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Ethnocentric nationality in the Democratic Republic of the Congo: An analysis under international human rights law

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Summary: *In order to dismantle institutionalised tribalism in the Democratic Republic of the Congo, which has fostered recurring war and armed conflict, its lynchpin of ethnocentric citizenship must be removed. Due to the Congolese law of nationality by birth being grounded in ethnicity, Congolese nationality has been and remains subject to political manipulation, particularly concerning the Banyamulenge people. In the latter half of the twentieth century the Congolese state has alternatively granted, withdrawn and reinstated their Congolese citizenship. Fundamentally, the basic Congolese nationality law – anchored in the Congolese Constitution – perpetuates a legal framework for racial division which does nothing to hinder but only enables malicious sympathies that tend toward exclusion, persecution, expulsion and genocide. To address this existential flaw, this article describes how the primacy of ethnicity in the Congolese law of nationality by birth violates three international human rights treaties that the DRC has accepted, thus laying a foundation for legal action to change the Constitution and nationality law of the DRC.*

Key words: *Banyamulenge; DRC; nationality; ethnic; discrimination*

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1 Introduction

Only two decades ago, nearly four million human beings perished during seven official years of war, from 1996 to 2003, in the Democratic Republic of the Congo (DRC), formerly known as Zaïre.¹ This was primed two years earlier by the slaughter of over 800 000 human beings in the space of less than four months, during the Tutsi genocide in neighbouring Rwanda.² Lower levels of armed conflict and violence continue some 20 years later.³ Dubbed ‘Africa’s World War’⁴ for having engaged ten African nation states besides the Congo,⁵ the accounts of its particular causes and participants’ motives vary.⁶ However, one thing is certain: A perennial dispute over the nationality of a minority ethnic group known as the Banyamulenge plays a central role in the conflict.⁷ The Banyamulenge are concentrated in DRC’s South Kivu province, in an unincorporated zone named Minembwe located up on the high plains of Itombwe. They are pastoral cattle herders, of Tutsi ethnicity, whose ancestors migrated from present-day Rwanda and Burundi into the DRC many generations ago. For this reason, they are considered non-indigenous to the Congo.⁸

The DRC Constitution prescribes acquisition of Congolese nationality in one of two ways: either ‘by origin’ (birthright), or ‘individually acquired’ (naturalisation).⁹ Defining the parameters of naturalisation is deferred to the legislature.¹⁰ The Constitution, however, defines acquisition of nationality at birth – but not as

1 There are several widely-divergent estimates of the total death toll during the Congo wars, ranging from 200 000 to 3,8 million. T Turner *The Congo wars: Conflict, myth and reality* (2007) 1-3.

2 See generally G Prunier *Africa’s world war: Congo, the Rwandan genocide, and the making of a continental catastrophe* (2009); Turner (n 1).

3 See generally K Berwouts *Congo’s violent peace: Conflict and struggle since the Great African War* (2017); S Autesserre *The trouble with the Congo: Local violence and the failure of international peacekeeping* (2010).

4 See Prunier (n 2); Turner (n 1).

5 These states were Rwanda, Uganda, Burundi, Zimbabwe, Angola, Namibia, Chad, Soudan, Libya and the Central African Republic. M Ould Lebat *Facilitation dans la tourmente: Deux ans de médiation dans l’imbroglio congolais* (2005) 21 fn 1.

6 See N Alusala ‘Boarder fragility and the causes of war and conflict in the Democratic Republic of the Congo’ in I Moyo & CC Nshimbi (eds) *African borders, conflict, regional and continental integration* (2019) 89.

7 See S Koko ‘State-building, citizenship and the Banyarwanda question in the Democratic Republic of Congo’ (2013) 35 *Strategic Review for Southern Africa* 41; Alusala (n 6) 89.

8 See generally I Ndaywel è Nziem *Histoire général du Congo: De l’histoire ancien à la République Démocratique* (1998) 381-382; LS Rukunda ‘Justice and righteousness in Matthean theology and its relevance to the Banyamulenge community: A post-colonial reading’ PhD thesis, University of Pretoria, 2005 93-174; and sources at nn 13-15 below.

9 Art 10 para 2(1) DRC Constitution.

10 Art 10 para 2(3) DRC Constitution. See the 2004 Act on Nationality.

being born either on Congolese soil, or of a Congolese parent, or a combination of the two, as is the norm throughout most of the world.¹¹ Rather, it defines the concept by declaring 'to be Congolese by origin all person[s] belonging to ethnic groups whose persons and territory constituted that which became the Congo (currently the Democratic Republic of the Congo) at independence'.¹²

Determining birthright nationality by reference to when one's ancestors came onto the territory and whether they owned land, makes that nationality susceptible to political manipulation.¹³ Depending on who has wielded the levers of power, the Congolese state, since independence from Belgium, has alternatively granted, withdrawn and reinstated the Banyamulenge's Congolese citizenship.¹⁴ The issue was at the heart of the Congo wars and continues to foment conflict.¹⁵ Fundamentally, by tying birthright citizenship to ethnicity, the basic Congolese nationality law perpetuates a legal framework for ethnic division and tribalism.

However, this provision of the DRC Constitution directly conflicts with at least three human rights treaties which the Congolese state, while named Zaïre, either ratified or acceded to: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);¹⁶ the International Covenant on Civil and Political Rights (ICCPR),¹⁷ and the African Charter on Human and Peoples' Rights (African Charter).¹⁸ This article discusses each violation in turn, and concludes by examining how they are actionable under Congolese law.

11 See D Klusmeyer 'Introduction' in TA Aleinikoff & D Klusmeyer (eds) *From migrants to citizens: Membership in a changing world* (2000) 5.

12 Art 10(2)(2) DRC Constitution (author's translation throughout).

13 A Court 'The Banyamulenge of South Kivu: The "nationality question"' (2013) 72 *African Studies* 416; S Jackson 'Of "doubtful nationality": Political manipulation of citizenship in the DR Congo' (2007) 11 *Citizenship Studies* 481; G Nzongola-Ntalaja 'The politics of citizenship in the Democratic Republic of Congo' in S Dorman et al (eds) *Making nations, creating strangers: States and citizenship in Africa* (2007) 69.

14 See K Vlassenroot 'Citizenship, identity formation and conflict in South Kivu: The case of the Banyamulenge' (2002) 29 *Review of African Political Economy* 499; MM Ruhimbika *Les Banyamulenge (Congo-Zaïre) entre deux guerres* (2001).

15 See G Mathys 'Bringing history back in: Past, present, and conflict in Rwanda and the Eastern Democratic Republic of Congo' (2017) 58 *Journal of African History* 465; J Stearns & Anonymous *Banyamulenge: Insurgency and exclusion in the mountains of South Kivu* (2013); M Mamdani 'Tutsi power in Rwanda and the citizenship crisis in Eastern Congo' in M Mamdani *When victims become killers: Colonialism, nativism, and the genocide in Rwanda* (2001) 234.

16 International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966) 660 UNTS 195 (ICERD).

17 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 (ICCPR).

18 African Charter on Human and Peoples' Rights (27 June 1981) 1520 UNTS 217 (African Charter).

2 Violations of international human rights law

2.1 International Convention on the Elimination of All Forms of Racial Discrimination

The DRC acceded to ICERD on 21 April 1976, without lodging any reservation, understanding or declaration, and has made none since.¹⁹ Article 1(1) of ICERD prohibits 'racial discrimination' which it defines as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'.²⁰ The Convention further mandates, at article 2(1)(c), that state parties 'shall take effective measures to ... amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination'.²¹

Furthermore, since ICERD's entry into force in 1969²² its prohibition of racial discrimination has attained the status of *jus cogens*.²³ That is, it has entered that category of peremptory general rules of international law including 'apartheid, slavery and genocide' which are 'accepted by the international community as standards from which no derogation is permitted'.²⁴ Moreover, it also has attained the concomitant status of an obligation *erga omnes*: counted among those 'obligations of a state towards the international community as a whole' which, 'by their very nature ... are the concern of all states', and for which 'all states can be held to have a legal interest

19 See 'International Convention on the Elimination of All Forms of Racial Discrimination, Table of Participants, Dates of Signatures and Ratifications, Declarations and Reservations, and Objections' *UN Treaty Collection*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en#EndDec (accessed 14 April 2021) (ICERD Table).

20 Art 1(1) ICERD.

21 Art 2(1)(c) ICERD.

22 On 4 January 1969 in accordance with art 19 ICERD. See ICERD Table (n 19).

23 N Lerner *The UN Convention on the Elimination of All Forms of Racial Discrimination* (rev ed 2015) xxv (citing JD Ingles 'Study on the implementation of article 4 of the Convention on the Elimination of All Forms of Racial Discrimination: Positive measures designed to eradicate all incitement to, or acts of racial discrimination' UN Doc A/CONF 119/10.CERD 2 (1986) 38); Juridical condition and rights of undocumented migrants IACHR Advisory Opinion OC-18/03 (17 September 2003) Ser A/ Doc 18: 'The principle of ... non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle in acceptable, and discriminatory treatment of any person, owing to ... ethnic ... origin ... is unacceptable. This principle ... forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*' para 101 (unanimous opinion).

24 A Cassese *International law* (2005) 65. See also art 53 of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

in their protection'.²⁵ The International Court of Justice (ICJ) recently clarified that any state 'and not only a specially affected state', may hold another state to account 'with a view toward ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end'.²⁶

The DRC itself has recognised the *jus cogens* status of ICERD's prohibition, albeit indirectly: In a case it brought against Rwanda in 2002, its representative argued before the ICJ in 2005²⁷ that the *jus cogens* prohibitions on genocide and racial discrimination preempt any state party reservation to the Court's jurisdiction under either the Genocide Convention²⁸ or ICERD.²⁹ In its brief, the DRC also recognised the *erga omnes* obligation of all states to protect against violations of 'the basic rights of the human person, including ... racial discrimination'.³⁰

In addition to prohibiting racial discrimination generally, ICERD enumerates many specific contexts in which the prohibition operates. Among these is the enjoyment of the human right to nationality.³¹ Article 5(d)(iii) provides that '[s]tate parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to ... ethnic origin, to equality before the law, notably in the enjoyment of ... in particular ... the right to nationality'.³²

25 *Case Concerning the Barcelona Traction, Light and Power Co, Belgium v Spain* ICJ (5 February 1970) (1970) ICJ Reports 3 32 paras 33-34. See generally Cassese (n 24) 16, 64-68, 195, 262 (discussing obligations '*erga omnes contractantes* laid down in a multilateral treaty safeguarding fundamental values').

26 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide: The Gambia v Myanmar* ICJ (23 January 2020) (2020) ICJ Reports 13 para 41. In so holding, the Court overruled Myanmar's objection that The Gambia – located on a different continent – lacked standing to bring a claim due to The Gambia not being a state 'injured' by Myanmar's alleged misconduct (unlike, eg, Bangladesh due to flows of Rohingya refugees from adjacent Myanmar). (2020) ICJ Reports 12 para 39.

27 *Armed Activities on the Territory of the Congo, DRC v Rwanda* ICJ (8 July 2005) Hearing on Jurisdiction and Admissibility, *verbatim* record paras 12.7-12.9, <https://www.icj-cij.org/public/files/case-related/126/126-20050708-ORA-01-00-BI.pdf> (orig), <https://www.icj-cij.org/public/files/case-related/126/126-20050708-ORA-01-01-BI.pdf> (trans) (accessed 6 December 2021).

28 Convention on the Prevention and Punishment of the Crime of Genocide, art 9 (9 December 1948) 78 UNTS 277.

29 Art 22 ICERD.

30 *DRC v Rwanda* ICJ (28 May 2002) Application Instituting Proceedings 29 (quoting *Barcelona Traction* (1970) ICJ Reports 32 para 34) <https://www.icj-cij.org/public/files/case-related/126/7070.pdf> (accessed 6 December 2021).

31 Art 15(1) Universal Declaration of Human Rights (10 December 1948) GA Res 217 (III) A (Universal Declaration).

32 Art 5(d)(iii) ICERD.

Article 10 of the DRC Constitution,³³ replicated in its implementing legislation,³⁴ starkly contrasts with article 5(d)(iii) of ICERD by purposely distinguishing those eligible for citizenship by origin from those not eligible for citizenship by origin, on the basis of *ethnic* origin. Moreover, the provision clearly contradicts article 1(1) of ICERD, in that it creates a 'preference based on ... ethnic origin'³⁵ regarding access to Congolese citizenship. Article 10 of the DRC Constitution, therefore, violates ICERD both generally at article 1(1), and also specifically at article 5(d)(iii).³⁶ Hence, the DRC must 'amend, rescind or nullify' this constitutional provision and its corresponding legislation, both explicitly per article 2(1)(c) of the Convention, and also implicitly per article 216 of the DRC Constitution³⁷ – especially given ICERD's *jus cogens* status, a status acknowledged by the DRC.

However, there is a potential defence in that article 1(3) of ICERD, on the face of it, could be read so as to preclude scrutiny of state party citizenship and naturalisation laws. The provision reads: 'Nothing in this Convention may be interpreted as affecting in any way the legal provisions of state parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any particular nationality.'³⁸

33 See text accompanying n 12.

34 Art 6 of Law 4/024 of 12 November 2004 relating to Congolese nationality. Although pre-dating the 2006 Constitution, when enacted the Law was in implementation of a similar provision in the transitional Constitution of 1 April 2003, which had been adopted as part of the peace accords ending the Second Congo War, establishing a government of transition with a view toward a constitutional plebiscite in 2006. The Law grew out of those accords and the Inter-Congolese Dialogue held shortly thereafter. See Introductory Remarks to Law 4/024 of 12 November 2004 (17 November 2004) 45 *Official Gazette of the Democratic Republic of the Congo* (special issue) i-v. The legislation adopted was a compromise, not an absolute guarantee of the Banyamulenge's Congolese nationality. See Jackson (n 13) 491. See also J Sarkin 'Towards finding a solution for the problems created by the politics of identity in the Democratic Republic of the Congo (DRC): Designing a constitutional framework for peaceful cooperation' in Konrad-Adenauer-Stiftung (eds) *Politics of identity and exclusion in Africa: From violent confrontation to peaceful cooperation* (2001) 67.

35 Art 1(1) ICERD.

36 Jackson (n 13) 489, citing S Ogata *The turbulent decade* (2005) 380 fn 37 (summarising UN Office of Legal Affairs 'Communication from Under Secretary-General for Political Affairs Marrack Goulding to High Commissioner for Refugees Sadaka Ogata' (24 May 1996); per email from the UN Office of Legal Affairs to this author on 11 October 2020, the communication remains confidential and not releasable to the public). See also AN Makombo 'Civil conflict in the Great Lakes region: The issue of nationality of the Banyarwanda in the Democratic Republic of the Congo' (1997) 5 *African Yearbook of International Law* 58 (asserting, at the advent of the transitional government under Laurent Kabila, that Congolese nationality law was incompatible with 'general principles of law' which include 'the right to a nationality'; written by a UN Department of Peace Keeping Operations Political Affairs Officer, with the caveat that the views expressed therein were 'not necessarily those of the United Nations' (49).

37 See nn 159-163 below and accompanying text.

38 Art 1(3) ICERD.

By 'bracket[ing] the use of race as a criterion for citizenship',³⁹ it appears that article 1(3) 'makes it clear' that ICERD may not be applied to state party laws⁴⁰ and, hence, that state party citizenship and naturalisation are exempt from the reach of ICERD.⁴¹ Such a reading would be consistent with traditional deference to the sanctity of state sovereignty,⁴² especially during the post-colonial liberation era of the Convention's drafting,⁴³ because determining the parameters of citizenship, under international law, has traditionally been the unique province of the nation state.⁴⁴

However, interpreting article 1(3) so as to preclude scrutiny of state party nationality laws would frustrate ICERD's object and purpose, which is determined by reference to its Preamble.⁴⁵ In its fifth preambular paragraph, ICERD specifically incorporates the 1963 United Nations Declaration on the Elimination of All Forms

39 P.J. Spiro 'A new international law of citizenship' (2011) 105 *American Journal of International Law* 716.

40 G. Nystuen *Achieving peace or protecting human rights? Conflicts between norms regarding ethnic discrimination in the Dayton Peace Agreement* (2005) 116.

41 B. Manby *Citizenship and statelessness in the member states of the Southern African Development Community* (2020) 104, https://reliefweb.int/sites/reliefweb.int/files/resources/Statelessness_in_Southern_Africa_Dec2020.pdf (accessed 6 December 2021). However, Spiro puts this view in context: 'In its original conception, at least, the Convention was not intended to constrain criteria for admission from outside the existing community. [At that time] international law had nothing to say about a citizenship regime that had the clear effect of excluding outsiders on the basis of race.' Spiro (n 39) 716 (citing Lerner (n 23) 28-32).

42 See D. Mahalic & J.G. Mahalic 'The limitations provisions of the International Convention on the Elimination of all Forms of Racial Discrimination' (1987) 9 *Human Rights Quarterly* 79, 82: '[The subsection was] designed to assure state parties that due respect is given to state sovereignty in areas concerning naturalisation ... Naturalisation laws have always been considered a prerogative of state sovereignty ... Consequently, the limitation provisions articulated in Article 1(3) have generated little controversy and merited only minor attention.' See also UN Charter art 2 para 7.

43 See P. Thornberry *The International Convention on the Elimination of All Forms of Racial Discrimination* (2016) 157: 'As the travaux suggest, the restrictive approach to non-citizens was to some extent bound up with the necessity of strengthening the sovereignty of newly independent states and nascent problems of the nationalisation of resources including personnel.'

44 *Nottebohm case, Liechtenstein v Guatemala* ICJ (6 April 1955) (1955) ICJ Reports 20 ('[i]t is for Liechtenstein, as it is for every sovereign state, to settle by its own legislation the rules relating to the acquisition of its nationality'). See generally A. Kaczorowska 'Nationality, statelessness, refugees and internally displaced persons' in A. Kaczorowska *Public International Law* (2005) 306-309.

45 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Qatar v United Arab Emirates* ICJ (4 February 2021) (2021) ICJ Reports para 84, <https://icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf> (accessed 6 December 2021). In the process of discerning ICERD's object and purpose, the International Court of Justice found it unnecessary to go beyond the treaty's text (para 89), in this case its Preamble (para 84), applying the customary rules of treaty interpretation reflected in arts 31 and 32 of the Vienna Convention on the Law of Treaties, specifically the very first rule: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (para 78) (quoting Vienna Convention on the Law of Treaties art 31(1)).

of Racial Discrimination,⁴⁶ and affirms that state parties 'desir[e] to implement the principles embodied in' the Declaration 'and to secure the earliest adoption of practical measures to that end'.⁴⁷ The Declaration itself admonishes that 'particular efforts shall be made to prevent discrimination based on ... ethnic origin, especially in the fields of ... access to citizenship'.⁴⁸

Moreover, well prior to ICERD, in April 1955, the ICJ had made clear that, despite the sovereign prerogative of citizenship and naturalisation, nationality laws nevertheless are subject to international scrutiny when they have 'international effect' in their application.⁴⁹ The Court at the time recognised that 'the diversity of demographic conditions ha[d] thus far made it impossible for any general agreement to be reached on the rules relating to nationality'.⁵⁰ Since then, one rule has emerged: the prohibition of discrimination on the basis of race, including ethnic origin, reflected in article 5(d) (iii) of ICERD. ICERD was concluded in July 1966, entered into force in January 1969, attained near universal ratification or accession in the following years,⁵¹ and its principles have evolved into *jus cogens* general rules of international law.⁵²

Furthermore, the dual use of the term 'nationality' in article 1(3) renders the provision ambiguous. Is the term 'nationality' as used in the first clause, that is, synonymously with 'citizenship', used similarly in the second? Or, rather, in the second clause, is 'nationality' analogous to the term 'ethnicity', as it is in article 1(1)?⁵³ Very little of ICERD's *travaux préparatoires* specifically addresses article 1(3) as such, but it does indicate the latter. As related by Thornberry in his recent and exhaustive commentary:⁵⁴

The view that 'nationality' shifts its meaning in [article] 1(3) from the legal concept to a concept closer to ethnicity was expressed by the representative of the UK ... who observed, following the voting on the article, that 'nationality' 'was obviously interpreted in different ways in different countries; her delegation understood the word "nationality"

46 UN Declaration on the Elimination of All Forms of Racial Discrimination (20 November 1963) GA Res 1904 (XVIII) (ERD Declaration).

47 12th preambular paragraph ICERD.

48 Art 3(1) ERD Declaration (n 46).

49 *Nottebohm case* (1955) ICJ Reports 21.

50 (1955) ICJ Reports 23.

51 See ICERD Table (n 19).

52 See n 23 and accompanying text.

53 Art 1(1) ICERD (defines the bases of 'racial discrimination' to include 'national or ethnic origin'). *Qatar v UAE* (2021) ICJ Reports para 105 ('the term "national origin" in Article 1, paragraph 1, of the Convention does not encompass current nationality').

54 Thornberry (n 43) 144 fnn 35 & 36 (citing UN GAOR 20th Sess 1307th 3rd Comm Mtg (12 October 1965) UN Doc A/C.3/SR 96-97 paras 24 & 28 (internal citation omitted)).

as used at the end of the new text ... to mean persons of a particular national origin'. The representative of Canada explained that he had voted in favour of [article] 1(3) 'because the text adopted made it clear that individuals could have a nationality on the basis of race as well as citizenship'.

Likewise, the scant academic commentary discussing article 1(3) militates for reading its second clause's use of 'nationality' as 'national origin'⁵⁵ – although the earliest of the three commentators demurs, if 'for no other reason than because it ought not to be lightly assumed that within one sentence the same term is given two different meanings'.⁵⁶ Thornberry himself posits that article 1(3) exists to qualify its predecessor, article 1(2), which reads: 'This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a state party ... between citizens and non-citizens'.⁵⁷ For Thornberry, article 1(3) serves 'as an exception to the exception that reinstates, within its frame, the non-discrimination principle as applicable among non-citizens when it concerns a particular nationality'.⁵⁸

The jurisprudence of the United Nations Committee on the Elimination of Racial Discrimination (ERD Committee) bears this out. The ERD Committee is the treaty body established by the Convention⁵⁹ to monitor and promote compliance with ICERD through both periodic review of state parties' practice,⁶⁰ and also to consider complaints – called 'communications' – against any given state party, brought by an individual or group of individuals,⁶¹ or another state party.⁶²

At its sixty-fifth session in 2004, the ERD Committee adopted a General Recommendation (GR) on the topic of non-citizens, in order to address the plight of so-called foreigners – not only in the sense of refugees and migrants, which it had done in 1993,⁶³ but also of people whose nationality is questioned even when they 'have lived

55 Thornberry (n 43) 145 fnn 45-46 (citing I Diaconu *Racial discrimination* (2011) 166; Lerner (n 23) 35 (1980 1st edn 30)).

56 Thornberry (n 43) 145 fnn 43-44 (quoting E Schwelb 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 *International and Comparative Law Quarterly* 1009).

57 Art 1(2) ICERD.

58 Thornberry (n 43) 146.

59 Art 8 ICERD.

60 Art 9 ICERD.

61 Art 14 ICERD.

62 Art 11 ICERD.

63 General Recommendation on non-citizens, CERD GR 11 (9 March 1993), UN Doc A/48/18 (1993).

all their lives on the same territory',⁶⁴ such as the Banyamulenge. This GR incorporated an earlier GR that has addressed article 1(3). The 1993 GR had explained that article 1(3) qualifies article 1(2)'s exemption of those 'actions by a state party which differentiate between citizens and non-citizens' from the definition of racial discrimination, 'by declaring that, among non-citizens, state parties may not discriminate against any particular nationality'.⁶⁵ As part of its 2004 update the ERD Committee recommended that state parties 'recognise that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of state parties' obligations to ensure non-discriminatory enjoyment of the right to nationality'.⁶⁶ The ERD Committee further recommended that state parties '[r]eview and revise legislation, as appropriate, in order to guarantee that such legislation is in full compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in article 5, without discrimination'.⁶⁷

If article 1(3) prohibited scrutiny of state parties' nationality laws, then the 2004 GR would be an absurdity. Indeed, in the sole complaint brought before the ERD Committee in which the respondent state party raised article 1(3) as a jurisdictional defence, the ERD Committee rejected the defence outright, citing the 2004 GR, and declared the communication admissible.⁶⁸

Furthermore, as in the case of article 15(1) of the Universal Declaration of Human Rights (Universal Declaration),⁶⁹ article 5(d) (iii) of ICERD does not purport to *create* the right to nationality. As the ERD Committee clarified, the non-exhaustive enumeration of specific human rights in article 5 of ICERD represents an 'assumption' by state parties of both 'the existence and recognition of these rights'.⁷⁰ Rather, what ICERD does is 'oblige' each state party 'to prohibit and eliminate racial discrimination in the enjoyment of such human rights'.⁷¹ Exempting scrutiny of state party laws which define nationality would allow state parties to discriminate on the basis of

64 General Recommendation on discrimination against non-citizens, CERD GR 30 (20 August 2004), UN Doc A/59/18 (SUPP) (2004) 93.

65 CERD GR 11 113.

66 CERD GR 30 95 para 14.

67 CERD GR 30 94 para 6.

68 *Pjetri v Switzerland* Communication 53/2013, CERD (23 January 2017), UN Doc CERD/C/91/D/53/2013 (2017) 13 paras 6.1-6.4 (although not directly attacking the state party's nationality law *per se*, the complainant alleged that the law as applied adversely affected his access to nationality).

69 'Everyone has the right to a nationality.' Art 15(1) Universal Declaration of Human Rights (10 December 1948) GA Res 217 (III) A (1948) (Universal Declaration).

70 General Recommendation on article 5 of the Convention, CERD GR 20 (8 March 1996), UN Doc A/51/18 (1996) 124 para 1.

71 CERD GR 20 124 para 1.

race in the granting of citizenship – a prerequisite to its enjoyment – and thus defeat ICERD's object and purpose.⁷²

Moreover, 'a distinction' in national law 'is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms'.⁷³ An impairing effect will be found if the law 'has an unjustifiable disparate impact upon a group distinguished by ... ethnic origin'.⁷⁴ Perhaps, facially, the distinction among ethnic groups on the basis of presence on and possession of territory in the DRC Constitution and corresponding nationality law cannot, in the abstract, be said to 'impair' the right to nationality *per se*. However, the effects of the law's reference to the ambiguous concepts of an ethnic group's presence on and ownership of territory at any given time have had, and continue to have, an unjustifiably disparate impact upon the Banyamulenge.

In practice before the ERD Committee, it is worth noting that the government of the DRC itself acknowledges that article 1(3) does not prohibit scrutiny of its nationality laws, insofar as the DRC submitted those laws for the ERD Committee's consideration in the context of the DRC's most recent (2006) Periodic Report submitted per article 9 of the Convention.⁷⁵ The ERD Committee did in fact scrutinise those laws, albeit perfunctorily, and in its Concluding Observations noted its concern 'that in practice Congolese nationality is particularly difficult to acquire by members of [the Banyarwanda] group'.⁷⁶ No mention whatsoever was made of article 1(3) of ICERD. The ERD Committee also invited the DRC 'to ensure that the application of [its nationality laws] does not give rise to discrimination in the enjoyment of the right to nationality by members of certain ethnic groups residing within its territory (art 5(d)(iii))'.⁷⁷ Moreover, the Committee 'note[d] with concern that ... there is no definition of racial discrimination in domestic law that reflects the definition given in article 1 of the Convention'.⁷⁸ The ERD Committee therefore recommended that the DRC 'take the necessary legislative measures

72 Although affirmative 'special measures' to grant nationality may be remedially warranted, and thus are permitted under ICERD arts 1(4) and 2(2). See generally General Recommendation on the meaning and scope of Special Measures, CERD GR 32 (24 September 2009) UN Doc CERD/C/GC/32 (2009).

73 General Recommendation on art 1(1) of the Convention, CERD GR 14 (17 March 1993), UN Doc A/48/18 (1993) 115 para 1.

74 CERD GR 14 115 para 2.

75 See 15th Periodic Report of the Democratic Republic of the Congo, CERD (3 August 2006) UN Doc CERD/C/COD/15 (2006) 10, 12 & 16, paras 40, 41, 51, 71 & 72.

76 Concluding Observations on the 15th Periodic Report of the Democratic Republic of the Congo, CERD (17 August 2007), UN Doc A/62/18 (SUPP) (2007) 66 para 331 (brackets in original).

77 As above.

78 Concluding Observations (n 76) 65 para 326.

to adopt in domestic law a definition of racial discrimination that is fully consistent with article 1 of the Convention'.⁷⁹

More than half a century has elapsed since ICERD's inception. More than a decade ago 'the view ha[d] emerged that the prohibition of discrimination [under the Convention] applies fully to nationality legislation'.⁸⁰ Just this year (2021) the ICJ found and declared ICERD's object and purpose as being 'to bring to an end all practices that seek to establish a hierarchy among social groups as defined by their inherent characteristics ... [by] eliminat[ing] all forms and manifestations of racial discrimination against human beings on the basis of real or perceived characteristics as of their origin, namely at birth'.⁸¹

The Convention 'is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society'.⁸² It is time to leverage ICERD to uncouple ethnicity entirely from the laws of nationality.

2.2 International Covenant on Civil and Political Rights

DRC acceded to the International Covenant on Civil and Political Rights (ICCPR) on 1 November 1976 and, as with ICERD, without any reservation, understanding or declaration and has not made any since.⁸³ Unlike ICERD however, ICCPR does not enumerate the right to nationality. It explicitly mentions the right only indirectly, in discussing the rights of the child.⁸⁴ Nevertheless, article 16 of ICCPR directs that '[e]veryone shall have the right to recognition everywhere as a person before the law',⁸⁵ implementing *verbatim* article 6 of the Universal Declaration.⁸⁶ ICCPR further directs, at article 26, that '[a]ll persons are equal before the law and are entitled without any

⁷⁹ As above.

⁸⁰ I Ziemele *State continuity and nationality: The Baltic states and Russia: Past, present and future as defined by international law* (2005) 294, quoted by Spiro (n 39) 722 fn 176.

⁸¹ *Qatar v UAE* (2021) ICJ Reports para 86.

⁸² CERD GR 32 (n 72) 2 para 5. See generally D Keane & A Waughray *Fifty years of the International Convention on the Elimination of All Forms of Racial Discrimination: A living instrument* (2017) 14-23.

⁸³ See 'International Covenant on Civil and Political Rights, table of participants, dates of signatures and ratifications, declarations and reservations, and objections' *UN treaty collection*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 28 January 2021) (ICCPR Table).

⁸⁴ Art 24(3) ICCPR ('Every child has the right to acquire a nationality').

⁸⁵ Art 16 ICCPR.

⁸⁶ Art 6 Universal Declaration.

discrimination to the equal protection of the law',⁸⁷ implementing nearly *verbatim* article 7 of the Universal Declaration.⁸⁸

The modern political world organises humankind into independent sovereign nation states, and tasks nation states with the enforcement of all rights, including human rights. Consequently, the individual must look to the nation state for vindication of his or her rights.⁸⁹ It necessarily follows that an individual's entitlement to the protection of a nation state derives from his or her nationality. As the ICJ remarked in 1955, 'it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection'.⁹⁰ Although this speaks to protection on the international plane, the Court pointed out that the effects of nationality extend to and are especially relevant in the domestic sphere:⁹¹

Nationality has its most immediate, its most far-reaching and, for most people, its only effects in the legal system of the state conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the state in question grants or imposes on its nationals.

Thus, in this world of independent sovereign nation states, deprivation of nationality amounts to 'the total destruction of the individual's status in society'.⁹² For those so deprived, 'their plight is not that they are not equal before the law, but that no law exists for them'.⁹³ In other words, the right to nationality equates to 'the right to have rights'.⁹⁴

87 Art 26 ICCPR.

88 Art 7(1) Universal Declaration ('All are equal before the law and are entitled without any discrimination to equal protection of the law').

89 See generally E Bates 'History' in D Moeckli et al (eds) *International human rights law* (2018) 3-21; Cassese (n 24) 3-4 & 142-150; L Henkin 'Rights in a world of states' in L Henkin *The age of rights* (1990) 43-50.

90 *Nottebohm case* (1955) ICJ Reports 13 (quoting *The Panevezys-Saldutiskis Railway Case, Estonia v Lithuania* PCIJ (28 February 1938) (1938) PCIJ Reports ser A/B 76 16 para 65). In the earlier case, the Permanent Court of International Justice – predecessor to the International Court of Justice – continued: 'Where the injury was done to the national of some other state, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a state is entitled to afford nor can it give rise to a claim which that state is entitled to espouse'. *Panevezys-Saldutiskis Railway Case* (1938) PCIJ Reports ser A/B 76 16 para 65.

91 *Nottebohm case* (1955) ICJ Reports 20. The Court concludes this paragraph with the sentence: 'This is implied in the wider concept that nationality is within the domestic jurisdiction of the state.'

92 *Trop v Dulles* 356 US 86 101 (1958) (holding that the Eighth Amendment to the US Constitution prohibits punitive denationalisation, finding it to be a cruel and unusual form of punishment).

93 H Arendt 'The decline of the nation-state and the end of the rights of man' in H Arendt *The origins of totalitarianism* (1958) 295-296.

94 Arendt (n 93) 295 (quoted without citation in *Trop v Dulles* 356 US 102). However, see K Rubenstein 'Globalisation and citizenship and nationality' in C Dauvergne (ed) *Jurisprudence for an interconnected globe* (2003) 171-172 ('Citizenship is no longer legitimately the major foundation upon which rights

Over half a century after these classic mid-twentieth century pronouncements, commentators continue to observe that ‘although “everyone has the right to recognition everywhere as a person before the law”, it is precisely lack of such recognition that generates many of the problems the stateless face’.⁹⁵ ‘Without citizenship in at least one state, it is impossible to enjoy most human rights; indeed, some stateless people are even enslaved.’⁹⁶ For the African Court on Human and Peoples’ Rights (African Court), nationality provides ‘the capacity to enjoy rights and exercise obligations ... since it is the legal and socio-political manifestation of the right’ to legal personality.⁹⁷ A Beninese commentator sums it up as follows: ‘*l’acquisition de la nationalité est la première image de l’existence juridique de l’être humain.*’⁹⁸

Therefore, the guarantees under international law to everyone of recognition everywhere as a person before the law and to all persons of equality before the law, as reflected in articles 16 and 26 of ICCPR, imply by necessity that ICCPR also guarantees the right to nationality. The jurisprudence of the United Nations (UN) Human Rights Committee (HR Committee)⁹⁹ bears this out, both in its two General Comments which touch on deprivation of nationality, and also in its views issued in the two communications brought before it which addressed the right to nationality.

In late 1989, by way of interpreting the principle of non-discrimination in article 26 of ICCPR, the HR Committee interpreted

are restricted and determined, even within the nation-state’) (quoted in Spiro (n 39) 719 fn 167).

- 95 KA Belton ‘Statelessness: A matter of human rights’ in RE Howard-Hassmann & M Walton-Roberts (eds) *The human right to citizenship: A slippery concept* (2015) 37 (quoting art 6 Universal Declaration (internal citation omitted), which ICCPR art 16 tracks nearly *verbatim*).
- 96 RE Howard-Hassmann ‘Introduction: The human right to citizenship’ in Howard-Hassmann & Walton-Roberts (n 95) 4; see also L van Waas ‘Nationality and rights’ in BK Blitz & M Lynch (eds) *Statelessness and citizenship: A comparative study on the benefits of nationality* (2011) 23.
- 97 *Robert John Penness v Tanzania* Judgment 013/2015, African Court on Human and Peoples’ Rights (28 November 2019) para 89, <https://www.african-court.org/cpmt/details-case/0132015> (accessed 6 December 2021), quoting *Open Society Justice Initiative (OSJI) v Côte d’Ivoire* Communication 318/06, African Commission on Human and Peoples’ Rights (27 May 2016) 25-26 paras 95-97, <https://www.achpr.org/sessions/descions?id=228> (accessed 6 December 2021).
- 98 ‘The acquisition of nationality is the first manifestation of the human being’s legal existence.’ RF Avlessi ‘La prévention de l’apatridie dans le système Africain des droits de l’homme’ (‘The prevention of statelessness in the African human rights system’) (2019) 3 *African Human Rights Yearbook* 286.
- 99 The treaty body established by ICCPR arts 28-45 to monitor and promote compliance with ICCPR, similar to the Committee on ERD for ICERD.

ICCPR as incorporating the terms of the earlier ICERD, as noted in its General Comment on non-discrimination:¹⁰⁰

The Covenant neither defines the term 'discrimination' nor indicates what constitutes discrimination. However, article 1 of [ICERD] provides that the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Moreover, article 26 of ICCPR does not limit the scope of rights protected against discrimination. Rather, 'it prohibits discrimination [as defined by ICERD] in law or in fact in any field regulated and protected by public authorities ... In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.'¹⁰¹

Furthermore, 'when legislation is adopted by a state party, it must comply with the requirement of article 26 that its content should not be discriminatory'.¹⁰² It follows, therefore that, upon discovery of an incompatibility with the non-discriminatory requirement of article 26 of ICCPR, article 2(2) of the Covenant requires a state party to amend extant legislation in order to cure the violation. In 2004 the HR Committee made this clear:¹⁰³

Article 2, paragraph 2, requires that state parties take the necessary steps to give effect to the Covenant rights in the domestic order ... Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.

State parties also must act promptly to amend their laws after discovery of prohibited discriminatory effect. Bringing domestic law into compliance with ICCPR is not a mere goal to be achieved progressively,¹⁰⁴ as in the case of economic, social or cultural rights: 'The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified

¹⁰⁰ General Comment on non-discrimination, UNHR Committee General Comment 18 (10 November 1989) UN Doc HRI/GEN/1/Rev 9 (Vol I) (1989) 2 para 6.

¹⁰¹ UNHR Committee General Comment 18 3 para 12.

¹⁰² As above.

¹⁰³ General Comment on the nature of the general legal obligation imposed on state parties to the Covenant, UNHR Committee General Comment 31 (26 May 2004) UN Doc CCPR/C/21/Rev 1/Add 13 (2004) 5 para 13.

¹⁰⁴ Compare with art 2(1) of the International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3 (ICESCR).

by reference to political, social, cultural or economic considerations within the state.¹⁰⁵

In addressing the two individual communications which alleged violations of ICCPR due to a denial of citizenship,¹⁰⁶ the HR Committee indicated – albeit indirectly – that ICCPR does encompass the right to nationality. Both cases were brought against Estonia, by persons who had served in the Soviet military during the time Estonia was part of the Soviet Union. Both communications’ authors alleged unlawful discrimination on the basis of their membership in a social group – former Soviet military officers – in the application of Estonian nationality law denying them Estonian citizenship, on national security grounds. In both cases, Estonia replied that the communications were not admissible because ICCPR does not expressly mention the right to nationality.

In response to the first communication, Estonia asserted that ‘the right to citizenship, much less [to] a particular citizenship, is not contained in the Covenant’.¹⁰⁷ The HR Committee rejected Estonia’s position, observing:¹⁰⁸

The author has not advanced a free-standing right to citizenship, but rather the claim that the rejection of his citizenship on the national security grounds advanced violates his rights to non-discrimination and equality before the law. These claims fall within the scope of article 26 and are, in the Committee’s view, sufficiently substantiated for purposes of admissibility.

In the second case Estonia went further, asserting ‘that the communication is manifestly ill-founded’ because ‘the right to citizenship is neither a fundamental right nor a Covenant right’.¹⁰⁹ The HR Committee tersely rejected this, stating that it ‘does not find the state party’s argument persuasive and finds that the author’s claims are sufficiently substantiated, for purposes of admissibility’.¹¹⁰

¹⁰⁵ UNHR Committee General Comment 31 (n 103) 6 para 14.

¹⁰⁶ *Borzov v Estonia*, Communication 1136/2002, UNHR Committee (25 August 2004) UN Doc CCPR/C/81/D/1136/2002 (2004) and *Šipin v Estonia*, Communication 1423/2005 (4 August 2008) UN Doc CCPR/C/93/D/1423/2005 (2008).

¹⁰⁷ *Borzov v Estonia* (n 106) 5 para 4.6.

¹⁰⁸ *Borzov v Estonia* 9 para 6.6. On the merits, however, the HR Committee held that the national security grounds asserted by Estonia were permissible under the circumstances, and found no violation of ICCPR. *Borzov v Estonia* 9-10 paras 7.1-8.

¹⁰⁹ *Šipin v Estonia* (n 106) 5 paras 4.1 & 4.3.

¹¹⁰ *Šipin v Estonia* 8 para 6.2. Again, however, the HR Committee decided for Estonia on the merits. *Šipin v Estonia* 9 para 8.

Regrettably, in its views on these two communications, the HR Committee did not affirmatively state that ICCPR implicitly contains the right to nationality. Yet, the authors of those communications had not placed that question before the HR Committee. Rather, it was the respondent state party who asserted the proposition, albeit in the negative, namely, that the right to nationality *is not* contained in ICCPR. This the HR Committee squarely addressed, and firmly rejected.

In sum, articles 16 and 26 of ICCPR oblige the DRC to guarantee the right to nationality to all persons within its jurisdiction without any discrimination, including racial discrimination. ICCPR incorporates ICERD which defines ‘racial discrimination’ to include discrimination on the basis of ethnic origin. In the attribution of nationality under Congolese law, article 10 of the DRC Constitution and the corresponding DRC nationality law distinguish on the basis of ethnic origin, or create a preference based on ethnic origin; hence, they violate articles 16 and 26 of ICCPR. Therefore, article 2(2) of ICCPR obligates the DRC to amend, rescind or nullify article 10 of its Constitution and the corresponding nationality law, so as not to define ‘nationality by origin’ on the basis of or with reference to ethnic origin.

2.3 African Charter on Human and Peoples’ Rights

The DRC ratified the African Charter on 28 July 1987, with effect from 28 October 1987.¹¹¹ As in the case of ICCPR, the African Charter does not explicitly mention the right to nationality. However, like article 16 of ICCPR, article 5 of the African Charter prescribes the right of everyone to be recognised as a person before the law.¹¹² Yet, the Charter goes deeper, by associating the individual’s right to legal status – or ‘juridical personality’¹¹³ – with human dignity itself: ‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of legal status.’¹¹⁴

Also, article 2 prohibits discrimination in the effectuation of rights, notably racial discrimination. The African Charter, however,

111 African Commission Table of Ratification and Adherence 1520 UNTS 245 n 1.

112 Art 5(1) African Charter.

113 *The Nubian Community in Kenya v The Republic of Kenya*, Communication 317/2006, African Commission on Human and Peoples’ Rights (30 May 2016), <https://www.achpr.org/sessions/descions? id=229> (accessed 6 December 2021) 28 n 47.

114 Art 5(1) African Charter.

unlike ICCPR, explicitly lists 'ethnic group' as a prohibited basis of discrimination, nesting it between 'race' and 'colour':¹¹⁵

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Moreover, the stated object and purpose of the African Charter includes the 'dismantling' of 'all forms of discrimination, particularly those based on race, ethnic group, colour', and so forth.¹¹⁶

Furthermore, the African Charter mandates that its interpreters – notably, the African Commission on Human and Peoples' Rights (African Commission) – embrace other international human rights instruments:¹¹⁷

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of ... the Universal Declaration of Human Rights [and] other instruments adopted by the United Nations and by African countries ... as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

Also, 'to determine principles of law' which apply to it, the Charter further mandates:¹¹⁸

The Commission shall also take into consideration other general or special international conventions ... African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.

Due to the African Charter's invoking the Universal Declaration, the African Court in late 2019 held that the African Charter encompasses the right to nationality as articulated by article 15 of the Universal Declaration, and guarantees it via article 5 of the African Charter.¹¹⁹ The Organisation of African Unity (OAU), now the African Union (AU), had established the African Court in 1998 so as 'to complement and reinforce the functions of the African Commission' judicially,¹²⁰ and

115 Art 2 African Charter.

116 Ninth preambular paragraph African Charter.

117 Art 60 African Charter.

118 Art 61 African Charter.

119 *Penesis v Tanzania* (n 97) para 168(v).

120 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (9 June 1998) OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) (1998), <https://www.africancourt.org>.

to be able to render binding findings as well as recommendations.¹²¹ The DRC recently recognised the African Court's authority, by ratifying the Protocol establishing the Court¹²² on 8 December 2020.¹²³

Regardless of whether the entire world views the Universal Declaration as having crystallised into an actionable instrument binding upon all states, the African Court 'recognise[s] it] as forming part of customary international law'.¹²⁴ Moreover, the DRC Constitution itself, if not outright incorporating the Universal Declaration, nevertheless 'reaffirms' the Congo's 'adhesion and attachment' to it.¹²⁵ For the African Court – due to the status of the Universal Declaration as customary international law, and because 'everyone shall have a right to nationality' under article 15 of the Declaration – the right to nationality 'applies' as a 'binding norm'.¹²⁶ This is founded, first, in 'the right to nationality' being 'a fundamental aspect of the dignity of the human person';¹²⁷ and, second, because 'the expression "legal status" under article 5 of the Charter encompasses the right to nationality'.¹²⁸ Therefore, 'article 5 of the Charter and article 15 of the Universal Declaration of Human Rights' 'guarantee' the right to nationality.¹²⁹

The African Commission, for whose work the African Court exists 'to complement and reinforce',¹³⁰ had opined in 2016 that article 5 of the African Charter encompasses the right to nationality, albeit not necessarily on the basis of the Universal Declaration. Rather, for

org/en/images/Basic%20 Documents/ african-court-humanrights.pdf (accessed 6 December 2021), eighth preambular paragraph (African Court Protocol).

121 See generally F Viljoen *International human rights law in Africa* (2012) 414-420.

122 African Court Protocol (n 120).

123 African Court on Human and Peoples' Rights 'Press release: Democratic Republic of Congo ratifies the Protocol on the Establishment of the African Court on Human and Peoples' Rights' (11 December 2020), <https://www.african-court.org/wpafc/democratic-republic-of-congo-ratifies-the-protocol-on-the-establishment-of-the-african-court-on-human-and-peoples-rights/> (accessed 6 December 2021). However, the DRC did not make the necessary declaration under art 34(6) African Charter permitting the Court to accept complaints against it from individuals and NGOs.

124 *Anudo Ochieng Anudo v Tanzania* Judgment 12/2015, African Court on Human and Peoples' Rights (22 March 2018), <https://www.african-court.org/cpmt/details-case/0122015> (accessed 6 December 2021) para 76 (citing *Case Concerning United States Diplomatic and Consular Staff in Tehran, USA v Iran* ICJ (24 May 1980) (1980) ICJ Reports 42 (Universal Declaration 'enunciates' 'fundamental principles' of international law) and *Matter of South-West Africa, Ethiopia v South Africa, Liberia v South Africa* ICJ (21 December 1962) (1962) ICJ Reports 358-360 (J Bustamente separate opinion) (the 'declaration' of an international trusteeship constitutes an 'agreement' among its parties to abide by its terms)).

125 DRC Constitution 5th preambular paragraph.

126 *Penesis v Tanzania* (n 97) para 85.

127 *Penesis v Tanzania* (n 97) para 87 (expressly so holding).

128 *Penesis v Tanzania* (n 97) para 89.

129 *Penesis v Tanzania* (n 97) para 168(v).

130 African Court Protocol 8th preambular paragraph.

the Commission it was founded on the attributes of 'legal status' invoked in article 5: that is, 'the ability of an individual to have rights and obligations', of which nationality is 'a basic component' because 'it is the legal and socio-political manifestation' of legal status.¹³¹ The year prior, the African Commission had 'agreed with the position espoused' by the Inter-American Court of Human Rights, 'that nationality (or citizenship) is a prerequisite for recognition of juridical personality',¹³² and that, therefore, 'a claim to citizenship or nationality as a legal status is protected under article 5 of [the African Charter]'.¹³³

The question originally came to the African Commission's attention through complaints of arbitrary denial of nationality, mass expulsions of non-nationals, and resulting statelessness, which the Commission viewed through the lens of human dignity: 'forcing people to live as stateless persons ... constitutes a violation of the dignity of a human being, thereby violating article 5 of the Charter'.¹³⁴ After over a decade of addressing such cases, particularly those involving women and children, and lobbying by African national human rights institutions and international organisations, the African Commission organised a series of debates and conferences, culminating in 2013 with adoption of its Resolution 234 on the right to nationality.¹³⁵ Thereby, the Commission

express[ed] its deep concern at the arbitrary denial or deprivation of the nationality of persons or groups of persons by African states, especially as a result of discrimination on grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status¹³⁶

and declared itself to be 'convinced that it is in the general interest of the people of Africa for all African states to recognise, guarantee and facilitate the right to nationality of every person on the continent and to ensure that no one is exposed to statelessness'.¹³⁷ It therefore

131 *OSJI v Côte d'Ivoire* (n 97) paras 96-97.

132 *Nubian Community v Kenya* (n 113) para 139 (citing *Case of the Yean and Bosico Children v Dominican Republic* IACHR (8 September 2005) Ser C/ Doc 130 para 178).

133 *Nubian Community v Kenya* (n 113) para 140.

134 *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 58.

135 See African Commission on Human and Peoples' Rights 'The right to nationality in Africa: Study undertaken by the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons, pursuant to Res 234 of April 2013 and approved by the Commission at its 55th Ordinary Session, May 2014' (2015), <https://www.achpr.org/legalinstruments/detail?id=52> (accessed 6 December 2021).

136 Resolution on the right to nationality, Resolution 234, African Commission on Human and Peoples' Rights (23 April 2013) para 7, <https://www.achpr.org/sessions/resolutions?id=260> (accessed 6 December 2021) (African Commission Resolution 234).

137 African Commission Resolution 234 (n 136) para 9.

'call[ed] upon African states to refrain from taking discriminatory nationality measures and to repeal laws which deny or deprive persons of their nationality on ground of race, ethnic group, colour, [etc]'.¹³⁸

However, in terms of an actionable right for all – men, women, and children alike – the Commission alluded to a pre-existing general right to nationality, by 'recalling' article 15 of the Universal Declaration, and 'noting the provisions of other human rights treaties relating to nationality, including article 5(d)(iii) of [ICERD]';¹³⁹ and then '[reaffirm]ed that the right to nationality of every human person is a fundamental human right implied within the provisions of article 5 of the African Charter on Human and Peoples' Rights and essential to the enjoyment of other fundamental rights and freedoms under the Charter'.¹⁴⁰

The African Commission's next opportunity to address nationality as a right came in 2015, when it cited the Resolution in a communication,¹⁴¹ and in 2016 it 'confirmed this position by reaffirming' the Resolution in another communication.¹⁴²

The facts behind the latter communication, *Open Society Justice Initiative v Côte d'Ivoire*, are particularly salient to the cause of the Banyamulenge. The case was brought by a non-governmental organisation (NGO) on behalf of the Dioula people, a distinct ethnic group that had migrated from present-day Mali, south into present-day Côte d'Ivoire, several centuries ago, but who still bear the brunt of being labelled 'foreign'.¹⁴³ Ivorian nationality law grants Ivorian citizenship at birth to those 'of Ivorian origin', without defining what constitutes 'Ivorian origin'.¹⁴⁴ Politicians exploit this ambiguity to claim that the Dioula are not 'of Ivorian origin', and successive regimes have taken advantage of the vague law on nationality to pursue a discriminatory policy against the Dioula, leading to continuous civil strife and war.¹⁴⁵ The African Commission condemned the ambiguous Ivorian law as violative of articles 2 and 5 of the African Charter.¹⁴⁶ In contrast, the DRC Constitution, unlike Côte d'Ivoire's nationality law,

138 African Commission Resolution 234 para 11.

139 African Commission Resolution 234 para 5.

140 African Commission Resolution 234 para 10.

141 *Nubian Community v Kenya* (n 113) para 140 n 52.

142 *OSJI v Côte d'Ivoire* (n 97) para 97.

143 See generally Minority Rights Group International 'Côte d'Ivoire: Manding (Dioula)' *MinorityRights.org*, <https://minorityrights.org/minorities/manding-dioula/> (accessed 6 February 2021).

144 *OSJI v Côte d'Ivoire* (n 97) para 54.

145 *OSJI v Côte d'Ivoire* (n 97) paras 53-61.

146 *OSJI v Côte d'Ivoire* (n 97) para 207(ii).

indeed does define ‘Congolese origin’. Unfortunately, it does so on the basis of membership in an ethnic group – a distinction expressly prohibited by article 2 of the African Charter. A definition of ‘origin’ may be needed, but not one that perpetuates tribalism.

Therefore, in the terms of article 2 of the African Charter, to make ‘any kind’ of ‘distinction’ on the basis of ‘ethnic group’ in the ‘enjoyment of’ the right to nationality – a right ‘guaranteed in [African Charter]’ article 5,¹⁴⁷ – violates the Charter.¹⁴⁸ Because article 10 of the DRC Constitution and the corresponding nationality law plainly distinguish on the basis of ethnic group in the attribution of nationality by origin, they patently violate article 2 of the African Charter. It follows, therefore, that article 1 of the African Charter obliges the DRC to rectify its Constitution and nationality law, insofar as the DRC, by ratifying the African Charter, pledged to ‘undertake to adopt legislative or other measures to give effect to’ ‘the rights, duties and freedoms enshrined in’ the Charter.¹⁴⁹

3 DRC’s monism renders these violations actionable

Finally, the tie of citizenship to ethnic group reflected in article 10 of the DRC Constitution and its corresponding legislation runs counter to Congolese law itself. This is because the DRC Constitution expressly incorporates ‘duly ratified treaties’ into Congolese law,¹⁵⁰ and assigns to them ‘an authority superior to that of [domestic] laws’.¹⁵¹ Hence, the violation of an international instrument to which the DRC is party – such as ICERD, ICCPR and the African Charter – constitutes a violation of Congolese municipal law. Moreover, treaty provisions attain domestic force of law ‘as of their publication’, and Congolese courts may apply them directly, without a need for implementing legislation.¹⁵²

This is contrary to most common law jurisdictions, derived from Anglo-Saxon legal tradition, which take a ‘dualist’ approach to international and domestic law: viewing each as a separate legal system, and requiring explicit domestication of treaty provisions through implementing legislation before domestic courts may

147 Both by its consecration of juridical personality (human dignity plus legal status) and also via the Universal Declaration and other international instruments, notably ICERD and ICCPR.

148 Art 2 African Charter (tracking the article’s language).

149 Art 1 African Charter.

150 Art 153(4) DRC Constitution.

151 Art 215 DRC Constitution.

152 As above.

apply them.¹⁵³ Yet, the Congolese legal system is heavily derived from that of Belgium and other civil law jurisdictions. Hence the DRC Constitution, by directing Congolese judges to apply treaties and international agreements,¹⁵⁴ reflects a 'monist' theory, where international and domestic law are integrated into one system, and in which international law has pride of place.¹⁵⁵

Some criticise such internationalist monism as being unrealistic and inconsistent in practice, particularly on the African continent.¹⁵⁶ This is due to the inevitable conflict between national interests and international obligations in a world order where national sovereignty is sacrosanct.¹⁵⁷ However, the DRC has achieved success in following the monist approach, as seen in recent years through its courts having directly applied the substantive provisions of the Statute of the International Criminal Court (Rome Statute) many years before the DRC National Assembly enacted legislation domesticating the Rome Statute.¹⁵⁸

True to the monist approach, the DRC Constitution states that 'if the Constitutional Court ... declares that a treaty or international agreement contains a clause contrary to the Constitution, [its] ratification or accession may only occur after revision to the Constitution'.¹⁵⁹ This reflects the prime monist principle, namely, that treaty law has 'an authority superior to that of' national law,¹⁶⁰ and that even the national Constitution must bend to it. Granted, this provision speaks in a context of *pre*-ratification or accession. Yet, a fact of non-conformity is the same regardless of which came first, the treaty or the national Constitution.¹⁶¹ Monism militates for the correction of the domestic law whenever non-conformity with the international is revealed.¹⁶² This should be particularly true when the

153 See generally DL Sloss 'Domestic application of treaties' in DB Hollis (ed) *The Oxford guide to treaties* (2020) 358.

154 Art 153(4) DRC Constitution.

155 See generally Cassese (n 24) 215.

156 See generally Viljoen (n 121) 518.

157 See Cassese (n 24) 213-237.

158 See JB Mbokani *Congolese jurisprudence under international law: An analysis of Congolese military court decisions applying the Rome Statute* (trans 2017) (2016).

159 Art 216 DRC Constitution.

160 Art 215 DRC Constitution. Arts 215 and 216 are modelled upon the French Constitution of 1958. Viljoen (n 121) 518 fn 6.

161 Art 10 of the 2006 Constitution is substantially the same as art 10 of the DRC's first Constitution, adopted in 1964. See 'Constitution de la République Démocratique du Congo du 1er août 1964' (1 August 1964) 5 *Moniteur Congolais* 3, <https://mjp.univ-perp.fr/constit/cd1964.htm> (accessed 26 November 2020). Therefore, the provision arguably pre-dates ICERD, ICCPR and the African Charter, if indeed the temporal sequence of national and international provisions is relevant.

162 Cassese (n 24) 216 ('it follows that international values override national ones and that state officials must always strive to achieve the objectives set by international rules').

treaty's purpose has evolved into a *jus cogens* norm, on a par with the prohibitions of apartheid, slavery and genocide.¹⁶³ Therefore, within the monistic framework, should a court of competent jurisdiction find a new constitutional provision to be contrary to a previously-ratified treaty, such provision must nevertheless be brought into conformity with the treaty.

4 Conclusion

Hence, the DRC Constitution's attribution of nationality on the basis of ethnic group not only violates international human rights law but, as a practical matter, also is actionable under Congolese law. The process and procedure of such an action, beginning in the Congolese Constitutional Court and continuing in regional and international fora, is beyond the scope of this article.¹⁶⁴ Suffice it to say that Congolese human rights defenders and champions of ostracised ethnicities are not without recourse.

163 UNHR Committee General Comment 31 5 para 13 (n 103 and accompanying text).

164 For such an analysis, see DA Buzard 'The Banyamulenge and ethnocentric nationality in the Congo: A litigation strategy for peace' LLM thesis, Regent University, 2021.