively' 'with the issue of statelessness' through 'addressing the emerging challenges rather than turning away applicants due to a disability in law'.*

<sup>224</sup>*To be consistent with Article 1 of the 1961 Convention on the Reduction of Statelessness. According to information from the Immigration Department, efforts towards this end are already underway.*

<sup>225</sup>*See, for instance, supra, note 33*

<sup>226</sup>*Attorney-General v Unity Dow (2001) AHRLR 99 at 101 (per Amisshah JP of the High Court of Botswana). See also article 7(2) of the CEDAW urging States to 'grant women equal rights with men with respect to the nationality of their children'.*

<sup>227</sup>*See the CRC article 9(2) and ACRWC article 6 (4).*

<sup>228</sup>*To be consistent with Article 7 of the CRC and Article 6 of the ACRWC.*

<sup>229</sup>*UNHCR, UNHCR Action to Address Statelessness: A Strategy Note (March 2010) at 20.*

<sup>230</sup>*See post script to this report.*

**Finding three: The committees established to vet persons before issuance of identity cards are not founded under statute, and they are discriminatory in nature and prone to abuse**

The committees established to vet persons in certain parts of the country before they are given IDs are not created by statute.

A law should outline their mandate, scope, composition and procedures, including appropriate appeal mechanisms.

On the composition of the vetting committees, the practice of requiring chiefs or their assistants to produce letters of recommendation could be sustained considering that they are the ones who are directly in touch with people on the ground. The Government though should regularize in law payment of village elders an allowance for sitting on the committees.<sup>231</sup> This position is consistent with a proposal made to the Kenyan Parliament in 2009.<sup>232</sup>

**Finding four: applicants lack adequate information on the procedures for issuance of ID cards and they experience bureaucratic delays**

The application process for identity cards for certain communities is slow.

The Government must take steps to ensure that applications are not delayed. The registration process should be decentralized. It would be more cost and time effective if appropriate technical and administrative capacity is provided at the provincial level. Additionally, the Government should stipulate and communicate information on the time it would take to process applications. Non-state agencies working with persons at risk of statelessness could assist in this process by disseminating information. If there is any reason for delay in the application process, this should be transmitted expeditiously to an applicant.

The Government has taken steps to create ‘awareness on the requirements’ for obtaining and replacing as well as altering details in an ID.<sup>233</sup> Even so, the effects of these measures are yet to be realized. Accordingly, the information transmission process must be stepped-up for persons at risk of statelessness. Stakeholders could buttress this process by undertaking strategies that will ensure that adequate and

---

<sup>231</sup>According to the NRB, allowances ‘are paid’ ‘during each sitting’. Letter from NRB, *supra*, note 78. However, those whom this study met stated that they were not remunerated for sitting on the committee.

<sup>232</sup>See clause 3 of the 2009 Chiefs’ (Amendment) Bill (‘The remuneration and terms of service of a [village head] shall be from public funds as determined by the Minister in consultation with the Treasury’).

<sup>233</sup>Letter from NRB, *supra*, note 78.



correct information is provided and circulated widely. Simple language and information dissemination materials and techniques should be used to ensure that the information reaches targeted audiences.

**Finding five: the number of stateless persons in Kenya and those at risk of statelessness is unclear and should be determined**

Estimates derived from civil society show that and cited by the UNHCR show that, as of 1 January 2009, there were some 100,000 stateless persons in Kenya.<sup>234</sup> These statistics are not exact considering that no census has been taken on the number of stateless persons in Kenya. Although officials; Government and Non-Government as well as UNHCR; had met stateless persons or persons at risk of statelessness, they were unaware of the exact number of this category of persons living within their jurisdiction of work or in the country.

It is essential to conduct targeted surveys in order to establish those who fall in this category. Statelessness related questions should also be included in the national population census exercise. There is also need for closer cooperation between the Government and United Nations agencies to identify the scope of statelessness in the country and the communities that are affected.

Thus far various researches have established that the following communities may be at risk of statelessness in Kenya: the Galjeel, Nubians, Pembans, Kenyan Somali in border areas, and people of Mozambican origin living in the coastal region and those from Zimbabwe who settled in Kenya in the late 1960s as well as people from Arab communities of Yemeni and Omani descent.

**Finding six: there is need for sensitization that stateless persons and those at risk of statelessness are entitled to rights**

Although it would make a significant contribution to the protection of stateless persons in any country, passage or amendment of the law by itself is not enough.<sup>235</sup> As this study found, the attitude of registration or immigration officials could be improved in view of the fundamental role they play in the protection regime. Overall, the relationship between persons at risk of statelessness and other citizens was cordial. However, in

---

<sup>234</sup> UNHCR, *Kenya: Country Operations Profile* available at <http://www.unhcr.org/pages/49e483a16.html> (accessed 20 August 2009).

<sup>235</sup> See Edwin Abuya, "A Place to Call Home": *Temporary Asylum in Australia—Lessons for South Africa* (2004) 15 *Stellenbosch Law Review* 429 at 446-447 ('[T]he litmus test does not lie in a state's membership to international treaties or passage of relevant domestic legislation, but rather in the extent to which [the] rights existing on paper are translated into real entitlements').

some instances it was claimed that members of the local community viewed them as outsiders.<sup>236</sup>

These mind-sets would have to be changed if the law in the books is to be translated into real rights. One way of realizing this goal is for non-state agencies to highlight the positive contribution that stateless persons and those at risk of statelessness have made and continue to make in the country.

Additionally, stakeholders must continuously monitor the implementation of the laws.<sup>237</sup> Non-Governmental Organizations dealing with human rights could also take a more active role in meeting specific needs of stateless persons and those at risk of statelessness. There is also need for legal assistance and advice to be provided by stakeholders. The Kenyan judicial practice on nationality issues is not developed enough. It is thus necessary to strengthen this aspect through legal action by NGOs on behalf of stateless persons and those at risk of statelessness.

The close nexus between statelessness, humanitarian concerns and human rights should be acknowledged and profiled by KNCHR as well as by United Nations mandate holders such as the UNHCR. These organizations should work towards ensuring sound assessments that would advance protection of human rights of stateless persons and persons at risk of statelessness. Such assessments should inform the agencies' programmes to enhance the advocacy efforts on behalf of stateless persons and those at risk of statelessness, especially when it comes to their ability to access services. New partnerships should be explored and formed with the range of actors and government service providers to bridge any gaps of a humanitarian nature that may be affecting stateless persons and those at risk of statelessness.

---

<sup>236</sup> Interview with Nonto, Coast Province, 15 September 2009 ('Our relationship [with the neighbouring communities] is okay, but they discriminate telling us we are only passersby, not citizens'). Interview with Piet, Coast Province, 19 September 2009 ('Chiefs and sub-chiefs look down on the foreigners and instead support the local community').

<sup>237</sup> See also Edwin Abuya, 'From Here to Where? Refugees Living in Protracted Situations in Africa,' in Alice Edwards and Carla Ferstman, (eds), *Human Security and Non-Citizens in the New Global Order* (Cambridge: Cambridge University Press, 2010) (forthcoming). See *East African Community v Republic (1970) EA 457 at 460* ('The provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya').

## CHAPTER SEVEN: CONCLUSION: ANY SOLUTIONS IN SIGHT?

Justice Mokgoro of the South African Constitutional Court contends that non-citizens are, generally speaking, vulnerable.<sup>238</sup> The discussion in this study suggests that stateless persons or those at risk of statelessness are in a worse-off position. The upshot of statelessness is to wipe out the essential, basic environment of the exercise of fundamental rights of the individual.<sup>239</sup>

Kenya must seriously consider the challenges facing these vulnerable members of society. This research has demonstrated that the problem of statelessness exists and requires further analysis. This phenomenon will continue to rise, if swift action is not taken by the Government and non-state agencies. The Government and other stakeholders can no longer ignore the plight of these human beings as they live in its territory. Legal and policy measures must be undertaken if Kenya is to meet the international and domestic obligations that it owes to the stateless or those at risk of statelessness. As of the moment, though, the following sentiments remain true:

*I live as a forgotten person.*<sup>240</sup>

*For how long will I be a visitor?*<sup>241</sup>

*It is a life where I have no access to human rights.*<sup>242</sup>

### POSTSCRIPT

As of June 2010, rapid constitutional developments were taking place in Kenya. Civic education and campaigns had begun leading to a referendum on 4 August 2010 on the Proposed Constitution of Kenya.

The new legal order seeks to introduce a number of fundamental changes. First, it makes provision for children found in the territory. Article 14 of the draft law provides that:

Further, under the Proposed Constitution, unlike its current counterpart, both Kenyan men and women can transmit citizenship to children born overseas.<sup>243</sup> Moreover,

---

<sup>238</sup> See *Larbi-Odam v Member of the Executive Council for Education (North-West Province) (1998) 1 SA 745 at 757.*

<sup>239</sup> J.B. Ojwang', *Constitutional Development in Kenya: Institutional Adaptation and Social Change (African Centre for Technology Studies: Nairobi, 1990) at 206.*

<sup>240</sup> Interview with Simon, Coast Province, 15 September 2009.

<sup>241</sup> Interview with Kwesi, Coast Province, 14 September 2009.

<sup>242</sup> Interview with Malema, Coast Province, 15 September 2009.

children born overseas of Kenyan mothers and foreign fathers before entry into force of the new Constitution would also be considered as Kenyan nationals by birth.<sup>244</sup> In addition, there are no limitations on citizenship by registration. Accordingly, foreign men married to Kenyan citizens can apply for citizenship under this mode, provided they meet prescribed residency requirements.<sup>245</sup> Moreover, dual citizenship is also permitted.<sup>246</sup>

These legal changes could go a long way towards reducing the incidence of statelessness in Kenya as well as the challenges facing persons at risk of statelessness in the country. But even then, as illustrated in this study, Kenya's policy, legislative and administrative environment would require fairly radical realignment to facilitate the exercise of rights by stateless persons as well as those at risk of statelessness.

---

<sup>243</sup>See clause 14(1) ('A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen').

<sup>244</sup>See clause 14 (2) ('Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen.')

<sup>245</sup>See clause 15(1) ('A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen').

<sup>246</sup>See clause 16 ('A citizen by birth does not lose citizenship by acquiring the citizenship of another country').

## BIBLIOGRAPHY

### BOOKS

- 1 J.B. Ojwang', *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (African Centre for Technology Studies: Nairobi, 1990)

### ARTICLES AND JOURNALS

- 1 Abraham Sing'oei, 'Promoting Citizenship in Kenya: The Nubian Case', in Brad Blitz and Maureen Lynch, *Statelessness and Benefits of Citizenship: A Comparative Study* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2009)
- 2 Adam Adam, 'Kenyan Nubians: Standing up to Statelessness', (2009) 32 *Forced Migration Review* 19.
- 3 Alice Edwards, 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women', available at <http://www.unhcr.org/refworld/docid/4a8aa8bd2.html>
- 4 4. Amnesty International, 'Nationality, Expulsion, Statelessness and the Right to Return', available at <http://www.unhcr.org/refworld/country,,AMNESTY,,BTN,4562d8cf2,3b83b6df7,0.html>
- 5 Andrew Brouwer, 'Statelessness in the Canadian Context: A Discussion Paper', available at <http://www.unhcr.org/refworld/docid/405f07164.html> at 21-37;
- 6 Central Intelligence Agency, *The World FactBook* <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>
- 7 Christopher Richter, 'Statelessness in Australian Refugee Law: The (Renewed) Case for Complementary Protection', (2005) 24 *University of Queensland Law Journal* 545;
- 8 Curtis Doebbler, 'A Human Rights Approach to Statelessness in the Middle East', (2002) 15 *Leiden Journal of International Law* 527.
- 9 David Weissbrodt and Clay Collins, 'The Human Rights of Stateless Persons', (2006) 28 *Human Rights Quarterly*
- 10 Dilip Ratha, Sanket Mohapatra and Ani Silwal, *Outlook for Remittances Flows 2009-2011: Remittances Expected to Fall by 7-10 percent in 2009*, available at: <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/Migration&DevelopmentBrief10.pdf>
- 11 Edwin Abuya and Dulo Nyaoro, 'Victims of Armed Conflict and Persecution in South Africa: Between a Rock and a Hard Place', (2009) 32 *Hastings International and Comparative Law* 1
- 12 Edwin Abuya, "'A Place to Call Home": Temporary Asylum in Australia—Lessons for South Africa (2004) 15 *Stellenbosch Law Review*
- 13 Edwin Abuya, 'From Here to Where? Refugees Living in Protracted Situations in Africa,' in Alice Edwards and Carla Ferstman, (eds), *Human Security and Non-Citizens in the New Global Order* (Cambridge: Cambridge University Press, 2010) (forthcoming).

- 14 Edwin Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective', (2007) 19 *International Journal of Refugee Law* 51
- 15 Edwin Abuya, 'Revisiting Liberalism and Post-Colonial Theory in the Context of Asylum Applications', (2006) 24 *Netherlands Quarterly of Human Rights* 193
- 16 Ekuru Aukot, 'Am I Stateless Because I am a Nomad?', (2009) 32 *Forced Migration Review* 18.
- 17 Gabor Gyulai, 'Forgotten Without Reason: Protection of Non-Refugee Stateless Persons in Central Europe', available at <http://www.unhcr.org/497099902.pdf>
- 18 Jo Boyden and Jason Hart, 'The Statelessness of the World's Children', (2007) 21 *Children and Society* Refugees International, 'Futures Denied: Statelessness Among Infants, Children and Youth', available at [http://www.refintl.org/sites/default/files/Stateless\\_Children\\_FINAL.pdf](http://www.refintl.org/sites/default/files/Stateless_Children_FINAL.pdf)
- 19 Julia Hess, 'Stateless and the State: Tibetans, Citizenship, and the Nationalist Activism in a Transnational World', (2006) 44 *International Migration*
- 20 Linda Keber, 'Towards a History of Statelessness in America,' (2005) 57 *American Quarterly*
- 21 Ludvig Beckman, 'Citizenship and Voting Rights: Should Resident Aliens Vote?', (2006) 10 *Citizenship Studies*
- 22 Manby; "Struggles for Citizenship in Africa"; "Citizenship Law in Africa" a comparative study by: Africa Governance Monitoring and Advocacy Project and Open Society Initiative.
- 23 Nehemiah Robinson, 'Convention Relating to the Status of Stateless Persons: Its History and Interpretation', available at <http://www.unhcr.org/refworld/docid/4785f03d2.html>
- 24 Carol Batchelor, 'Stateless Persons: Some Gaps in International Protection', (1995) 7 *International Journal of Refugee Law*
- 25 Paul Weis, 'The United Nations Convention on the Reduction of Statelessness, 1961', (1962) 11 *International and Comparative Law Quarterly*
- 26 Rachel Settlege, 'No Place to Call Home: Stateless Vietnamese Asylum-Seekers in Hong Kong', (1997-1998) 12 *Georgetown Immigration Law Journal* 187
- 27 Refugees International, 'About Being Without: Stories of Statelessness in Kuwait', available at <http://www.unhcr.org/refworld/country,,RI,,KWT,4562d8cf2,47a6eb910,0.html>
- 28 Refugees International, 'Nationality Rights for All: A Progress Report and Global Survey on Statelessness', available at [http://www.refugeesinternational.org/sites/default/files/RI%20Stateless%20Report\\_FINAL\\_031109.pdf](http://www.refugeesinternational.org/sites/default/files/RI%20Stateless%20Report_FINAL_031109.pdf)
- 29 Refugees International, *supra*, note 42; Bronwen Manby, *Citizenship Law in Africa: A Comparative Study* (Open Society Institute: New York, 2009).
- 30 Richard Bernstein, 'Hannah Arendt on the Stateless', (2005) 11 *Parallax* 46; William Samore, 'Statelessness as a Consequence of the Conflict of Nationality Laws', (1951) 45 *American Journal of International Law* 476.

- 31 Robyn Linde, 'Statelessness and Roma Communities in the Czech Republic: Competing Theories of State Compliance', (2006) 13 *International Journal on Minority and Group Rights* 341;
  - 32 Sumit Sen, 'Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia-Part 1', (1999) 11 *International Journal of Refugee Law* 625.
  - 33 Tang Lee, 'Refugees from Bhutan: Nationality, Statelessness and the Right to Return', (1998) 10 *International Journal of Refugee Law* 118;
  - 34 The Arakan Project, 'Issues to be Raised Concerning the Situation of Stateless Rohingya Women in Myanmar (Burma)', available at [http://www.burmalibrary.org/docs6/CEDAW\\_Myanmar\\_AP\\_Submission-Final-Web.pdf](http://www.burmalibrary.org/docs6/CEDAW_Myanmar_AP_Submission-Final-Web.pdf)
  - 35 UNHCR, 'Evaluation of UNHCR's Programme to Prevent and Reduce Statelessness in Crimea, Ukraine', EPAU/2004/03 (March 2004), available at <http://www.unhcr.org/405ab4c74.html>
  - 36 UNHCR, 'Nationality and Statelessness: A Handbook for Parliamentarians', available at <http://www.unhcr.org/protect/PROTECTION/436774c62.pdf>
  - 37 Linda Kerber, 'Toward a History of Statelessness in America', (2005) 57 *American Quarterly* 727
  - 38 Paul Magocsi, 'Mapping Stateless Peoples: The East Slavs of the Carpathians', (1997) 39 *Canadian Slavonic Papers* 301.
  - 39 UNHCR, 'Stateless People Figures', available at <http://www.unhcr.org/pages/49c3646c26.html>
  - 40 UNHCR, Kenya: Country Operations Profile available at <http://www.unhcr.org/pages/49e483a16.html>
  - 41 United Nations Development Programme, Human Development Report 2009 available at [http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf)
- INTERNATIONAL CONVENTIONS AND RESOLUTIONS**
- 42 ACRWC- African Charter on the Rights and Welfare of the Child
  - 43 African (Banjul) Charter on Human and Peoples' Rights ('Banjul Charter'), adopted 27 June 1981
  - 44 African Charter on the Rights and Welfare of the Child ('ACRWC'), OAU Doc. CAB/24.9/49, entered into force 29 November 1999.
  - 45 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.T.S. 1465, adopted by UN General Assembly resolution 39/46 of 10 December 1984, (entered into force 26 June 1987).
  - 46 Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'), G.A. Res.34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (entered into force 3 September 1981).
  - 47 Convention on the Elimination of All Forms of Racial Discrimination ('CERD'). Adopted by the UN General Assembly Resolution 2106 (xx) of 21 December 1965, UNTS 9464, vol. 660, page 195
  - 48 Convention on the Reduction of Statelessness, 15 March 2006, C.E.T.S. 200.

- 49 Convention on the Rights of the Child ('CRC'), GA Res.44/25 of 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990).
- 50 Convention Relating to the Status of Refugees(1951)
- 51 Convention Relating to the Status of Stateless Persons, 6 June 1960, 360 U.N.T.S. 117 (entered into force 6 June 1960).
- 52 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, 30 August 1961, 989 U.N.T.S. 175 (entered into force 13 December 1975).
- 53 CRC.
- 54 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live, G.A. res. 40/144, annex, 40 U.N. GAOR Supp. (No. 53) at 252, U.N. Doc. A/40/53 (1985) ('Declaration on Foreign Nationals').
- 55 European Convention on Nationality, 6 November 1997, CETS No. 166 (entered into force 1 March 2000).
- 56 Guiding Principles on Internal Displacement, UN doc E/CN.4/1998/53/Add.2 of 11 February 1998.
- 57 International Covenant on Civil and Political Rights ('ICCPR'), GA Res. 2200(XXI) UN GAOR, 21st Sess., Supp. No. 16, 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 March 1976).
- 58 International Covenant on Economic, Social and Cultural Rights, adopted by UN Gen Ass. on 16 Dec. 1966, 999 UNTS (entered into force 3 January 1976) ('IC-ESCR') article 6.
- 59 International Law Commission 'Draft Articles on Diplomatic Protection' (2006)
- 60 OAU Convention on the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10 September 1969) (entered into force 20 June 1974).
- 61 UNGA resolution 3274(XXXIV); UNGA resolution A/RES49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995 endorsing the Executive Committee Conclusion no. 78 (XLVI)-1995.
- 62 UNGA resolution A/RES/61/137 of 19 December 2006, endorsing the Executive Committee Conclusion 106 (LVII) of 2006.
- 63 UNHCR Executive Committee Conclusion No. 106 (LVII) – 2006
- 64 Universal Declaration of Human Rights ('UDHR'), UNGA Res 217 A, GAOR, 3d Sess., 183 plen. Mtg., art 22 UN Doc. A/810 (1948).



## **STATUTES AND ACTS OF PARLIAMENT**

- 65 Chiefs' (Amendment) Bill [2009]
- 66 Immigration Act Cap 172
- 67 Income Tax Act, 1974.
- 68 Kenya Citizenship Act Cap. 170,
- 69 Kenya National Commission on Human Rights Act No. 9 of 2002
- 70 Land Control Act Cap 302
- 71 Law of Succession Act Cap 160
- 72 Police Act (1961)Cap 84
- 73 Refugees Act, 2006
- 74 Registration of Persons Act Cap. 107
- 75 Registration of Persons Rules 1949.
- 76 The Kenyan Constitution.

## **CASES**

- 77 Attorney-General v Unity Dow (2001) AHRLR 99 at 101 (per Amisshah JP of the High Court of Botswana.
- 78 East African Community v Republic (1970) EA 457 at 460
- 79 Government of the Republic of South Africa v Grootbrom (2000) 11 BCLR 1169 (CC)
- 80 Kaunda v President of the Republic of South Africa (2005) 4 SA 235 at 304.
- 81 Larbi-Odam v Member of the Executive Council for Education (North-West Province) (1998) 1 SA 745 at 757.
- 82 Okunda v Republic (1970) EA 457

## APPENDIX ONE: RESEARCH ASSISTANTS

1. Anne Songole
2. Betty Mkasia Bosco
3. Dan Amolo
4. Serah Esendi Okumu
5. Steven Kimetu
6. Patroba Odhiambo Odungo
7. Allan Nandwa
8. Amos Otieno
9. Jacklyne Madegwa
10. Lucy Minayo
11. Mohammed Duba

## APPENDIX TWO: LIST OF PARTICIPANTS AT THE PEER REVIEW WORKSHOP

Name	Institution
Laban Osoro	Kituo Cha Sheria
Amos Akoth	Kenya National Commission on Human Rights (KNCHR)
Edwin Abuya	Consultant
John Kinyumu	National Registration Bureau
Beverley Lamenya	FIDA Kenya
Antonia Okuta	Kenya National Commission on Human Rights (KNCHR)
Christine Njeru	Kenya National Commission on Human Rights (KNCHR)
Charles Njanga	Refugee Consortium of Kenya
Faith Tabu	The Cradle
Salaton Leteipan	United Nations High Commission for Refugees (UNHCR)
Vincent Musebe	Kenya Human Rights Commission (KHRC)
Nicholas Ongeri	Ministry of Immigration and Registration of Persons
Lucy Njihia	Ministry of Immigration and Registration of Persons
Wambui Kimathi	Commissioner, Kenya National Commission on Human Rights
Lawrence Mute	Commissioner, Kenya National Commission on Human Rights

**APPENDIX THREE: LIST OF INTERVIEWS WITH NON-OFFICIALS**

<b>Pseudonym and Sex</b>	<b>Date of Interview</b>	<b>Place of Birth of parents</b>	<b>Place of Birth of Grandparents</b>	<b>Current Status</b>
Abdel (M)	14 Sept 2009	Kenya	Kenya	No ID
Aby (F)	17 Sept 2009	Kenya	Kenya	No ID
Achille (M)	18 Sept 2009	*	*	No ID
Aisha (F)	16 Sept 2009	Kenya	Kenya	No ID
Agatha (F)	18 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Agnes (F)	15 Sept 2009	Kenya	*	No ID
Aissatou (F)	17 Sept 2009	Kenya	*	No ID
Alain (M)	16 Sept 2009	Kenya	Kenya	No ID
Albert (M)	15 Sept 2009	Zimbabwe	Zimbabwe	No ID
Ali (M)	15 Sept 2009	Zimbabwe	Zimbabwe	No ID
Alfred (M)	18 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Alfonso (M)	17 Sept 2009	Kenya (Mother); Tanzania (Father)	Tanzania and Kenya	Holds Kenyan ID
Amelia (F)	17 Sept 2009	Kenya (Mother); Malawi (Father)	Kenya and Malawi	Holds Kenyan ID
Amina (F)	16 Sept 2009	*	*	No ID
Aurelia (F)	14 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Bheki (M)	15 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Bintu (F)	14 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Biyani (M)	17 Sept 2009	Kenya	Kenya	No ID
Bluz (M)	15 Sept 2009	Kenya	Kenya	No ID
Charles (M)	16 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Christina (F)	18 Sept 2009	Kenya	*	Holds Kenyan ID
Christo (M)	15 Sept 2009	Zimbabwe	Zimbabwe	No ID
Dan (M)	15 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Dlamini (M)	14 Sept 2009	Burundi	Burundi	No ID
Doumbia (M)	19 Sept 2009	Kenya	Kenya	No ID
El-Mouhoub (M)	14 Sept 2009	*	*	No ID
Emily (F)	17 Sept 2009	Kenya	Zanzibar	Holds Kenyan ID
Emmanuel (F)	17 Sept 2009	Kenya	Malawi	Holds Kenyan ID
Eric (M)	15 Sept 2009	Burundi	*	No ID
Fatima (F)	18 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Fernando (M)	14 Sept 2009	Mozambique	Mozambique	No ID
Fridah (F)	16 Sept 2009	Kenya	*	Holds Kenyan ID

Pseudonym and Sex	Date of Interview	Place of Birth of parents	Place of Birth of Grandparents	Current Status
Ganesh (M)	16 Sept 2009	*	*	No ID
Gift (F)	14 Sept 2009	Kenya	*	Holds Kenyan ID
Gora (M)	16 Sept 2009	Kenya	Kenya	No ID
Hadji (M)	14 Sept 2009	Burundi	Burundi	No ID
Hasan (M)	14 Sept 2009	Burundi	Burundi	No ID
Ibrahim (M)	18 Sept 2009	Kenya	Kenya	No ID
Ines (F)	16 Sept 2009	Kenya	Kenya	No ID
Ismael (M)	14 Sept 2009	Kenya	Kenya	No ID
Jabulani (M)	18 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Jacob (M)	15 Sept 2009	Rwanda	Rwanda	No ID
Jamuri (M)	15 Sept 2009	Burundi	Burundi	No ID
Jeff (M)	14 Sept 2009	Kenya	Yemen and Kenya	No ID
Joshua (M)	15 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Kader (M)	17 Sept 2009	*	*	No ID
Karolina (F)	16 Sept 2009	Kenya	Kenya	No ID
Kizito (M)	15 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Kganadi (M)	19 Sept 2009	Kenya	*	No ID
Kwesi (M)	14 Sept 2009	Mozambique	Mozambique	No ID
Lerato (F)	15 Sept 2009	Kenya	Mozambique	No ID
Lorina (F)	18 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Malema (M)	15 Sept 2009	Mozambique	Mozambique	No ID
Manuel (M)		Kenya	Kenya	Holds Kenyan ID
Marianne (F)	14 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Miriam (F)	15 Sept 2009	Mozambique (Father); Kenya (Mother)	Mozambique and Kenya	No ID
Mnisi (M)	16 Sept 2009	Kenya	Malawi	Holds Kenyan ID
Modibo (M)	14 Sept 2009	Burundi	Burundi	No ID
Mosidisi (F)	15 Sept 2009	Kenya	Mozambique	No ID
Mushinga (M)	17 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Ncebakazi (F)	15 Sept 2009	Kenya	Kenya	No ID
Nadia (F)	16 Sept 2009	Uganda	Uganda	No ID
Nadira (F)	16 Sept 2009	Kenya	Kenya	No ID
Noelina (F)	16 Sept 2009	Kenya	*	Holds Kenyan ID
Nonto (F)	15 Sept 2009	Mozambique	Mozambique	No ID
Ntombi (F)	16 Sept 2009	Kenya	Kenya	No ID
Omar (M)	14 Sept 2009	Burundi	Burundi	No ID
Onik (M)	17 Sept 2009	Kenya	Kenya (Grandmother); * (Grandfather)	No ID

Pseudonym and Sex	Date of Interview	Place of Birth of parents	Place of Birth of Grandparents	Current Status
Onik (M)	17 Sept 2009	Kenya	Kenya (Grandmother); * (Grandfather)	No ID
Paulo (M)	17 Sept 2009	Kenya	Kenya	No ID
Phebo (M)	17 Sept 2009	Kenya	*	No ID
Philemon (M)	14 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Piet (M)	19 Sept 2009	Burundi	Burundi	No ID
Pumi (F)	16 Sept 2009	Kenya	Kenya	No ID
Roger (M)	16 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Sada (M)	15 Sept 2009	Burundi	Burundi	No ID
Schalk (M)	14 Sept 2009	Kenya	Kenya	No ID
Sebuleni (M)	14 Sept 2009	Kenya	Kenya	No ID
Sevdah (F)	15 Sept 2009	Uganda	Uganda	No ID
Shauku (M)	16 Sept 2009	Kenya	Kenya	No ID
Shulat (F)	18 Sept 2009	Kenya	*	No ID
Sifiso (M)	15 Sept 2009	Rwanda	Rwanda	No ID
Simon (M)	15 Sept 2009	Mozambique	Mozambique	No ID
Sofie (F)	17 Sept 2009	Kenya	Tanzania (Maternal); Mozambique (Paternal)	No ID
Stellah (F)	15 Sept 2009	*	*	No ID
Tabitha (F)	16 Sept 2009	Kenya	Tanzania	Holds Kenyan ID
Tala (F)	16 Sept 2009	Kenya (Father); Uganda (Mother)	Kenya and Uganda	No ID
Tesfaalem (M)	14 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Thabo (M)	14 Sept 2009	Burundi	Burundi	No ID
Thembi (F)	14 Sept 2009	Kenya	Kenya	No ID
Theodore (M)	17 Sept 2009	Kenya	*	No ID
Todil (M)	15 Sept 2009	Burundi	Burundi	No ID
Tsepo (M)	15 Sept 2009	Mozambique	Mozambique	No ID
Vero (F)	17 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Walter (M)	14 Sept 2009	Kenya	*	No ID
Waly (M)	15 Sept 2009	Mozambique	Mozambique	No ID
Yassin (M)	14 Sept 2009	Mozambique	Mozambique	No ID
Yusuf (M)	16 Sept 2009	Kenya	Kenya	Holds Kenyan ID
Zama (F)	16 Sept 2009	Kenya	Kenya	No ID

\* The interviewee was unable to recall this detail.

#### APPENDIX FOUR: LIST OF INTERVIEWS WITH OFFICIALS

Pseudonym	Sex	Date of Interview	Position
Amadu	Male	17 Sept 2009	Government Administrator
Boubacar	Male	18 Sept 2009	Government Administrator
Carlos	Male	16 Sept 2009	Government Administrator
Cheikh	Male	15 Sept 2009	NGO* Official
Christopher	Male	15 Sept 2009	NGO* Coordinator
Davide	Male	18 Sept 2009	NGO* Coordinator
Dennis	Male	16 Sept 2009	Registration Official
Edgar	Male	17 Sept 2009	UNHCR Official
Esther	Female	16 Sept 2009	Community Services Official
Fauz	Male	18 Sept 2009	NGO* Coordinator
Feisal	Male	19 Sept 2009	NGO* Coordinator
Gabrielle	Male	16 Sept 2009	Village Elder
George	Male	16 Sept 2009	Government Administrator
Gilbert	Male	15 Sept 2009	Government Official
Henry	Male	15 Sept 2009	Government Administrator
Isabella	Female	17 Sept 2009	NGO* Programme Manager
Issa	Male	19 Oct 2009	Registration Official
Jack	Male	16 Sept 2009	Registration Official
Jimmi	Male	2 Oct 2009	Immigration Official
Jonah	Male	15 Sept 2009	Immigration Official
Juma	Male	17 Sept 2009	Registration Official
Kazoni	Male	1 Oct 2009	NGO* Official
Koli	Male	16 Sept 2009	NGO* Support Staff
Kundai	Male	15 Sept 2009	Government Administrator
Lawrence	Male	16 Sept 2009	Government Administrator
Lindela	Male	15 Sept 2009	Law Enforcement Official
Luka	Male	16 Sept 2009	Government Administrator
Lucy	Female	15 Sept 2009	NGO* Chairperson
Maria	Female	16 Sept 2009	Senior Support Staff Official
Musa	Male	14 Sept 2009	NGO* Official
Ngobese	Male	18 Sept 2009	Government Administrator
Patriko	Male	16 Sept 2009	Government Administrator
Riason	Male	14 Sept 2009	Religious Official
Roberto	Male	16 Sept 2009	Government Administrator
Salim	Male	18 Sept 2009	Government Administrator
Santos	Male	16 Sept 2009	Registration Official
Tendai	Male	15 Sept 2009	Government Administrator
Thomas	Male	16 Sept 2009	Government Administrator

\* The name of the NGO has been concealed to maintain anonymity.

## APPENDIX FIVE: CONSENT LETTER AND SURVEY QUESTIONS WITH OFFICIALS AND INDIVIDUALS



### **Kenya National Commission on Human Rights**

1st Floor, CVS Plaza, Lenana Road, P.O. Box 74359 - 00200, Nairobi - Kenya

Tel: 254-20-2717908/2717928/2717256/2712664, Fax: 254-20-2716160

Email: haki@knchr.org

### **CONSENT LETTER**

To be read or given to all interviewees to read before beginning interview:

Good evening/day/etc. My name is \_\_\_\_\_. I am working on a project, with the Kenya National Commission on Human Rights, which is evaluating the extent of statelessness in Kenya. This project aims at identifying the challenges facing this category of persons and making practical recommendations.

If you agree, I would like to ask you a series of questions about your life and experiences. This is not a test or an examination and my questions do not have 'right' or 'wrong' answers. Please tell me what you honestly think and remember you are free to not answer questions or to stop the interview at any time. Your responses will help us to develop a better understanding of the needs and ideas of stateless people. What you say will be kept confidential and will not be given to the government, the police or any other institution/person. All information gathered through the interview that will be used in publications arising from this study will not contain identifying information about you or any other people that you might have mentioned (or any other information that will make it easy for people to identify who you are).

Before we continue, I would like you to understand that we can not promise you anything for your participation. However, we do hope that your responses will be able to help us to meet the objectives of this study.

If you have any queries, or would like further information, please let us know via phone (254-20-2717908/2717928) or email (cnjeru@knchr.org).

All together this interview should take just between 45 minutes to complete. Are you ready to go ahead? If you are, I would be grateful if you could sign this letter (in duplicate).



Warm regards

Kenya National Commission on Human Rights

First name of interviewee:

Signature of interviewee:

If the answer to the question above is yes, the interviewer should complete the following questions

1. Interviewer's Name:
2. Date of Interview:
3. Start Time:
4. Finish Time:
5. Total Minutes (in minutes) Spent on Interview (to be completed after interview):



## Kenya National Commission on Human Rights

1st Floor, CVS Plaza, Lenama Road, P.O. Box 74359 - 00200, Nairobi - Kenya.

Tel: 254-20-2717908/2717928/2717256/2712664, Fax: 254-20-2716160

Email: haki@knchr.org

### **SURVEY QUESTIONS: WITH STATELESS PERSONS**

(First) Name:

Date and Place of Birth:

Do you have a Birth Certificate?

If not, why?

Sex:

Native language and language(s) spoken and understood:

What is the highest level of formal education you have completed?

Apart from what you have just mentioned, have you completed any additional training or education?

Are you currently working? If yes, which sector? It is a full-time or part-time position? If no, give reasons. Profession:

What is the highest professional position you have ever occupied?

Can you tell me more about your family background?

Migration history (why did you leave your country, which countries did you transit before coming to Kenya, why did you choose Kenya, when did you arrive in Kenya, what was your primary reason for coming to [ ] insert name of city, instead of going to another city):

What is your legal Status in Kenya?

What are the main challenges that you face owing to your status?

How do you think these challenges can be solved?

Have you tried to acquire Kenyan nationality? Give reasons.

Did you face any challenges?

Were they resolved to your satisfaction? Give reasons.

What are your future hopes and aspirations?

Is there anything else that you would like to add?



**Kenya National Commission on Human Rights**

1st Floor, CVS Plaza, Lenana Road, P.O. Box 74359 - 00200, Nairobi - Kenya.

Tel: 254-20-2717908/2717928/2717256/2712664, Fax: 254-20-2716160

Email: haki@knchr.org

**SURVEY QUESTIONS: WITH OFFICIALS-GOVERNMENT AND NON-GOVERNMENT**

Name:

Sex:

Language(s) spoken and understood:

Language in which interview was conducted:

What is the highest level of formal education you have completed?

Apart from what you have just mentioned, have you completed any additional training or education?

Current Position:

Do you know who a stateless person is?

Have you ever met any stateless person in Kenya?

Are you aware of the number of stateless persons residing in Kenya?

Based on experience, what are some of the challenges that this category of persons face?

How can these challenges be solved?

Have any of the initiatives that you have mentioned been taken by the Government of Kenya? Please explain.

Tell me more about the procedure of acquiring Kenyan nationality, especially in applications involving stateless persons.

Are there any recommendations that you could make to improve the current process?

Is there anything else that you would like to add?

