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Chair, African Committee of Experts on the Rights and Welfare of the Child
% The Director
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Commission of the African Union
African Union Headquarters
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VIA COURIER AND FACSIMILE

14 April 2009

RE: Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Kenyan Nubian Minors vs. Kenya

Dear Madame Chair,

1. The Institute for Human Rights and Development in Africa (IHRDA) and the Open Society Justice Initiative seek to introduce through this letter a communication to the African Committee of Experts on the Rights and Welfare of the Child, with regard to the systematic and discriminatory denial to Nubian children in Kenya of the Kenyan nationality essential to the enjoyment of their protected human rights.
2. This denial violates Article 3 (Non-Discrimination) and Article 6 (Name and Nationality) of the African Charter on the Rights and Welfare of the Child (the "Charter"), which Kenya ratified on 25 July 2000. The denial of effective citizenship to the Nubian community causes violations of Kenyan Nubian children's rights to equal access to education, contrary to Art.11.3 of the Charter, and to non-discriminatory access to health, contrary to Art.3 as well as Art.14.2(b) and (c) of the Charter. Such discriminatory treatment also violates the prohibition against degrading treatment, protected by Art.16 of the Charter. The discriminatory denial of citizenship to Nubian adults causes violations of 20.2(a) and (b) of the Charter, pursuant to which Kenya is obliged to take appropriate measures to assist parents in furnishing children with nutrition, health care, education, clothing and housing.

Factual background

3. Kenyan Nubians, descendants from Sudanese Nubian members of the British colonial armed forces, currently number approximately 100,000.¹ After the Second World War, the British government refused to repatriate the Nubians to Sudan, and instead allocated to many of them plots of land throughout Kenya, without, however, creating an adequate settlement scheme or providing to them valid identity documents.² The majority of Nubians were allocated plots of land near Nairobi, in an area called Kibera. Upon independence, the new Kenyan government refused to recognize the Nubians' Kenyan citizenship or their claims to land. Ninety percent of the Kenyan Nubian population remains landless today, the majority of them in Kibera, which has been subsumed by Nairobi.
4. Citizenship in Kenya, while technically based on place of birth and parents' nationality, is in reality grounded in the idea that specific ethnic groups have ancestral homelands in Kenya which informed their recognition as British subjects during the colonial era and subsequently as Kenyan citizens. In the case of other groups, such as persons from the Indian sub-continent who did not have any ancestral lands, they were formally recognized as British subjects of Kenya and thus became Kenyan citizens at independence.³ The Nubians, who were also brought to Kenya by the British and were given land, have never been recognized as British subjects of Kenya and consequently Kenyan citizens. The Kenyan government's refusal to recognize the Nubians' claim to land is thus intimately linked with denial of Nubians' Kenyan citizenship: the fact that Nubians have, ostensibly, no ancestral homeland within Kenya is a justification frequently cited by government officials for denying Nubians Kenyan citizenship. Furthermore, that refusal undermines Nubian children's access to housing, education, and health care. The Kenyan government considers Kibera in particular to be 'government land', and thus asserts that the Nubians' residence there is illegal. As a result, the Kenyan government systematically refuses to pave roads or provide clean drinking water, sanitation, or health care to Kibera's residents, and schools and health clinics are fewer and of lower quality than outside Kibera, since in the eyes of the state no one should be inhabiting the area.
5. Since the late 1990s, Kenyan birth certificates have borne the caveat that "Possession of a birth certificate does not constitute proof of nationality". Section 6 of the Registration of Persons Act 1973 (Cap.107), as amended by the Registration of Persons (Amendment) Act 1987, requires that everyone should be registered at age 18 and obtain a national identity card. It is the national identity card, rather than the birth certificate, which constitutes proof of Kenyan nationality. Prior to age 18, most Kenyan children have no documentary proof of their nationality, since their birth certificates do not constitute such proof.
6. Children from most Kenyan ethnic groups are presumed to be citizens thanks to their parents' citizenship and have a legitimate expectation that they will be issued proof of their citizenship at the age of 18. Nubian children suffer from the opposite presumption: their parents' citizenship status is suspect because Nubian identity is tantamount to having no recognized homeland in Kenya, so the children lack an effective nationality. Registration officials have the discretion under Section 8 of the Registration of Persons Act to require an applicant to produce additional

¹ See Open Society Initiative, *Nubians in Kenya Appeal for their "Right to Existence,"* July 17, 2005, available at http://www.soros.org/initiatives/osiea/news/nubians_20050630.

² See Maurice Odhiambo Makoloo, *Minority Rights Group Int'l, Kenya Minorities, Indigenous Peoples and Ethnic Diversity(2005)* at page 16, available at <http://www.minorityrights.org/1050/reports/kenya-minorities-indigenous-peoples-and-ethnic-diversity.html>

³ *Id.* at 17.

evidence of eligibility for nationality “as it is within the power of that person to furnish.”⁴ When Kenyan Nubians apply for an identification card at age 18, this provision is employed to require that Kenyan Nubians undergo a vetting process that most Kenyans do not. Ultimately, Nubians often find it impossible to obtain Kenyan identity cards, or to receive them in a reasonable time. After spending their childhood in limbo, Nubian children often are not able to obtain official recognition of their Kenyan nationality.

Legal Basis of Claim

Discriminatory Denial of Nationality to all Nubians

7. The institutionalized discrimination against the Nubian community in access to nationality constitutes a violation of Nubian children’s rights under Article 3 (Non-Discrimination) of the Charter.
8. Article 3 of the Charter provides that the rights within the Charter should be granted to everyone, irrespective of ethnic group, national or social origin, or other status. The practice of the Kenyan government in denying Nubians’ Kenyan nationality as a matter of right, even when they fulfill the constitutional conditions for Kenyan nationality, constitutes discrimination.

Denial of Name and Nationality to Nubian Children

9. Nubian children’s lack of effective nationality during their childhood constitutes a violation of Article 6.3 (Name and Nationality) of the Charter.
10. Article 6.3 provides that every child has the “right to acquire a nationality”— that is, to have nationality while still a child. The fact that Kenyan birth certificates officially do not constitute proof of nationality leaves Kenyan children’s nationality in limbo. Notwithstanding the absence of proof of nationality for all children in Kenya, most children are treated as citizens before the age of majority, because of the widespread expectation that they will acquire proof of nationality through acquisition of a national identity card when they turn 18. For Nubian children, the situation is precisely the reverse. The presumption of nationality that most Kenyan children enjoy does not apply to Nubian children, and even when they become 18, many are denied proof of nationality.

Discriminatory effects of the denial of nationality

11. The denial of effective nationality and land claims of the Nubian community causes discrimination in Kenyan Nubian children’s enjoyment of the rights to education, health care, and housing, contrary to Article 11.3, Article 14.2(b) and (c), and Article 20.2(a) of the Charter.
12. A disproportionate number of Kibera’s residents are Nubian: although Nubians constitute less than 1% of Kenya’s overall population, they are nearly 20% of the population in Kibera. Similarly, approximately 70% of Kenya’s Nubians live in Kibera. Thus, disproportionate enjoyment of access to education, housing and public security by residents of Kibera is prima facie evidence of discrimination against Nubians.⁵

⁴ *Id.* at 16.

⁵ Nubians in the rest of Kenya are clustered in similar enclaves. Nubians are constrained from leaving their enclaves for two reasons. One is that their lack of identity documents means they are vulnerable to harassment if they leave, whereas inside the enclave they are relative safe from official harassment. In Kibera, for example, Kenyan police generally do not enter or conduct identity checks. The other reason is that lack of nationality constrains Nubians’ access to the formal job market; the only asset of the

13. The lack of recognition of Nubians' citizenship denies Nubian children equal enjoyment of the right to education. The government of Kenya does not guarantee free access to primary school, and all Kenyans must thus find the funds to pay for their children's education. The lack of proof of Kenyan nationality—and the continuous threats to Nubians' possession of land—institutionalizes their economic marginalization and disadvantages them in paying for education. In a survey of Kibera, UN-HABITAT found that of the 2,400 respondents who were interviewed, only 45% had completed primary education and a mere 20% had continued to the secondary level.⁶ By contrast, according to UNICEF, the general level of primary school enrollment across Kenya is 79%, and secondary school enrollment is 50%.⁷ UN-HABITAT concluded that as a result of these low-levels of education, the majority of Kibera residents “cannot access the competitive jobs in the formal (modern) sector,” and are instead relegated to lower-paying informal economic activities.⁸ Other researchers studying the well-being of adolescents residing in Kibera found that girls were much more likely to drop out of school than boys, and that both genders most often left school because their families could not afford the school fees.⁹
14. The refusal of the government to recognize Nubians' land claims and the designation of Kibera and other Nubian enclaves as “government land” negatively affect the health and housing of Nubian children, relative to other ethnic groups. The government does not provide ordinary public services, such as policing, in Kibera, since according to the government's view it is not a residential area. All housing in Kibera is, technically, ‘temporary’, and residents are not permitted to extend or even repair their houses. This is an institutionalization of slumlike conditions, even upon those Kibera residents who might have the funds to improve their living standards.
15. Surveys of Kibera and other Nubian enclaves demonstrate the degrading conditions imposed on the Nubians. UN-HABITAT has reported that “urban services are non-existent or minimal at Kibera,”¹⁰ and that health services in particular are inadequate and underutilized.¹¹ This finding was echoed in a study on child morbidity in Kibera, which found the government health facilities in the area to be inadequate and lacking in supplies and drugs.¹²

Conclusion

16. On behalf of the Nubian Children of Kenya, a full communication will be sent to the Committee of Experts on the Rights and the Welfare of Children once the Committee is seized of the case. The full communication will contain details of the facts and legal arguments that are made on behalf the children, together with evidence in support. It will also include arguments as to admissibility.

community is the land that they live on. In Kibera, many Nubians survive by renting their houses to non-Nubian Kenyans. In the rest of Kenya, Nubians farm what plots are left to them.

⁶ See UN-HABITAT/Government of Kenya, *Kibera Social and Economic Mapping: Household Survey Report 3* (February 2005).

⁷ http://www.unicef.org/infobycountry/kenya_statistics.html, accessed on 4 March 2009

⁸ *Id.*

⁹ See Annabel S. Erulkar and James K. Matheka, Population Council, *Adolescence in the Kibera Slums of Nairobi Kenya* 13 (2007) at 9. Of the 1,675 adolescents aged 10 to 19 who were interviewed, 43% of girls were out of school, compared to 29% of boys.

¹⁰ UN-HABITAT, *supra* note 31, at 8.

¹¹ *Id.* at 22-23.

¹² See Margaret Nyanchoka Keraka and Wellington Nguya Wamicha, *Child Morbidity and Mortality in Slum Environments Along Nairobi River*, 19(1) E. Af. Soc. Science Res. R. 41, 49 (2003). at 52

17. The Committee is respectfully asked to accept this introductory letter prior to the full communication being filed.

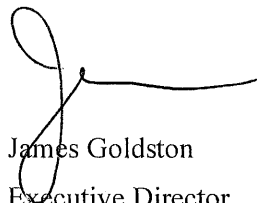
18. We would be grateful if the Committee would acknowledge receipt of this introductory letter.



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