

COMMUNICATION SUBMITTED TO THE
**AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF
THE CHILD**

Institute for Human Rights and Development in Africa
(IHRDA) and the Open Society Justice Initiative on behalf of the

Nubian Children in Kenya

against

The Republic of Kenya

ARGUMENTS ON THE MERITS OF THE COMMUNICATION

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I. INTRODUCTION

1. Children in Kenya are denied recognition of their nationality at birth. Unlike other children in Kenya, Nubian children cannot be sure that they will be accepted as citizens, as they will have to go through a long and complex vetting process to have their citizenship recognized at the age of 18. Without identity (“ID”) cards, their life prospects are slim. They are condemned to live in enclaves of poverty such as Kibera, without public utilities, and without equal access to schools and healthcare. They must endure a life with second class status.
2. This treatment of Nubian Children violates the rights protected in the African Charter on the Rights and Welfare of the Child (“the Charter”) for the following reasons.

A. Violation of the Right to Acquire a Nationality at Birth.

3. Although the Nubians have lived in Kenya for over 100 years, they were always regarded as “aliens” and continue to have an uncertain citizenship status. Children in Kenya do not have their nationality recognized at birth. While most Kenyan children have a legitimate expectation that their Kenyan citizenship will be recognized, Nubian children have no such expectation.
4. The extended denial of secure nationality status to Nubian children violates the child’s right to acquire a nationality at birth, protected by Article 6 of the Charter, and also to have that nationality registered. Without a clear nationality at birth, Nubian children are left to grow up effectively stateless and vulnerable, with an uncertain future.

B. Unlawful Discrimination against Nubian Children

5. Nubian children are treated differently from other children in Kenya because of their ethnic and religious origins, for which there is no legitimate justification, in violation of the prohibition of discrimination in Article 3 of the Charter.
6. On reaching the age of 18, Kenyan children apply for the ID cards that are necessary to prove citizenship. For most Kenyan children, this is a simple process. However, Nubian children are forced to go through a long and complex vetting procedure with an uncertain result. Some will never receive ID cards. Some will get them only after a long delay. Nubians are the only non-border people to be treated in this way.
7. While non-Nubian children grow up knowing that they will have their citizenship recognized, there is no such certainty for Nubian children. This situation has been described by the Kenyan National Commission on Human Rights as “institutionalised discrimination.”¹

¹ Ex. 1: Kenya National Commission on Human Rights, *An Identity Crisis? A Study on the Issuance of National Identity Cards* (2007), at page 10 (“KNCHR, An Identity Crisis”). Available at: [www.knchr.org/dmdocuments/Final IDsReport.pdf](http://www.knchr.org/dmdocuments/Final%20IDsReport.pdf).

C. Consequential Violations

8. As a result of their historical treatment as foreigners, their continued uncertain citizenship status, the failure to recognise their nationality at birth, and the discrimination against them, Nubian children are consigned to live without secure property rights in enclaves such as Kibera, the only ancestral homeland that they have.
9. The failure to recognize nationality or what has been called the “right to have rights,”² means that the government does not recognise the property rights of the Nubians and treats them as squatters on their own land. Consequently, the government refuses to provide public utilities to Kibera, such as water, and fails to provide equal access to education and healthcare, condemning Nubian children to a life of poverty.
10. On behalf of the Kenyan Nubian children, the Institute for Human Rights and Development in Africa (IHRDA) and the Open Society Justice Initiative hereby present arguments on the merits of this communication to the African Committee of Experts on the Rights and Welfare of the Child, request the Committee to find that the treatment of Nubian children by Kenya violates the Charter, and ask the Committee to ensure that Kenya remedies the violation.

II. STATEMENT OF THE FACTS

11. The facts submitted in this communication are supported by reports from United Nations bodies, independent researchers, academics and non-governmental organisations. They are also supported by statements taken from Nubian children living in Kenya and their parents.

A. The Kenyan Nubians

12. The Nubians are descended from the Nuba Mountains in what is now central Sudan. They were forcibly conscripted into the colonial British army in the early 1900s when Sudan was under British rule. Upon their demobilisation they requested to be returned to Sudan, but the colonial government refused. The Nubians, who by then retained no ties with Sudan and had no claim to land in that country, could not return independently to Sudan and were therefore left with no choice but to remain in Kenya.³

² This phrase was first used by the German political theorist Hannah Arendt in her book *The Origins of Totalitarianism* (1951) in which she was referring to the importance of the notion that every individual belongs to humanity, in order for their rights to be guaranteed. It has often been used to describe the importance of citizenship, most notably by the Supreme Court of the United States in the landmark decision of *Trop v. Dulles*, 356 U.S. 86 (1958) which held that the deprivation of nationality of a native-born citizen of the United States was unconstitutional (at page 102).

³ Ex. 2: Minority Rights Group International/Centre for Minority Rights Development, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity* (2005), at page 16 (“Kenya: Minorities”).

13. The British colonial authorities did allocate land for the Nubians, including the settlement known as Kibera on the outskirts of Nairobi. But the authorities did not grant British citizenship to the Nubians as they did to the Indian Railway workers they had brought from India to Kenya for labour in the late 19th Century. As such, the Nubians remained simply as British subjects under colonial rule.
14. The exact number of Nubians living in Kenya today is unknown, but estimates are in the tens of thousands.⁴ Many Nubians live in the vast slum of Kibera, near Nairobi. The remaining Nubians live in settlements in the towns of Bondo (Nyanza), Kisumu (Nyanza), Kibos (Nyanza), Mumias (Western Province), Meru (Eastern Province), Isiolo (Eastern Province), Mazeras township near Mombasa, Eldama Ravine (Rift Valley Province), Tange-Kibigori, Sondu (Nyanza), Kapsabet (Rift Valley Province), Migori (Nyanza) and Kisii (Nyanza).⁵ The Nubians are predominantly Muslim in a country that is predominantly Christian.⁶
15. At Kenyan independence, in 1963, the citizenship status of the Nubians was not directly addressed, and for a long period of time they were consistently treated by the government as “aliens.” Kenyan government officials frequently justified this position by arguing that since the Nubians had no ancestral homeland within Kenya, they could not be granted Kenyan citizenship.⁷ Since independence, successive Kenyan governments have failed to take any concrete steps to address the uncertain status of Nubians’ Kenyan nationality.⁸ The government still maintains that any Nubians who arrived in Kenya after 1945 are not citizens, creating doubt as to the status of all Nubians in Kenya.⁹
16. The refusal by the Kenyan government to recognise the Nubians’ claim to land is closely linked with the denial of Nubians’ Kenyan citizenship.¹⁰ The Nubians are caught in a vicious circle: although they were allocated land by the colonial government, their claims to land have never been recognized by the independent Kenyan government, because they were not recognised as citizens.¹¹ Lack of clear title to land makes the Nubians’ lives extremely precarious. The government has

⁴ See UNHCR Global Report 2008 - Kenya (2009), at page 65. Available at: <http://www.unhcr.org/4a2d286d2.html>. See also Ex. 1: KNHCR, An Identity Crisis, at page 10 (“Today over 100,000 Nubians live in Kenya and are scattered in several places in the country with the largest numbers found in Kibera (Nairobi).”). See also U.S. Department of State, 2008 Human Rights Report: Kenya. Available at: <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119007.htm>.

⁵ Ex. 2: Kenya: Minorities, at page 16.

⁶ *Ibid.*, at page 11 (stating that, having been colonized by a Christian nation, most Kenyans today profess to be Christians, although there is no state religion. Thus, followers of non-Christian religions are minorities. Muslims are a religious minority in Kenya, along with Buddhists, Hindus, and those Kenyans who practice traditional African religions).

⁷ Ex. 1: KNCHR, An Identity Crisis, at page 14.

⁸ *Ibid.*

⁹ Ex. 3: *The Nubian Community in Kenya v. Kenya*, Government Response to African Commission Comm. No. 317/2006, see immediately prior to Section 1.2.2.

¹⁰ Ex. 1: KNHCR, An Identity Crisis, at page 14.

¹¹ See generally Ex. 4: Douglas H. Johnson, “Tribe or Nationality? The Sudanese Diaspora and the Kenyan Nubis”, 3 *Journal of East African Studies* (2009) 112-131.

made public statements that Kibera is not owned by Nubians, causing immense problems for the Nubian inhabitants. They are often forcibly and arbitrarily expelled from lands they have occupied for decades and are unable to fight these evictions in court because they lack legal title. In almost all the areas where they live in Kenya, Nubians live, technically, as squatters.¹² This leads to the marginalisation of Kenyan Nubians, particularly Nubian children.

17. Nubians in Kibera are confined to live precariously in settlements designated as “government land” and to which they have no legal title, and which are provided with virtually no public services: “About 94 per cent of the households lack basic physical and social infrastructure and security of tenure.”¹³ A study by the United Nations reveals that only 44% of Kibera’s residents have a regular income.¹⁴ In addition, they suffer poor health and nutrition, literacy and educational performance, and physical infrastructure.¹⁵ As Zura Abdul Aziz, who has lived her entire life in Kibera explains:

“I have never seen the City Council or government collecting garbage or cleaning. The standing water breeds mosquitoes which can cause disease. There is no system for sewage in Kibera, but there are such systems in other surrounding areas.”¹⁶

18. Nubians in the rest of Kenya are clustered in similar enclaves.¹⁷ 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.¹⁸ 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 community, tenuous though it is, is the land that they

¹² Ex. 5: Centre on Housing Rights and Evictions (COHRE), *Listening to the Poor? Housing Rights in Nairobi, Kenya* (2005), at page 18 (“Listening to the Poor”).

¹³ *Ibid.*, at page 23.

¹⁴ Ex. 6: UN-HABITAT/Government of Kenya, *Kibera Social and Economic Mapping: Household Survey Report* (February 2005), at page 5 (“Kibera Mapping”). Available at: www.unhabitat.org.

¹⁵ See generally Ex. 7: Centre on Housing Rights and Evictions (COHRE), *Rapid Assessment of the Water and Sanitation Situation within Informal Settlements in Nairobi* (2008) (“Rapid Assessment”). Available at: www.cohre.org. In addition, see generally Ex. 6: Kibera Mapping; and Ex. 8: African Population and Health Research Centre (APHRC), *Population and Health Dynamics in Nairobi’s Informal Settlements: Report of the Nairobi Cross-sectional Slums Survey (NCSS) 2000* (2002) (“Population and Health Dynamics”). Available at: www.aphrc.org.

Each of these reports details statistics of the poor living conditions of residents of Kibera, which has the largest concentration of Nubians in Kenya.

¹⁶ Ex. 9: Affidavit of Zura Abdul Aziz, 24 October 2007, at para. 13.

¹⁷ Ex. 2: Kenya: Minorities, at page 4.

¹⁸ Ex. 10: Bronwen Manby, *Struggles for Citizenship in Africa* (Open Society Justice Initiative, 2009), at page 124-125 (“Struggles for Citizenship”). See also Ex. 11: Open Society Justice Initiative, “Kenyan Nubians: Without Papers, Who Are You?”, *Report on Developments 2005-2007* (2007), at page 18.

live on.¹⁹ In Kibera, many Nubians survive by renting their houses to non-Nubian Kenyans.²⁰ In the rest of Kenya, Nubians farm what plots are left to them.

B. Refusal to Register Births of Nubian Children

19. A major difficulty in making the right to nationality effective for Nubian children is the fact that many Nubian parents have difficulty in registering the birth of their children. Many public hospital officials refuse to issue birth certificates to Nubian children.

20. One Nubian mother, Fatuma Kadara Sebit, expressed her difficulty in obtaining birth certificates for her children:

“None of my children has a birth certificates because of certain complications. They were all born at home not in a hospital. First, the people working at the birth registry demanded money from me to prepare birth certificates. Not having the money, I was not able to get birth certificates for my children.”²¹

21. The fact that many Nubian parents lack valid identity documents further complicates their efforts to register their children’s births. The testimony of Shafir Ali Hussein shows how delays frustrate the registration of Nubian children even when their parents have IDs. He recounts:

“I have one child, she is 1½ years old [...]. I have been trying to get her a birth certificate since late December 2005 [...]. I went to Sheria House where I was given a form to fill. I filled out the form and took it back. I was told to go to City Hall. At City Hall I was asked for my wife’s clinic card and my daughter’s clinic card. I brought these cards back but I was told that they were not stamped. I had to return to the hospital and get them stamped. I took the stamped cards back to City Hall but could not find the person I was dealing with. After some visits, I found the officer and he told me to fill in a form B3. The form asked the names of the child, the father, and the mother and the date of birth of the child. I filled out the form. I then had to take the form to the Chief and Sub-Chief for signatures. I returned the form to the City Hall on Tuesday 4 February 2006. I am waiting for a response. I do not feel good about this process. The reason they are giving me all these hurdles are because of the Muslim name.”²²

¹⁹ *Ibid.*, at page 125 (“[Abdalla Ali Ramadhan] cannot be formally employed without an ID card, something which significantly contributes to unemployment and poverty amongst Nubians.”).

²⁰ Yet the security of even this income is jeopardized by the continued denial of Nubians’ Kenyan nationality. According to Zuhura Adam: “Since 2001, tenants in my house have been refusing to pay [rent] following the Presidential declaration that Kibera is government land. It was in a public meeting that the area Member of Parliament (MP) stated that rents in Kibera are too high. The President responded by saying Kibera is government land and no one should be getting high rents on houses. What followed were ethnic conflicts and near rebellion where tenants refuse to pay rent.” See Ex. 9: Affidavit of Zuhura Adam, 24 October 2007, at para. 10.

²¹ Ex. 13: Affidavit of Fatuma Kadara Sebit, 24 October 2007, at para 5.

²² Ex. 14: Affidavit of Shafir Ali Hussein, 9 February 2006, at para. 16-18.

C. Refusal to Grant Citizenship to Nubian Children on their Reaching the Age of Majority

22. Children in Kenya have no proof of their citizenship. For most children in Kenya, this is not a problem in practice, as they have a legitimate expectation that they will be recognised as citizens when they reach the age of 18. However, Nubian children do not have such an expectation, as many Nubians are not granted the ID cards that are essential to prove citizenship, or only get them after a long delay. This uncertainty means that the future prospects of Nubian children are severely limited, and they are condemned to live as stateless persons.

Citizenship law in Kenya

23. Nubians are entitled to Kenyan nationality under Kenyan law. However, their historical classification as “aliens” has left them with a tenuous citizenship status. Therefore, they effectively live as stateless persons without adequate protection from the state, and without enjoying their rights under national and international law as a result of systematic discrimination by the authorities.
24. Citizenship in Kenya is governed by Chapter VI of the Constitution of Kenya. Section 87 provides for citizenship as follows:

“Every person who, having been born in Kenya, is on 11th December 1963 a citizen of the United Kingdom and colonies or a British protected person shall become a citizen of Kenya on 12th December 1963; Provided that a person shall not become a citizen of Kenya by virtue of this subsection if neither of his parents was born in Kenya.

Every person who, having been born outside Kenya, is on 11th December 1963 a citizen of the United Kingdom and Colonies or a British protected person shall, if his father becomes, or would but for his death, have become, a citizen of Kenya by virtue of subsection (1), become a citizen of Kenya on 12th December 1963.”

25. The British Nationality Act of 1949 defines a British protected person as one who, being a British subject, had a close relationship either through birth or descent with the UK and its remaining colonies. This group included indigenous populations and ethnic communities living in Kenya under colonial rule,²³ like the Nubians.
26. 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; except that a person shall not become a citizen of Kenya by virtue of this section if at the date of his birth –

- a) his father possesses immunity from suit and legal process as is accorded to the envoy of a foreign state accredited to Kenya; or

²³ Ex. 15: J. B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Acts Press, African Centre for Technology Studies, 1990).

- b) his father is a citizen of a country with which Kenya is at war and the birth occurs in a place then under occupation by that country.”
27. Under this legal scheme, Kenyan Nubians who were born in Kenya before 11th December 1963 who had at least one parent who was born in Kenya are Kenyan citizens by operation of law, and those born in Kenya after that date are citizens if one of their parents was a citizen at the time of their birth. The few Kenyan Nubians born before or after 1963 of parents who were not born in Kenya or neither of whom were Kenyan citizens are still entitled to Kenyan citizenship through application.
28. Therefore, virtually all Kenyan Nubians descendant from those who were forcibly conscripted and displaced from Sudan and settled in Kenya by the British are entitled to Kenyan citizenship by law.²⁴
29. Since the late 1990s, Kenyan birth certificates have borne the caveat “Note: A Certificate of Birth is not proof of Kenya Citizenship.”²⁵ Prior to age 18, most Kenyan children have no documentary proof of their nationality, since their birth certificates do not constitute such proof. It is the national identity card (“ID card”), obtained only at age 18, rather than the birth certificate, which constitutes proof of Kenyan nationality.

“It is the right of every Kenyan attaining 18 years to register and be issued with a National Identity Card (ID). A National Identity Card represents ‘proof’ of Kenyan citizenship without which an individual cannot vote, purchase property, access higher education or even obtain employment; further, those without the document find themselves victims of arrest and extortion by the police on spurious grounds.”²⁶

Applying for an ID Card: The Vetting Process for Nubians

30. Nubians are required to undergo a vetting process in order to obtain the national identity card that is necessary for recognition of their citizenship and essential for everyday life.²⁷ Only two other communities are subjected to the vetting process, the Kenyan Somalis and Kenyan Arabs, both of whom share the same Muslim faith of the Nubians, but both of whom, unlike the Nubians, are communities that live near Kenya’s borders.²⁸
31. Under the Registration of Persons Act, any person who has attained the age of 18 years and meets the requirements of citizenship under the Kenyan Constitution,

²⁴ This would include those Nubians born outside Kenya before independence whose father did not become, and was not entitled to become, a Kenyan citizen upon independence.

²⁵ Ex. 16: Certificate of Birth of Abdul Rahim.

²⁶ Ex. 1: KNCHR, An Identity Crisis, at page 6.

²⁷ Nubians are also affected by other difficulties such as the refusal by hospital authorities to register births of Nubian children and failure by the State to issue late registration of births. See Ex. 17: Korir A. Singo’ei and Adam H. Adam in conjunction with the Kenyan Nubian Council of Elders, *Covert Racism. The Kibera Clashes: An Audit of Political Manipulation of Citizenship in Kenya And 100 years of Nubians’ Landlessness*” (2002), at page 43.

²⁸ See generally Ex. 1: KNCHR, An Identity Crisis.

shall be eligible for registration. Upon registration, Kenyan national identity (“ID”) cards are issued. Under Section 8 of the Act, registration officials have the discretion to require an applicant to produce additional evidence of eligibility for nationality “as it is within the power of that person to furnish.”²⁹

32. Section 8 is commonly used to require that, alone among non-border populations in Kenya, Kenyan Nubians undergo an extensive and burdensome “vetting” process prior to securing the ID card that is essential to prove the citizenship to which they are entitled under Kenyan law. Non-Nubians do not need to undergo this process and “only need to produce the ID of one parent and a baptismal certificate from the church” to be issued with identification documents.³⁰
33. The vetting process typically consists of the following. First, a Kenyan Nubian candidate must produce documents, including their parents’ and grand-parents’ identification documents, which in many cases do not exist.³¹ The candidate must then undergo questioning by a “vetting committee”. The vetting committees are generally comprised of a District Officer (as chair and convener), a registration officer (as secretary), chiefs, village elders, and intelligence officers. Finally, the candidate must swear an oath before a Magistrate, and pay a fee.³²
34. In a report by the Kenya National Commission on Human Rights (KNCHR) the practice of vetting is described as “a requirement without any legal or official basis for the registration of applicants resident in urban settings and border districts.”³³ Vetting committees are not established under the authority of the Registration of Persons Act,³⁴ and the report suggests that in trying to establish the legal basis of the vetting committees, a number of informants talked about guidelines and circulars which could not be specified.³⁵
35. An elder from the Nubian Vetting Committee in Kibera concludes:

“The Nubians face more rigorous processes and scrutiny. It takes very long to obtain an ID and in some cases Nubians are simply denied IDs. This ensures further marginalization of the Nubians.”³⁶

²⁹ Ex. 18: Registration of Persons Act (1973) as amended by the Registration of Persons (Amendment) Act (1987), at para. 8. Available at: <http://www.kenyalaw.org>.

³⁰ Ex. 19: Affidavit of Abdallah Sebit, 9 February 2006, at para. 11. See also Ex. 20: Affidavit of Ali Hussein Mursall, 9 February 2006, at para. 8-9; and Ex. 21: Michael Mugwanga, “Application forms for IDs Run Out”, *Kenya Daily Nation* (21 January 2006).

³¹ See generally Ex. 1: KNCHR, An Identity Crisis.

³² *Ibid.*, at page 22.

³³ *Ibid.* (emphasis added).

³⁴ *Ibid.* The vetting committees consist of politically selected elders and members of the Provincial Administration and Civil Service. Section 8 of the Registration of Persons Act empowers a Registration Officer to require “any person” registered under the Act to furnish such documentary or other evidence of the truth of the information given by that person. Any directive targeting an entire community for identity verification would be *ultra vires*.

³⁵ *Ibid.*

³⁶ Ex. 1: KNHCR, An Identity Crisis, at page 11.

36. Zuhura Adam describes the difficulties of the “vetting process” in the following way:

“I have participated in the two vetting process for my children. First the elders vet the child in Kibera where they produce a letter certifying that the child is indeed a Nubian whom they know. Then the child has to go to Nyayo House for further vetting before a panel of 10 or 12 people. At this point the child has to produce their birth certificate, parents’ ID cards, and school leaving certificate. On certifying that the documents are the child’s and that he has duly answered all the questions that you go to Milimani Court to be sworn in and pay Kshs 500.”³⁷

37. Zena Ahmed describes the process for her children:

“[M]y children have been vetted by the elders in the presence of village Chiefs and myself. During the vetting I was asked to state my tribe, my clan, my resident and parents. I also produced my grandparents ID which I had. This was done for all my children...My children were vetted and were required to produce school leaving certificate and vetting letter from elders, and were sworn in Court. Only after all this they were allowed apply for ID.”³⁸

38. The Kenyan National Commission on Human Rights concluded the following:

“The difficulty experienced in the legal status of Nubians is caused by two factors: the first is that Kenyan citizenship is linked to ethnic identity and Nubians are yet to receive official recognition as a Kenyan ethnic grouping. The second factor is the constitutional failure to provide definite transitional clauses with respect to citizenship status of immigrants who had obtained residence in Kenya several years prior to independence. Consequently, there has been a systemic violation against Nubians and other Kenyans deemed of foreign origin since independence with respect to citizenship laws and issuance of identity cards.”³⁹

D. Life in Kibera: The Consequences of the Deprivation of Effective Citizenship

39. The vetting process means that citizenship is uncertain for Nubian children, as they will face severe delays in securing their ID cards, and some of them will never receive them. While other children grow up knowing that they are citizens, and will be able to prove that they are citizens when they are 18, Nubian children enjoy no such certainty, and they are deprived of the consequential rights and benefits of citizenship. Nubians grow up knowing that they will not have equal access to

³⁷ Ex. 12: Affidavit of Zuhura Adam, 24 October 2007, at para. 6.

³⁸ Ex. 22: Affidavit of Zena Ahmed, 26 October 2007, at para. 5-6.

³⁹ Ex. 1: KNCHR, An Identity Crisis, at page 14.

employment, may not have the right to vote and work in the formal sector, and may not be able to travel.⁴⁰

40. ID cards are required for nearly all official transactions. Beyond securing employment in the formal sector and voting, the lack of ID bars individuals from opening a bank account or to seek a range of public services.⁴¹ Lack of ID also restricts entrance into certain government offices,⁴² as well as access to any license, permit or other government document.⁴³ The most serious problem caused by lack of a national ID is police harassment: security agents often demand to be shown national IDs to forestall arrest.⁴⁴
41. The anxiety experienced by Nubian children vis-à-vis the very limited future prospects they face due to the numerous obstacles in securing ID cards is evident in the testimony of Arafa Ali, who has stated that:

“I am worried about getting an ID card when I turn 18. ID cards are important because I will need one to get a job or open a bank account.”⁴⁵

42. The lack of an ID card causes uncertainty for children and young Kenyans:

“My son Sebi Ismail applied for ID in 2005 while in school, the Kiptoin Secondary School in Koibatek. All the applicants in that school got their IDs except my son and another Nubian boy. They were told they were not Kenyans and had to reapply and be vetted. It took one year since he reapplied to get the ID. During the period while waiting for his ID my son could not apply for jobs or higher education.”⁴⁶
43. As a result, Nubian children are left to begin their lives in enclaves, marginalized from society. The largest of these enclaves is Kibera, where Nubian children live in poverty, with low levels of income, poor health and nutrition, literacy and educational performance.⁴⁷

1. Poor Housing

44. Nubian children in Kibera suffer from poor housing as a result of the insecurity that arises from the uncertain citizenship status of Kenyan Nubians. As outlined in

⁴⁰ Ex. 1: KNCHR, *An Identity Crisis*, at page 5-6. The Report notes that National ID Cards are required to prove Kenyan citizenship, and are necessary for the enjoyment of basic rights in Kenya such as the right to vote, own property, access basic social services, employment, marriage, and family and the freedom of movement. Their difficulties in obtaining ID cards means that Nubians suffer violations of these rights.

⁴¹ Ex. 24: *Row on ID Cards Tender Rages*, Daily Nation, 7 February 2006.

⁴² Ex. 1: KNCHR, *An Identity Crisis*, at page 6; Ex. 26: Affidavit of Mariam Gharib Ahmed, 9 February 2006, at para. 13.

⁴³ Ex. 25 Gitonka Muriuki, “Demands by Officers to See ID Cards Illegal”, *Kenya Daily Nation*, 6 February 2006.

⁴⁴ Ex. 22: Affidavit of Zena Ahmed, 26 October 2007, at para. 7.

⁴⁵ Ex. 23: Affidavit of Arafa Ali, 24 October 2007, at para. 6.

⁴⁶ Ex. 22: Affidavit of Zena Ahmed, 26 October 2007, at para. 7.

⁴⁷ See generally Ex. 7: Rapid Assessment; Ex. 6: Kibera Mapping; and Ex. 8: Population and Health Dynamics. Each of these reports details statistics of the poor living conditions of residents of Kibera, which has the largest concentration of Nubians in Kenya.

paragraph 16 above, the Kenyan government asserts that the land in Kibera – where the majority of Nubians live – is government land and that the Nubians are occupying it illegally.⁴⁸ Consequently, the Kenyan government systematically refuses to construct roads, provide clean drinking water, sanitation, policing, or health care for Kibera’s residents, as they do not consider it a “residential” area.

45. All housing in Kibera is, technically, “temporary”, and residents are not permitted to extend or even repair their houses. As Zura Abdul Aziz explains, the process only applies to Nubians:

“There is a process that Nubians in Kibera must go through in order to make repairs on their house. You have to write an application to the Chief and include photographs of the place that you want to repair. Then the Chief has to come and see it, when he is satisfied he forwards it to the district office, and then final authority is given to make repairs. This process is only for Nubians.”⁴⁹

46. If this process is not followed the renovations will be removed:

“If you decide to do repairs without getting permission first and the Chief’s office finds out, then they will send people to come and undo the repairs. These people who tear down the repairs in your home are from the Chief’s office and they work for the government administration. I have not seen this happen anywhere but Kibera.”⁵⁰

47. Others testify that this process only applies in Kibera:

“I do not understand why the chief has to interfere when it is our house we are trying to repair. In Kisumu it is not like this. You do not need permission to fix your house. I do not know of any place in Kenya where you need permission from the government before you can fix your house. Last year our roof caved in and we had to get permission from the chief to repair it.”⁵¹

48. Mrs. Zubeda Kasim, a Nubian mother, describes the living conditions that she and her family live in:

“We have poor sanitation. The pit latrines get filled up quickly because of the congestion in my house and the owner of the house is not willing to empty them. There is frequent water shortage and I have to fetch water quite a distance from where I live. My two elder children assist me in fetching water for the house.”⁵²

2. Poor Education

49. As a result of their uncertain citizenship status, many Nubian children in Kibera do not receive an effective education. While primary education is provided free of

⁴⁸ Ex. 5: Listening to the Poor, at page 28.

⁴⁹ Ex. 9: Affidavit of Zura Abdul Aziz, 24 October 2007, at para. 11.

⁵⁰ Ex. 27: Affidavit of Asmin Barya, 24 October 2007, at para. 11.

⁵¹ Ex. 28, Affidavit of Halima Hamis, 24 October 2007, at para. 6.

⁵² Ex. 30: Affidavit of Zubeda Kasim, 24 October 2007, at para. 14.

charge in Kenya, in Kibera the government provides an insufficient number of schools for all the children living there. As a result, classes in Kibera are overcrowded. Denied equal access to the job market, Nubian parents are often unable to afford the cost of stationery and uniforms, preventing their children from attending school. Secondary education is not provided for free, and there is little chance for Nubian children to continue their education as their parents are too poor to afford it.

50. In a 2005 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.⁵³ The general level of primary school enrollment across Kenya is 79%, and secondary school enrollment is 50%.⁵⁴ 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.⁵⁵ 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.⁵⁶

51. Zakia Yusuf describes the low quality of education and the overcrowded facilities:

“My son is complaining because the school is not good. They will turn children out from school if they do not have the money. The teachers say the children are too much. There are 1,000 children in the school, and the school is overcrowded. The books are not enough at school. There are 80 kids in his class. The teacher cannot reach all of them, the classes are filled so it’s impossible. Education is very low, if you pay more money for tuition then when the other students leave then the teacher spends extra time with your child. I want my child to get a good education. He has to share his textbook, it is very expensive to buy, so it is hard.”⁵⁷

52. Mwajuma Bashir discusses the financial constraints of primary school and the discrimination Nubians face in obtaining bursaries for secondary education.

“I believe that the government discriminates when giving out bursaries to assist with the cost of secondary school. I believe this is why very few Nubians in my community have been able to go to secondary school. When my daughters finished class 8, I went to the government’s Education Office to seek funds to send my daughters to secondary school. I went with a group of other Nubians

⁵³ Ex. 6: Kibera Mapping, at page 14.

⁵⁴ Ex. 31: UNICEF, *Info by Country: Kenya*. Available at: http://www.unicef.org/infobycountry/kenya_statistics.html.

⁵⁵ *Ibid.*

⁵⁶ Ex. 32: Annabel S. Erulkar and James K. Matheka, *Adolescence in the Kibera Slums of Nairobi Kenya* (Population Council, 2007), at page 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.

⁵⁷ Ex. 33: Affidavit of Zakia Yusuf, 24 October 2007, at para. 10.

seeking the same thing. We were all denied, and I have received no government assistance to educate my own children, nor the children that I care for.”⁵⁸

53. Medina Juma Suleiman, aged 16, describes the discrimination she has experienced:

“If you’re a Nubian the head teacher treats you differently...They think Nubians need punishment. Sometimes you can just see it on the head teacher’s face. Some teachers treat you badly and call the Nubian children names like dogs, prostitutes, and wolves. I have been called such names but there is no use in telling other teachers because they never believe us. When you’re in class and you’ve made noise the teacher will say things like ‘You Muslims, you like to make noise,’ just to make you feel bad.”⁵⁹

3. Poor Health Care

54. Uncertain and discriminatory citizenship status also has an effect on the poor quality of health care for Nubian children in Kibera, in particular because of the government’s refusal to provide a sufficient number of health clinics and related facilities to persons whose nationality it denies.

55. Mrs. Fatuma Kadara Sebit, a Nubian woman caring for her grandson Ibrahim describes the poor quality of the healthcare available in Kibera:

“Whenever he is sick, I have to take him to a private clinic in Kibera. I do not take him to a government hospital because they are far from here. I do not think there are enough hospitals and schools here in Kibera.

The sanitary conditions in our neighborhood are poor. There are not enough toilets. There are no drains and waste water from our neighbor’s houses runs in front of my house. ... These insanitary conditions make Ibrahim fall sick often. We have a toilet which is also used by the community. My household maintains the toilet.”⁶⁰

III. VIOLATIONS OF THE CHARTER

56. The facts described above disclose violations of the following rights protected by the African Charter on the Rights and Welfare of the Child (“The Charter”).

- *A. Violation of the Right to Acquire a Nationality at Birth.* The failure to recognize the nationality of Nubian children at birth, coupled with the tenuous nature of their citizenship status even upon reaching the age of majority, deprives them of their nationality, and violates the Charter which guarantees the right of children to acquire a nationality.
- *B. Unlawful Discrimination against Nubian Children.* Nubian children are treated differently in access to nationality because they are Nubian, for which

⁵⁸ Ex. 34: Affidavit of Mwajuma Bashir, 26 October 2007, at para. 9.

⁵⁹ Ex. 36: Affidavit of Medina Juma Suleiman, 24 October 2007, at para. 5.

⁶⁰ Ex. 13: Affidavit of Fatuma Kadara Sebit, 24 October 2007, at para. 8-9.

there is no legitimate justification, violating the prohibition of discrimination in Article 3 of the Charter.

- *C. Consequential Violations.* As a result of the failure to recognize their nationality at birth, and the discrimination against them, further rights of the Nubian children under the Charter are violated.

A. Violation of the Right to Acquire a Nationality at Birth – Article 6

57. The failure to recognize the nationality of the Nubian children at birth violates their rights under the Charter, including (1) the right to nationality, which must be an effective right, (2) the duty to register children and their nationality at birth, and (3) the right of Nubian children to be treated with dignity.

1. Nubian children have a right to nationality

58. The failure to register Nubian children at birth, coupled with the tenuous nature of their Kenyan nationality upon reaching the age of majority, violates the right to nationality of the Nubian children, and their right not to be arbitrarily denied it. This right is firmly grounded in African human rights standards and in international law more broadly. Nubian children in Kenya are not recognized as citizens, have no legitimate expectation of citizenship, and are left effectively stateless.

59. Article 6(3) of the Charter provides that “every child has the right to acquire a nationality.” Article 6(4) of the Charter says:

“States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.”

60. The language of the Charter is plain, but it should also be read in light of the right to a nationality under international law, which is clearly affirmed in the Universal Declaration of Human Rights (Article 15), the International Covenant on Civil and Political Rights (Article 24), and the Convention on the Rights of the Child (Article 7). The United Nations Commission on Human Rights noted in a 1997 resolution “the importance of the right to nationality of every human person as an inalienable human right,” and that “arbitrary deprivation of nationality on racial, ethnic, or religious grounds is a violation of human rights and fundamental freedoms.” A resolution of the UN Human Rights Council in 2008 explicitly called for States:

“to refrain from taking discriminatory measures and from enacting or maintaining legislation that would arbitrarily deprive persons of their nationality on grounds of race, colour, gender, religion, political opinion or national or ethnic origin, especially if such measures and legislation render a person stateless.”⁶¹

⁶¹ UN Human Rights Committee Res. A/HRC/7/L.27, 3 March 2008.

61. In several cases concerning arbitrary denial or deprivation of citizenship, the African Commission of Human and Peoples' Rights has found that citizenship is essential to the enjoyment of other rights guaranteed by the African Charter.⁶²
62. The importance of the right to nationality is recognized as the legal bond that guarantees individuals the full enjoyment of all human rights as a member the political community:

“[Nationality] is one of the most important rights of man, after the right to life itself, because all other prerogative guarantees and benefits man derives from his membership in a political and social community – the States – stem from or are supported by this right.”⁶³
63. The corollary of the right to nationality is the prohibition of statelessness, which is a status given to a person “who is not considered as a national by any State under the operation of its law.”⁶⁴ This includes those individuals who do not enjoy state protection or the benefits flowing from citizenship in a state.
64. Kenyan law also recognizes the right of children to nationality. The Children's Act of Kenya provides that:

“Every child has a right to a name and nationality. Where a child is deprived of his identity, the Government shall provide assistance and protection with a view to establishing his or her identity.”⁶⁵
65. International law places special emphasis on the right to nationality enjoyed by children.⁶⁶ In particular, Article 7(2) of the UN Convention on the Rights of the Child echoes the text of Article 6(4) of the Charter which obliges states to grant citizenship to children born within their territory where such children would otherwise be stateless.⁶⁷ The UN Human Rights Council has recognized “the special needs of children for protection against arbitrary deprivation of nationality.”⁶⁸
66. The right to nationality must be protected effectively in practice as well as in theory. In order to fulfil this requirement the procedures governing access to nationality must be clear, and they must afford access without undue delay, and

⁶² See *Modise v. Botswana*, ACHPR Decision of 6 November 2000, Comm'n No. 97/93; *Malawi African Ass'n v. Mauritana*, ACHPR Decision of 11 May 2000, Comm'n Nos. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98; *Amnesty International v. Zambia*, ACHPR Decision of 5 May 1999, Comm. No. 212/98.

⁶³ Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Chile*, Inter-Am. C.H.R. OEA/Ser.L/V/II/40 Doc. 10, 11 February 1977, at para. 10.

⁶⁴ Art. 1, Convention Relating to the Status of Stateless Persons (1954).

⁶⁵ Ex. 37: Children's Act of 2001, Chapter 586, Laws of Kenya, at para. 11.

⁶⁶ Art. 24 ICCPR; Art.7 CRC; African Charter on the Rights and Welfare of the Child, O.A.U. Doc. CAB/LEG/24.9/49, 11 July 1990, at Art. 6.

⁶⁷ Art. 7(2) CRC: “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”.

⁶⁸ UN Human Rights Council Res. 10/13, 26 March 2009 (Tenth Session), at para. 8.

with no financial obstacles that unduly restrict the recognition of nationality.⁶⁹ Individuals must be able to access the procedures in place without any fear of discrimination. Due process safeguards must be in place to allow for review or appeal in instances where the above guarantees have not been met.

67. Under the African Charter on Human and Peoples' Rights, such obligations come within the duty to respect, protect, promote *and fulfill* rights under that instrument. This principle was unequivocally upheld in the *Ogoni* decision, where the Commission stated that:

“At a primary level, the obligation to **respect** entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.”⁷⁰

“At a secondary level, the State is obliged to **protect** right-holders against other subjects by legislation and *provision of effective remedies*. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to **promote** the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.”⁷¹

“The last layer of obligation requires the State to **fulfill** the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights.”⁷²

68. In light of the above, Kenya is obliged to provide effective nationality for the Nubian children by recognizing it at birth both in law and in practice, so as to protect and promote their human rights.

⁶⁹ Comparable principles relating to availability and accessibility can be found in relation to the rights to education, housing and health, as evidenced, respectively in General Comment 13, The right to education (Article 13 of the International Covenant on Economic, Social, and Cultural Rights), 8 December 1999, at paras. 6(a)-(b); General Comment 4, The right to adequate housing (article 11 of the International Covenant on Economic, Social, and Cultural Rights), 13 August 1991, at paras. 8(c)-(e); General Comment 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2000, at paras. 12(a)-(b).

⁷⁰ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, ACHPR Decision of 27 October 2001, Comm'n No. 155/96, at para. 45.

⁷¹ *Ibid.*, at para 46 [emphasis added].

⁷² *Ibid.*, at para 47.

2. The Kenyan Government has a Duty to Register Children and their Nationality at Birth

69. The treatment of the Nubian children violates their right to be registered at the time of their birth, and to have their nationality recognized at that time, so as not to leave them in the vulnerable position of being stateless.
70. As described in the facts above, many Nubian parents have difficulty in registering the birth of their children. Many public hospital officials refuse to issue birth certificates to Nubian children. Those birth certificates that are issued do not confer nationality.
71. Article 6(2) of the Charter recognizes that a child's citizenship begins with the registration of their birth:
- “Every child shall be registered immediately after birth.”
72. UNICEF has defined registration of births as:
- “[T]he State's first official acknowledgement of the child's existence; it represents a recognition of each child's individual importance to the State and of the child's status under the law. Where children are not registered, they are less likely to be visible, and sometimes less valued citizens.”⁷³
73. The Committee on the Rights of the Child has emphasized the integral role of prompt birth registration and issuance of birth certificates in accessing children's rights:
- “Comprehensive services for early childhood begin at birth [...]. As a first step in ensuring the rights to survival, development and access to quality services for all children (art. 6), the Committee recommends that States parties take all necessary measures to ensure that all children are registered at birth. [...] [A]ll children should be registered at birth, without discrimination of any kind (art. 2).”⁷⁴
74. The UN Human Rights Committee explains the importance of the right of registration at birth **in the context of the right to acquire a nationality**:
- “Special attention should also be paid, in the context of the protection to be granted to children, to the right of every child to acquire a nationality [...]. While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no

⁷³ Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, (UNICEF, 2007).

⁷⁴ UN Committee on the Rights of the Child, General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, UN Doc. CRC/C/GC/7/Rev.1, 20 September 2006, at para. 25.

discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.”⁷⁵

75. Kenya should amend its law and practice such that the nationality of all children is determined when they are born. Given the language carried by birth certificates that they are not proof of citizenship, children are left in an ambiguous situation contrary to Article 6 of the Charter. This is particularly so for Nubian children, insofar as, unlike other Kenyan children, Nubians have no reasonable expectation that, upon reaching the age of 18, they will secure Kenyan nationality. It becomes ever more difficult to prove a child’s nationality as the years pass—parents may die, lose their documents, or become separated from their children; records of birth may be lost. Determining and documenting citizenship at birth provides the best protection for children and is also most straightforward for states—as is clear from the fact that most countries do indeed make this their practice.⁷⁶ There is no justification for leaving the determination of citizenship until age 18 for everyone, especially given the serious consequence for Nubian children who suffer statelessness during childhood as a result.

3. The Duty to Protect the Dignity of Children

76. The treatment of the Nubian children violates their right under the Charter to be treated with dignity, and the positive obligation of the State to protect vulnerable individuals such as children. Given the history of poverty and discrimination against Nubian children, which are closely linked to, and/or emanate from, their uncertain citizenship status, the government should be taking special measures to improve their access to education, health care, housing, and other fundamental aspects of a dignified existence.
77. The Charter explicitly recognizes in its preamble that:
- “[T]he child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.”⁷⁷
78. The duty to protect the dignity of the child is repeated throughout the Charter, emphasizing the importance accorded to the principles of “freedom, equality, justice and dignity [as] essential objectives for the achievement of the legitimate aspirations of the African peoples”, upheld in both the Charter of the Organization of African Unity and the African Charter on Human and Peoples’ Rights.⁷⁸

⁷⁵ UN Human Rights Committee, General Comment 17 on the Rights of the Child (Article 24), 7 April 1989, at para. 8 [emphasis added].

⁷⁶ See Ex.10, Struggles for Citizenship.

⁷⁷ African Charter on the Rights and Welfare of the Child, Preamble.

⁷⁸ See Charter of the Organization of African Unity, Preamble; and African Charter on Human and Peoples Rights, Preamble.

79. In the *Modise* decision, the African Commission on Human and Peoples' Rights ruled that living as a stateless person was "degrading treatment".⁷⁹ In a case involving the denial of nationality to two school-girls in the Dominican Republic, the Inter-American Court of Human Rights recognized the importance of nationality as a prerequisite for the recognition of an individual's legal identity, concluding that:

"the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals."⁸⁰

80. The respect for the right to nationality is crucial for the dignity of the human person, and the State therefore has a special duty to effectively secure and protect it.

B. Unlawful Discrimination against Nubian Children – Article 3

81. Nubian children are treated differently from other children in Kenya, for which there is no legitimate justification, amounting to unlawful discrimination, in violation of Article 3 of the Charter. Nubians are treated differently because unlike other children in Kenya they are required to undergo a vetting process to acquire proof of their nationality at 18, they do not have a legitimate expectation of citizenship, and they are left effectively stateless. As the Kenya National Commission on Human Rights concluded:

"The process of vetting ... Nubians ... is discriminatory and violates the principle of equal treatment. Such a practice has no place in a democratic and pluralistic society."⁸¹

82. Discrimination on grounds including ethnic or religious origin is prohibited by Section 82 of the Constitution of Kenya (1963) and by other international and regional instruments ratified by Kenya.⁸² The Charter also specifically protects children from discriminatory treatment for a broad range of reasons, many of which apply to Nubian children. Article 3 states:

"Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child or his or parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status."

⁷⁹ *Modise v. Botswana*, note 62 above, at para. 91; *Legal Resources Foundation v. Zambia*, ACHPR Decision of 7 May 2001, Comm'n No. 211/98, at para. 58.

⁸⁰ *Yean and Bosico v. Dominican Republic*, I-ACtHR Decision of 8 September 2005, at para. 179.

⁸¹ Ex. 1: KNCHR, *An Identity Crisis*, at page vi.

⁸² Art. 2 African Charter on Human and Peoples' Rights (ratified by Kenya on 23 January 1992); Art. 2 ICCPR (ratified by Kenya on 1 May 1972); Art. 2 ICERD (ratified by Kenya on 13 September 2001); Art. 2 CRC (ratified by Kenya on 30 July 1990).

83. In the case of *Meldrum v the Republic Of Zimbabwe*, the African Commission referred to the principle of discrimination as “essential to the spirit of the African Charter.”⁸³ In another case, the Commission stressed that:

“Equality or the lack of it affects the capacity of one to enjoy many other rights.⁸⁴ For example, one who bears the burden of disadvantage because of one’s place of birth or social origin suffers indignity as a human being and as an equal and proud citizen. [...] Finally, the Commission should take note of the fact that in a growing number of African States, these forms of discrimination have caused violence and social and economic instability, which has benefited no one. It has cast doubt on the legitimacy of [...] the democratic credentials of states.”⁸⁵

84. The prohibition against racial discrimination in particular and related intolerance has been affirmed in a wide number of normative instruments, including in the Durban Declaration of the World Conference Against Racism, where such discrimination was found to:

“[C]onstitute serious violations of and obstacles to the full enjoyment of all human rights and deny the self-evident truth that all human beings are born free and equal in dignity and rights, are an obstacle to friendly and peaceful relations among peoples and nations, and are among the root causes of many internal and international conflicts, including armed conflicts, and the consequent forced displacement of populations.”⁸⁶

85. The prohibition of racial discrimination has become a *jus cogens* norm of customary international law.⁸⁷ It has attained this status on account of being

⁸³ *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v. Zimbabwe*, ACHPR Decision of April 2009, Comm’n 294/2004, at para. 91[“*Meldrum v. Zimbabwe*”].

⁸⁴ For a more comprehensive discussion on non-discrimination in the ICCPR, see generally UN Human Rights Committee, General Comment 18, Non-discrimination, 1989.

⁸⁵ *Legal Resources Foundation v. Zambia*, note 79 above, at para. 63.

⁸⁶ Durban Declaration, World Conference against Racism, Racial Discrimination, Xenophobia and Intolerance (2001), Preamble.

⁸⁷ In addition to African human rights law prohibiting discrimination, the bar on racial and ethnic discrimination is enshrined in many international and regional human rights instruments. See: International Covenant on Civil and Political Rights, entered into force on 23 March 1976, U.N. doc. A/6316, art. 2 & 26 (“ICCPR”); European Convention of Human Rights, entered into force on 3 September 1953, art. 14 (“ECHR”). See also: *Regina v. Immigration Officer at Prague Airport and another, ex parte European Roma Rights Centre and others*, 9 December 2004, [2004] UKHL 55, at para. 46 (stating that “the great theme which runs through subsequent human rights instruments, national, regional and international, is the legal right of equality with the correlative right of non-discrimination on the grounds of race. . . It is true that in the world, as we know it, departures from this norm are only too many. But the international community has signed up to it. The moral norm has ripened into a rule of customary international law. It is binding on all states.”)

“accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”⁸⁸

86. Section 82(1) of the Kenyan Constitution provides that “subject to sub-sections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself **or in its effect**” (emphasis added). Under African and international law, it is clear that intent to discriminate is not a necessary element of an act or pattern of unlawful discrimination. The lack of a requirement to prove intent to discriminate within the African Charter of Human and Peoples’ Rights was confirmed in the case of *Meldrum v the Republic Of Zimbabwe*, where the African Commission defined discrimination as:

“[A]ny act which aims at distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has *the purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms. Article 2 of the African Charter stipulates the principle of non discrimination, which is essential to the spirit of the African Charter.”⁸⁹

1. Nubian Children are Subjected to Discriminatory Treatment

87. Nubian children are treated differently because of their racial, ethnic, national and religious origins. This amounts to direct discrimination, for which no limitation can be justified.
88. The Kenyan National Commission on Human Rights found that the denial of identity cards to specific ethnic groups was discriminatory, further marginalizing such communities,⁹⁰ and concluded that the treatment of the Nubian community in Nairobi amounted to “institutionalised discrimination”:

“While it is not a border situation, every person belonging to the Nubian community has to be vetted ... The Nubians are not classified among the recognized ethnic groups in Kenya. For this reason, all Nubians are vetted. The underlying assumption of vetting of Nubians, is that they are foreigners unless proven otherwise.”⁹¹

89. In the case of *Legal Resources Foundation v. Zambia*, the African Commission on Human and Peoples’ Rights considered the way in which laws sometimes limit the rights enjoyed by citizens, and concluded that where the government seeks to provide justification for “setting perimeters on the enjoyment of a right”:

⁸⁸ Vienna Convention on the Law of Treaties, entered into force on 27 January 1980, U.N. doc. A/CONF.39/11/Add.2, art. 53.

⁸⁹ *Meldrum v. Zimbabwe*, note 83 above, at para. 91 [emphasis added].

⁹⁰ Ex. 1: KNCHR, *An Identity Crisis*, at page 24.

⁹¹ *Ibid.*, at page 10.

“... there has to be a two-stage process. First, the recognition of the right and the fact that such a right has been violated. Second, that such a violation is justifiable in law.”⁹²

90. The Commission has explicitly warned that “[t]he reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.”⁹³ Even more importantly, it stressed that “a limitation may never have as a consequence that the right itself becomes illusory.”⁹⁴
91. As outlined in paragraphs 30 to 38 above, when seeking to acquire the ID cards that are necessary for their lives, young Nubians on reaching the age of 18 will be treated differently from non-Nubians in a variety of ways:
 - They are required to provide additional evidence in support of their claims.
 - They are required to demonstrate the nationality of their grand-parents.
 - They must seek and gain the approval of the Nubian elders, and governmental officials.
 - They must visit the Magistrates’ Court in order to swear an affidavit in support of their claims.
 - They must pay a fee to the Court.

2. Nubian Children Suffer Discriminatory Effects

92. The treatment of the Nubian children by failing to recognize their nationality leaves them without an expectation of citizenship, and leads to a series of negative consequences which affect them, and only them, as Nubians, and do not affect other ethnic groups in Kenya. Even if the measures are not intended to be discriminatory, they are still considered a violation of the prohibition of discrimination where the effects of the measures are to cause a difference in treatment to a particular ethnic group.
93. The discrimination in access to Kenyan IDs has wide and serious consequences that affect practically every sphere of every day life. Though these limitations only formally apply to children after they reach the age of majority, Nubians are compelled to grow up without any expectations as to their future legal recognition as full members of Kenyan society.
94. The discriminatory government policies perpetuate discriminatory attitudes towards Nubian children by maintaining their second class status. As outlined in paragraph 53 above, Nubian children are subjected to humiliation and degrading treatment in classrooms and elsewhere on the basis of their racial, ethnic, national and/or

⁹² *Legal Resources Foundation v. Zambia*, note 79 above, at para. 67.

⁹³ *Media Rights Agenda and Others v. Nigeria*, ACHPR Decision of 31 October 1998, Comm’ns 105/93, 128/94, 130/94, 152/96, at para. 69.

⁹⁴ *Ibid.*, at para. 70.

religious origins, and told to “go back to where you came from,” even though they have lived in Kenya for their entire lives.

95. Robbing children of their future in this manner has been recognized by the Inter-American Court as violating childrens’ physical, mental and moral integrity and even their lives.⁹⁵

C. Consequential Violations

96. The systematic failure to recognize the nationality of Nubian children leads to violations of other rights under the Charter, including (1) their right of equal access to education, and (2) their right of equal access to health care. It also violates the rights of their parents who should be assisted to bring up their children under Article 20 of the Charter.

1. Equal Access to Education

97. The lack of effective schooling for Nubian children outlined in paragraphs 49 to 53 above violates the right of equal and effective access to education. The government has not provided sufficient numbers of schools in Kibera for the size of the population, parents often cannot pay the costs of stationary and uniforms in order for their children to attend school, and Nubian children have little or no prospect of any secondary education, unlike other children in Kenya.

98. Article 11(3) of the Charter requires that children have an effective right of access to education:

“State parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

- provide free and compulsory basic education;
- encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
- make higher education accessible to all on the basis of capacity and ability by every appropriate means;
- take measures to encourage regular attendance at schools and the reduction of drop-out rates;
- Take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.”

99. The UN Committee on Economic, Social and Cultural Rights has outlined that the accessibility of education has three overlapping dimensions:

⁹⁵ *Villagran Morales et al. v. Guatemala*, I-ACtHR Decision of 19 September 1999, at para. 191.

“(i) Non-discrimination - education must be accessible to all, *especially the most vulnerable groups*, in law and fact, without discrimination on any of the prohibited grounds;

(ii) Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme);

(iii) Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available ‘free to all’, States parties are required to progressively introduce free secondary and higher education.”⁹⁶

100. The Human Rights Council has equally addressed the issue of education accessibility in its review of Universal Periodic Review of Member States. In its examination of the Dominican Republic, several points raised linked the issue of education accessibility directly to that of birth registration and nationality. In this regard, it explicitly called upon the Dominican Republic to:

“Promote access to basic and secondary education and health care for all children and adolescents, without having these services depend on the possession of a valid birth certificate.”⁹⁷

“Include all children in education regardless of their registration status, as recommended by the Committee on the Rights of the Child.”⁹⁸

“Make more efforts to guarantee the right of all children to be registered immediately after birth through a simplified and inclusive procedure, thus allowing them access to basic social services such as education and health.”⁹⁹

101. The Kenyan government’s failure to guarantee equal access to education violates Article 11(3) of the Charter. The lack of any objective or reasonable justification for this failure is particularly striking in light of the role of education as an indispensable means of realizing other human rights. This is particularly so as an “empowerment right”, whereby education serves as the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.¹⁰⁰

102. 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 the costs of education.

⁹⁶ UN Committee on Economic, Social and Cultural Rights, General Comment 13 on the Right to Education, UN Doc. E/C.12/1999/10, 8 December 1999, at para. 6(b)(i), (ii) and (iii) [emphasis added].

⁹⁷ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Dominican Republic*, UN Doc. A/HRC/13/3, 4 January 2010, at para. 87(35).

⁹⁸ *Ibid.*, at para. 87(39).

⁹⁹ *Ibid.*, at para. 88(29).

¹⁰⁰ *Ibid.*, at para 87(37).

2. Equal Access to Health Care

103. As a result of the discriminatory policy of denying citizenship to Nubian children, they are consigned to live with poor access to healthcare, in violation of their rights in the Charter.
104. As outlined in paragraphs 54 to 55 above with regard to poor healthcare, the Nubian witnesses tell first hand stories of the everyday difficulties that they face as a result of being condemned to a life of poverty and neglect in Kibera because they are not considered Kenyan citizens nor considered to possess any property rights over the land in Kibera.
105. Article 14 of the Charter provides that:
- “(1) Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.
 - (2) State parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:
 - (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
 - (c) to ensure the provision of adequate nutrition and safe drinking water.”
106. The right to health has been recognized by the UN as being closely related to and dependent upon the realization of other human rights contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.¹⁰¹
107. Together, the statements of the Nubians reflect a reality of ineffective access to health care that falls short of the minimum standards allowed by the Charter and other international standards, including the underlying principles of the right to health, which is:
- “an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.”¹⁰²

¹⁰¹ UN Committee on Economic, Social and Cultural Rights, General Comment 14 on the Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2000/4, 11 August 2000, at para. 3.

¹⁰² *Ibid.*, at para. 11.

108. The Government of Kenya's designation of Kibera and other Nubian enclaves as "government land" over several decades has forced generations of Nubian children into a life of poverty, illiteracy and ill-health. Its inaction in either recognizing this land as formally inhabited, or in facilitating the relocation of its inhabitants constitutes a marked failure to uphold its duties to guarantee non-discriminatory access to education and health care in keeping with international human rights obligations for the protection of children.

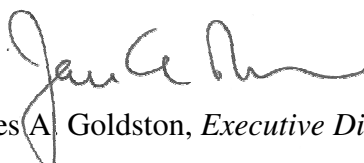
IV. CONCLUSION

109. On the basis of the evidence available, the Government of Kenya has systematically discriminated against and refused to recognize Kenyan Nubian children as citizens of Kenya. By refusing to recognize the land rights of Nubians in Kenya, the Government of Kenya has failed to provide effective educational and health facilities for residents of Kibera, which directly impacts negatively on Nubian children who cannot access these facilities outside Kibera. Nubian children are restricted to accessing poor health services and condemned to live in inhuman conditions in Kibera. Kenya has violated the rights within the Charter outlined herewith.

V. REMEDIES

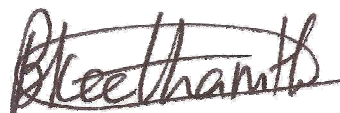
110. The applicants hereby request the African Committee of Experts on the Rights and Welfare of the Child to:
- a) Find the Republic of Kenya to have violated the rights of the Nubian children under the Charter;
 - b) Recommend that the Republic of Kenya take all legislative and other measures to ensure that Nubian children are granted Kenyan citizenship at birth;
 - c) Recommend that the Republic of Kenya take all legislative and other measures to ensure that all Kenyan citizens be granted proof of their citizenship from birth, including modifying birth certificates or providing alternate documentation to this effect and establishing a register of children born such that circumstances of birth can be verified and will no longer rest solely on individuals remaining in possession of their documentation;
 - d) Recommend that the Republic of Kenya take all legislative and other measures to recognize the land rights of Nubians to the land in Kibera; and

- e) Recommend that the Republic of Kenya take all legislative and other measures to provide, on a non-discriminatory basis, adequate health care and health facilities, schools and other basic socio-economic infrastructure such as paved roads, potable water, proper drainage and sewerage and sanitary facilities to all residents of Kibera.



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VI. APPENDIX OF RELEVANT LAWS

A. Kenyan Law

The Constitution of Kenya (1963)

111. Section 82 of the Constitution of Kenya prohibits discrimination on the following grounds:

“82. (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3) In this section the expression “discriminatory” means 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 whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law so far as that law makes provision

—

(a) with respect to persons who are not citizens of Kenya;

(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons;
or

(d) whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to race, tribe, place of origin or residence or other local connection, political opinion, colour or creed) to be required of a person who is appointed to an office in the public service, in a disciplined force, in the service of a local government authority or in a body corporate established by any law for public purposes.

(6) Subsection (2) shall not apply to -

(a) anything which is expressly or by necessary implication authorized to be done by a provision of law referred to in subsection (4); or

(b) the giving or withholding of consent to a transaction in agricultural land by any body or authority established by or under any law for the purpose of controlling transactions in agricultural land.

(7) Subject to subsection (8), no person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging-houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(8) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of a description mentioned in subsection (3) may be subjected to a restriction on the rights and freedoms guaranteed by sections 76, 78, 79, 80 and 81, being a restriction authorized by section 76 (2), 78 (5), 79 (2), 80 (2), or paragraph (a) or (b) of section 81 (3).

112. Section 87 provides for citizenship as follows:

“Every person who, having been born in Kenya, is on 11th December 1963 a citizen of the United Kingdom and colonies or a British protected person shall become a citizen of Kenya on 12th December 1963; Provided that a person shall not become a citizen of Kenya by virtue of this subsection if neither of his parents was born in Kenya.

Every person who, having been born outside Kenya, is on 11th December 1963 a citizen of the United Kingdom and Colonies or a British protected person shall, if his father becomes, or would but for his death, have become, a citizen of Kenya by virtue of subsection (1), become a citizen of Kenya on 12th December 1963.”

The Children’s Act (2001)

113. Section 11 states:

“Every child has a right to a name and nationality. Where a child is deprived of his identity, the Government shall provide assistance and protection with a view to establishing his or her identity.”

B. International Law

African Charter on Human and Peoples’ Rights (1981)

114. The African Charter, ratified by Kenya on 23 January 1992, prohibits discrimination:

Article 2

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

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Universal Declaration of Human Rights (1948)

115. The right to nationality is guaranteed in many international instruments, including the Universal Declaration of Human Rights (Article 15), which states:
- (1) Everyone has the right to a nationality.
 - (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality

UN Convention relating to the Status of Stateless Persons (1954)

116. The prohibition against statelessness, which is intrinsically linked to the right to nationality is equally protected under international law, starting with the present Convention. Article 32 states:
- The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

UN: Convention on the Reduction of Statelessness (1961)

117. Kenya ratified the Convention on the Reduction of Statelessness on 2 March 1989. Article 1(2)(b) states:
- A Contracting State may make the grant of its nationality in accordance with subparagraph (b) of paragraph 1 of this article subject to one or more of the following conditions:
- (a) that the application is lodged during a period, fixed by the Contracting State, beginning not later than at the age of eighteen years and ending not earlier than at the age of twenty-one years, so, however, that the person concerned shall be allowed at least one year during which he may himself make the application without having to obtain legal authorization to do so;

(b) that the person concerned has habitually resided in the territory of the Contracting State for such period as may be fixed by that State, not exceeding five years immediately preceding the lodging of the application nor ten years in all.”(Emphasis added)

118. Article 8(4) states:

Contracting State shall not exercise a power of deprivation [...] except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

International Covenant on the Elimination of All Forms of Racial Discrimination (1965)

119. Articles 2(2) and 5(d)(iii) of this Covenant, ratified by Kenya on 13 September 2001, state that:

Article 2 (2)

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 5 (d)(iii)

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(d) Other civil rights, in particular:

(iii) The right to nationality;

International Covenant on Civil and Political Rights (1966)

120. Kenya ratified this Covenant on 1 May 1972.

Article 2 (1)

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 24

(1) Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

(2) Every child shall be registered immediately after birth and shall have a name.

(3) Every child has the right to acquire a nationality.

Article 26

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.

International Covenant on Economic Social and Cultural Rights (1966)

121. This Covenant, ratified by Kenya on 1 January 1972, also prohibits discrimination under Article 2(2), in the following terms:

Article 2(2)

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Convention on the Elimination of All Forms of Discrimination against Woman (1979)

122. This Convention, ratified by Kenya on 9 March 1984, prohibits discrimination in the following terms:

Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Convention on the Rights of the Child (1989)

123. The CRC, ratified by Kenya on 30 July 1990, also prohibits discrimination:

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

124. Article 7, underscores the particular strength of the right to nationality with regard to children under international law by providing that:

1. The child shall be registered *immediately after birth* and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. 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. [Emphasis added]

C. Other Regional Standards

American Convention on Human Rights (1969)

125. The right to nationality is also prevalent in other regional systems, including under Article 20 of this Convention, which outlines the following provision:

1. Every person has the right to a nationality.

2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.

3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

126. The right in question is accorded such importance so as to constitute a non-derogable right under that Convention.¹⁰³

European Convention on Nationality (1997)

127. This Convention, exclusively dedicated to the protection of the right to nationality, provides protection against the arbitrary deprivation of nationality.¹⁰⁴ It also

¹⁰³ See Article 27 of the American Convention on Human Rights, on Suspension of Guarantees: "1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin. 2. The foregoing provision *does not* authorize any suspension of the following articles: ... Article 20 (Right to Nationality), ... or the judicial guarantees essential for the protection of such rights" [emphasis added].

includes rules governing the acquisition of nationality¹⁰⁵ and the right to review,¹⁰⁶ among several other provisions. The Convention's Explanatory Note further elaborates on the correlating obligation to avoid statelessness – an obligation that it references as having crystallised as customary international law.¹⁰⁷

¹⁰⁴ Art. 4(c) European Convention on Nationality.

¹⁰⁵ *Ibid.*, at Art. 6.

¹⁰⁶ *Ibid.*, at Art. 12.

¹⁰⁷ Explanatory Report of the European Convention on Nationality, at para. 33. The paragraph references Article 4 of the European Convention on Nationality: “The rules on nationality of each State Party shall be based on the following principles: (a) everyone has the right to a nationality; (b) statelessness shall be avoided; (c) no one shall be arbitrarily deprived of his or her nationality; (d) neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.”

LIST OF DOCUMENTS

- Exhibit 1 Kenya National Commission on Human Rights, *An Identity Crisis: A Study on the Issuance of National Identity Cards* (2007)
- Exhibit 2 Minority Rights Group International/Centre for Minority Rights Development, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity* (2005)
- Exhibit 3 *The Nubian Community in Kenya v. Kenya*, Government Response to African Commission Comm. No. 317/2006
- Exhibit 4 Douglas H. Johnson, "Tribe or Nationality? The Sudanese Diaspora and the Kenyan Nubis", 3 *Journal of East African Studies* (2009) 112-131
- Exhibit 5 Centre on Housing Rights and Evictions (COHRE), *Listening to the Poor? Housing Rights in Nairobi, Kenya* (2005)
- Exhibit 6 UN-HABITAT/Government of Kenya, *Kibera Social and Economic Mapping: Household Survey Report* (February 2005)
- Exhibit 7 Centre on Housing Rights and Evictions (COHRE), *Rapid Assessment of the Water and Sanitation Situation within Informal Settlements in Nairobi* (2008)
- Exhibit 8 African Population and Health Research Centre (APHRC), *Population and Health Dynamics in Nairobi's Informal Settlements: Report of the Nairobi Cross-sectional Slums Survey (NCSS) 2000* (2002)
- Exhibit 9 Affidavit of Zura Abdul Aziz, 24 October 2007
- Exhibit 10 Bronwen Manby, *Struggles for Citizenship in Africa* (Open Society Institute, 2009)
- Exhibit 11 Open Society Justice Initiative, "Kenyan Nubians: Without Papers, Who Are You?", *Report on Developments 2005-2007* (2007)
- Exhibit 12 Affidavit of Zuhura Adam, 24 October 2007
- Exhibit 13 Affidavit of Fatuma Kadara Sebit, 24 October 2007
- Exhibit 14 Affidavit of Shafir Ali Hussein, 9 February 2006
- Exhibit 15 J. B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Acts Press, African Centre for Technology Studies, 1990)
- Exhibit 16 Certificate of Birth of Abdul Rahim
- Exhibit 17 Korir A. Singo'ei and Adam H. Adam in conjunction with the Kenyan Nubian Council of Elders, *Covert Racism. The Kibera*

- Clashes: An Audit of Political Manipulation of Citizenship in Kenya And 100 years of Nubians' Landlessness*" (2002)
- Exhibit 18 Registration of Persons Act, 1973 (Cap 107) as amended by the Registration of Persons (Amendment) Act 1987
- Exhibit 19 Affidavit of Abdallah Sebit, 9 February 2006
- Exhibit 20 Affidavit of Ali Hussein Mursall, 9 February 2006
- Exhibit 21 Michael Mugwanga, "Application forms of IDs Run Out", *Kenya Daily Nation* (Jan. 21, 2006)
- Exhibit 22 Affidavit of Zena Ahmed, 26 October 2007
- Exhibit 23 Affidavit of Arafa Ali, 24 October 2007
- Exhibit 24 Lucas Barasa, "Row on ID Cards Tender Rages", *Kenya Daily Nation* (Feb. 7, 2006)
- Exhibit 25 Gitonka Muriuki, "Demands by Officers to See ID Cards Illegal", *Kenya Daily Nation* (6 February 2006)
- Exhibit 26 Affidavit of Mariam Gharib Ahmed, 9 February 2006
- Exhibit 27 Affidavit of Asmin Barya, 24 October 2007
- Exhibit 28 Affidavit of Halima Hamis, 24 October 2007
- Exhibit 29
- Exhibit 30 Affidavit of Zubeda Kasim, 24 October 2007
- Exhibit 31 UNICEF, *Info by Country: Kenya*
- Exhibit 32 Annabel S. Erulkar and James K. Matheka, *Adolescence in the Kibera Slums of Nairobi Kenya* (Population Council, 2007)
- Exhibit 33 Affidavit of Zakia Yusuf, 24 October 2007
- Exhibit 34 Affidavit of Mwajuma Bashir, 26 October 2007
- Exhibit 35
- Exhibit 36 Affidavit of Medina Juma Suleiman, 24 October 2007
- Exhibit 37 Children's Act of 2001, Chapter 586, Laws of Kenya (Excerpt of pages 1-14)