

317/06 The Nubian Community in Kenya vs The Republic of Kenya

Communication 317/2006 - The Nubian Community in Kenya vs The Republic of Kenya

Summary of the Complaint

1. The Complaint was submitted by the Open Society Justice Initiative (OSJI) and the Institute for Human Rights and Development in Africa (IHRDA) on behalf of the Nubian community of Kenya (the Complainants), against the Republic of Kenya (State Party to the African Charter and hereinafter referred to as Kenya).
2. According to the Complainants, the present Nubian community in Kenya, who number over one hundred thousand (100,000), comprises descendants of ex-Sudanese forcefully conscripted into the colonial British King's African Rifles Regiment in the early 1900s. The Nubians originally occupied the Nuba Mountains in the central part of the Republic of The Sudan.
3. The Complainants allege that as a result of the conscription, the Nubian soldiers were taken to various parts of British East Africa, including present- day Kenya, to assist the British in their military expeditions. The colonial 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 and were not granted British citizenship. As subjects, they were considered British protected persons.
4. After the British expeditions, it is alleged that the Nubians demanded to be returned to Sudan but their demands were not met. They were left without any resettlement scheme in Kenya, neither were they granted British citizenship. Members of the Nubian community in Kenya have lived in the Kibera slums in Nairobi, and in Bondo, Kisumu, Kibos, Mumias, Meru, Isiolo, and Mazeras in Mombasa as well as the Eldama Ravine, Tange-Kibigori, Sondu, Kapsabet, Migori and Kisii areas since they moved into Kenya in the early 1900s and know no other home. There are many Nubians today whose grandparents known oother home but Kenya, because hey were born there.
5. 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." The Complainants allege that even though these people qualify for Kenyan citizenship under the Kenyan Constitution and consequently qualify for registration as Kenyan citizens, they have been denied their right to nationality. They have also been denied Kenyan passports and National Identity Cards, and thus the benefits that accrue from the possession of these documents. The lack of these documents and other citizenship rights has, for example, led to the disenfranchisement and exclusion of the Nubian community from both the political process and social development. The Complainants allege that the deliberate, systematic and sustained denial of identity papers to the Nubian community and their non-recognition as Kenyan citizens has also denied them basic services and led them to extreme poverty.
6. The Complainants claim that as de facto stateless people they are without legal protection. They remain uneducated and are denied access to other civil, political, economic and cultural rights provided for under the Kenyan Constitution and other regional and international human rights instruments that Kenya is a signatory to. They remain landless and are exposed to arbitrary and uncompensated displacements from their dwelling places throughout Kenya, and continue to be threatened with further displacements.

Complaint

7. The Complainants allege violations of Articles 1, 2, 3, 5, 12(1) and (2), 13, 14, 15, 17(1), 18, 19, 22 and 24 of the African Charter on Human and Peoples' Rights (African Charter).

Procedure

8. The Communication was received at the Secretariat of the African Commission on 23 January 2006. The Commission was seized of the Communication at its 39th Ordinary Session held from 9-23 May 2006 in Banjul, The Gambia.

9. The parties were informed about the seizure by correspondence dated 17 July 2006. The Complainant was in the same correspondence requested to submit on Admissibility.

10. The Complainants' submissions on Admissibility were received at the Secretariat on 15 September 2006, which acknowledged receipt and forwarded same to the Respondent State by correspondence of 12 October 2006.

11. By Note Verbale of 10 February 2007, the Respondent State was reminded to submit its observations on Admissibility.

12. The Respondent State submitted its argument on Admissibility at the 41st Ordinary Session, in Accra, Ghana. The Admissibility brief was also transmitted to the Complainants during the same session.

13. On 30 August 2007, both parties were informed that the African Commission would take a decision on the Admissibility of the Communication at the 42nd Ordinary Session in Brazzaville, Republic of Congo.

14. At its 42nd Ordinary Session held in Brazzaville, Republic of Congo, the African Commission considered this Communication and decided to defer further consideration of the matter to the 43rd Ordinary Session owing to lack of time.

15. The Communication was subsequently declared admissible at the 46th Ordinary Session of the Commission held from 11 - 25 November 2009. The parties were informed and the Complainant was requested to submit on the Merits.

16. The Complainants' initial submissions on the Merits were received at the Secretariat in May 2010 and a complete electronic copy was made available on 15 November 2012.

17. The Complainants' submissions were transmitted to the Respondent State by correspondence of November 2012, with a request for its observations on the Complainants' submissions.

18. By correspondence of 15 February 2013, the Respondent State requested for an extension of time within which to submit on the Merits in terms of Rule 113 (2) of the Commission's Rules. It also entered a preliminary objection on the admissibility of the Communication and promised to provide particulars of the objection.

19. By correspondence of 14 March 2013, the Respondent State was informed that its request had been granted and it was requested to submit its observations within one month. The Complainants were also informed by correspondence of the same date.

20. By Correspondence of 7 April, the Respondent State was again requested to forward its observations on the Complainants' submission. To date, the Respondent State's observations on the merits as well as

the particulars of its objections on the Commission's decision on Admissibility have not been received.

The Law

Admissibility

21. The Admissibility of Communications brought pursuant to Article 55 of the African Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a Complainant in order for a Communication to be declared Admissible.

22. The Complainants argue that they fulfill all seven requirements stipulated in Article 56 of the African Charter, including fulfilling the conditions of Article 55.

23. Of the seven conditions, the Respondent State claims that the Complainants have failed to fulfill Article 56(5), i.e., Communication relating to Human and Peoples' Rights shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

24. Consequently, it seems that the only provision of Article 56 that is contentious between the parties is the question of Admissibility and the rule of the 'exhaustion of local remedies.' The African Commission will therefore focus on the said provision only.

25. The rule of exhaustion of local remedies is a well-established rule of customary international law. Article 56 (5) clearly stipulates that the Complainant need not exhaust local remedies where the procedure is "unduly prolonged."¹ But what is the ordinary meaning of "unduly prolonged"? How has the African Commission interpreted the provision of "unduly prolonged"? It is worth noting that the Complainants are not arguing that local remedies are not available. On page 6 of their Admissibility submission, they write: in this case local remedies such remedies (*sic*) as may exist are unduly prolonged and real remedies are essentially non-existent.

26. In the Inter-American system, for example, a similar exception exists where it has been found that a delay of three years,² one year and eight months,³ and even six months⁴ amount to "undue delay."

Complainants' submissions on admissibility

27. In the present case, the principal Complainants, Open Society Justice Initiative, argue that real remedies are essentially non-existent in the Republic of Kenya, as every effort has been made to establish the Nubians' right to Kenyan citizenship by seeking remedies through proper domestic channels.

28. The Complainants argue that in 2002, the Nubian community, through the Kenyan Nubian Council of Elders, instructed the Centre for Minority Rights Development (CEMIRIDE) to institute legal action against the Kenyan Government for denial of citizenship and / or discrimination in the issuance of identity documents to the Nubian community contrary to the Kenyan Constitution and international and regional human rights standards binding on Kenya.

29. The Complainants further state that on 17 March 2003, an action was commenced at the High Court of Kenya by way of an Urgent Application seeking leave of the Court to file a Representative Constitutional Application on behalf of the Nubian community. The Complainants further state that on the same day, ie, 17 March 2003, CEMIRIDE filed the Substantive Constitutional Application in the High Court in Nairobi by way of an Originating Summons seeking, among other things, a declaration that the Nubian Community in Kenya are Kenyan citizens under Section 87 of the Kenyan Constitution and that the treatment meted out against them is discriminatory and violates the Constitution of Kenya.

- 30.** The Complainants argue that numerous procedural obstacles have been deliberately and systematically brought up by the state. The Complainants claim that despite appearing in Court over a dozen times in the intervening years, CEMIRIDE have never had a hearing on the Merits of their case. Giving an example of such deliberate "procedural obstacles", the Complainants state that on 8 July 2003, Justice Daniel Aganyanya of the Nairobi High Court refused to transmit the file to the Chief Justice on the grounds that there was a need to ascertain the identity of the 100,000 Applicants on whose behalf the application had been filed. The Complainants argue that this was clearly burdensome and inconsistent with the orders obtained on 17 March 2003, which recognized that a Complainant called Yunis Ali had a right to represent the Nubian class of people.
- 31.** The Complainants argue that the Plaintiffs brought the case before another High Court Judge, Justice Kariuki, arguing that the order to produce 100,000 affidavits was unreasonable. They state that Justice Kariuki agreed and also fixed a date for the hearing of the case on the Merits for 7 June 2004. However, when CEMIRIDE appeared before the sitting Judge (Justice Mugo) for the case to be heard as scheduled, Justice Mugo declined to hear the case and referred it back to the duty judge for directions on the grounds that there were contradictory orders in the file. The Complainants argue that within fifteen months of filing, the case had been brought before five different judges, none of whom has proceeded with it.
- 32.** The Complainants further argue that CEMIRIDE wrote to the Chief Justice on 18 June 2004 to complain about the numerous administrative obstacles placed on the path of the Applicants, but no response was received. The Complainants further state that apart from the letter of 18 June 2004, numerous letters on the matter have also been despatched to the Chief Justice, with no reply.
- 33.** The Complainants claim that for more than three years after CEMIRIDE instituted proceedings on behalf of the Nubian community, no Bench has been constituted by the High Court, and no date has been fixed for a substantive hearing on the case. Such delays, argue the Complainants, are excessive and unduly prolonged.
- 34.** The Complainants also argue that real remedies are essentially non-existent in Kenya. The Communication alleges violations of Articles 15, 16, 17, 18 and 19 of the African Charter by the Kenyan Government. These articles guarantee economic rights as well as group rights. The Complainants argue that the Kenyan Constitution does not protect these rights, that it only guarantees civil and political rights of the individual. Therefore, legal remedies for violations of these rights are not available in the Courts in Kenya.
- 35.** The Respondent State submits that the present Communication should not be admitted because the Applicants have not exhausted local remedies in the Kenyan judicial and administrative systems.
- 36.** The Respondent State argues that the case is still pending in the High Court of Kenya. It argues that it was stood over because the Court demanded some information to confirm that indeed some of the people who are represented in the suit are the bona fide aggrieved persons. The Respondent State says that the Plaintiffs were asked to identify the Applicants, but they were unable to do so or for their own well-known reasons did not do so.
- 37.** The Respondent State argues that during the preliminary hearing, the Applicants were found to have identity cards and passports and the issue that arose was whether they had *locus standi* to institute the suit. It states that the presiding Judge then gave orders asking the Applicants to produce affidavits authorising them to represent the Nubian community by the Nubians they were representing before placing the file before the Chief Justice.
- 38.** The Respondent State argues that to date, the Applicants / Complainants have never filed the required affidavits and the case is stood over generally until the parties set a date for the hearing. The Respondent State therefore argues that the Complainants should not have come before the African Commission until they have exhausted all local remedies.

39. The Respondent State further argues that the Complainants have not exhausted remedies such as the Judicial Review which is provided for in Order 53 of the Civil Procedure Code. This provision, argues the Respondent State, would have enabled the Courts to compel the Ministry of Immigration and their Department of Registration to issue the Applicants and their representatives with national ID cards and passports.

40. The Respondent State also argues that the Complainants have not lodged an official claim with the Kenya National Commission for Human Rights to look into the matter. It states that the Kenyan National Commission for Human Rights is an independent body that acts as a watch dog on human rights issues.

41. The Respondent State further argues that the Complainants have not adduced any evidence to show that they pursued administrative remedies from the relevant Government Ministries on behalf of the Nubian community. The Respondent State argues that the Kenyan judicial system meets the test of 'availability', 'sufficiency', and 'effectiveness'. It claims that similar complaints by the Njemps community, a minority group in Kenya, have been adequately addressed.

42. Even though the Respondent State agrees that social, cultural and economic rights are not expressly protected under the Kenyan Constitution, the Kenyan Government endeavours to respect, protect, promote, fulfil and ensure that these rights are realized.

43. The Respondent State also addressed the case of Yunis Ali and 19 others referred to by the Complainants. The Complainants argue that the High Court had granted orders to enable Yunis Ali and others to file a class action suit on behalf of the Nubian community. The Respondent State does not seem to argue or deny that fact; it however argues that even in the case of Yunis Ali and 19 others, local remedies have not been exhausted.

Analysis of the Commission

44. The African Commission has held that the rule of exhausting domestic remedies is the most important condition for Admissibility of Communications. There is therefore no doubt that in all Communications seized by the African Commission, the first requirement considered concerns the exhaustion of local remedies....⁵

45. The question, which remains to be answered, is whether or not the remedies were available or unavailable, and further if they were available, were they effective? The availability of a remedy must be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness.

46. The Complainant puts forward the argument that the exception to the rule in Article 56(5) is applicable in this Communication, because local remedies are unavailable, ineffective and have been unduly prolonged.

47. The onus is on the Respondent State, Kenya, to demonstrate that local remedies are available, sufficient and effective.⁶ The African Commission has unequivocally held that when a Government argues that the Communication must be declared inadmissible because the local remedies have not been exhausted, the Government then has the burden of demonstrating the existence of such remedies.⁷

48. The Grand Chamber of the European Court for Human Rights has expressed the opinion that: it is incumbent on the Government claiming non-exhaustion of domestic remedies to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time.⁸ The Court also explained: ...that is to say, that it was accessible was one which was capable of providing redress in

respect of the applicant's complaints and offered reasonable prospects of success.⁹ Only once this burden of proof has been met does the petitioners have to establish that the local remedy {quote}was in fact exhausted or for some reason inadequate or ineffective in the particular circumstances.[/quote]¹⁰

49. Similarly, the Inter-American Commission on Human Rights has expressly stated that the burden of proving that effective local remedies exist and that they have not been exhausted falls upon the Government making such a claim.¹¹ In 46(1)

× Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: **a.** that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law; **b.** that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment; **c.** that the subject of the petition or communication is not pending in another international proceeding for settlement; and **d.** that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

and 46(2) [sic!

× 46(2)(a)] **2.** The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when: **a.** the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated

and 46 (2b)

× the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them

of the American Convention on Human Rights it is stated that the State has duties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights.¹² In the *Loayza Tamayo* Case, the Court held that the State claiming non-exhaustion of domestic remedies has an obligation to prove that the domestic remedies remain to be exhausted and that they are effective.¹³

50. A similar view regarding the burden of proof has been taken by the United Nations Human Rights Committee which draws attention to the fact, among others, that the Government had failed to provide...sufficient information on effective remedies.¹⁴ Equally, the European Court and Commission of Human Rights have held that the Government shoulders the burden of proving that there are effective remedies.

51. The African Commission has also held in several of its decisions that the rationale of the rule to exhaust local remedies is to allow the State concerned an opportunity to remedy a grievance through its own domestic legal system.¹⁵ However, the African Commission has gone ahead to state that it will not hold this requirement to apply literally in cases where it is impracticable or undesirable for the Complainant to seize the domestic courts.¹⁶ Accordingly, the African Commission, in *Dawda Jawara v The Gambia*,¹⁷ states that for a Complainant to be able to exhaust local remedies, such remedies must meet three basic criteria - they must be available, effective and sufficient.¹⁸ The African Commission went on to state with respect to that case that, if the availability of a remedy is not evident, it cannot be invoked by the State to the detriment of the Complainant.¹⁹ The burden of proof thus falls on the State of Kenya to prove that effective local remedies exist and that they are reasonably accessible, available, effective and sufficient.

52. The African Commission having looked at all the issues arising from this matter and taking into consideration the desperate situation of the Nubians is of the opinion that the Government of Kenya has not met this burden of proof because it has not shown that Complainants have any adequate and effective remedies. The African Commission is of the view that the Complainants in the particular circumstances are unable to utilize local remedies mainly because of many procedural and administrative bottlenecks put in their path.

53. For example, the African Commission notes that since CEMIRIDE filed an application on 17 March 2003, seeking leave of the High Court to file a Representational Constitutional Application on behalf of the Nubians, no Bench has been constituted to hear the case despite many attempts by Legal Counsel of the

Applicants.

54. The African Commission also note that on 8 July 2003, Justice Daniel Aganyanya of the Nairobi High Court refused to transmit the file to the Chief Justice on the ground that there was need to ascertain the identity of the 100,000 applicants on whose behalf the application was filed. Even where a date had been fixed for the hearing of the case on the Merits for 7 June 2004, Justice Mugo declined to hear the case and referred it back to the duty judge for directions on the grounds that there were contradictory orders in the file. Furthermore, letters to the Chief Justice complaining about the difficulties in access the courts have gone unanswered.

55. In the present Communication, the African Commission agrees with the Complainants that local remedies are unavailable. A remedy is considered available if the petitioner can pursue it without impediment. After more than four years, there does not seem to be any realistic prospect of the Complainants' case being heard. In the Jawara case, the African Commission held that a remedy is considered available only if the Complainant can make use of it in the circumstances of his case.²⁰ It is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.

56. The Jawara case stated the following: ...A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success and it is found sufficient if it is capable of redressing the complaint.[/quote] It states further that [quote]...The Commission has stressed that remedies the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant ... The existence of a remedy must be sufficiently certain, not in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness. Therefore, if the Complainant cannot turn to the judiciary of his country because of insurmountable legal and administrative bottlenecks, local remedies would be considered to be unavailable.²¹ In the present case, the African Commission finds that even though in theory the domestic remedies were available, they were not effective, and could not be pursued without much impediment.

57. The Respondent State argues that the case is still pending in the High Court of Kenya, and that it was stood over because the Court requested for some information to confirm that indeed some of the people who were represented in the suit were really the aggrieved persons. The Respondent State says that the Complainants were asked to identify the Applicants by having signed affidavits, but they were unable to do so or for their own well-known reasons did not do so. The Respondent State has failed to inform the Commission what these "well-known reasons are."

58. The Complainants claim that the Government of the Republic of Kenya has been aware of the situation of the Petitioners for years and has not acted to protect them.

59. The African Commission has held that where the existence of serious and massive violations of human rights has been shown, the requirement of exhaustion of local remedies is founded on the principle that a Government should have notice of such human rights violations in order to have the opportunity to remedy such violations.²² The African Commission has also stated that when a series of serious violations of Human rights are indicated it is only right that the government be given ample notice of the violations.²³

60. Without going into the Merits of the case, the Communication alleges violations of Articles 15, 16, 17, 18 and 19 of the Charter. These Articles guarantee economic rights as well group rights which are not protected under the Kenyan Constitution. The African Commission notes that the Government has been sufficiently aware of the plight of the Nubians to the extent that it can be presumed to know the situation prevailing within its own territory as well as the content of its international obligations.

61. The Respondent State has suggested that Complainants could have also lodged an official complaint with the Kenya National Commission for Human Rights to look into the matter, as an independent human rights body that acts as a watchdog on human rights issues. Two issues emanate from such a statement: is there a suggestion that the Courts have not been independent in this case, and also is there any realistic prospect of getting justice from the National Commission for Human Rights?

62. The Respondent State also argues that the Complainants have not adduced any evidence to show that they pursued administrative remedies from the relevant Government Ministries on behalf of the Nubian community, claiming that similar complaints by the Njemps community, a minority group in Kenya, have been adequately addressed. Besides the Commission not being told who the Njemps are, and what issues were "adequately addressed", who addressed them and before what court or administrative body, the African Commission is of the view that the grievances of the Petitioners are unlikely to have redress in the Kenyan Courts or administrative structures, especially given the fact that social, cultural and economic rights are not expressly protected under the Kenyan Constitution. That is a contention the Respondent State does not contest. Consequently, the African Commission concludes that no effective remedies are available to the Nubians in Kenya.

63. The Commission holds that all the provisions of Article 56 of the African Charter, have been fulfilled by the Complainant. In view of the above, the Commission declares the Communication admissible.

Merits

The Complainants' Submissions on the Merits

Alleged Violation of Article 2 and 3

64. The Complainants submit that Kenyan Nubians are treated differently in the acquisition of identity documents because of their ethnicity and their religion, for which there is no justification, amounting to unlawful discrimination in violation of Articles 2 and 3 of the Charter.

65. According to them, Kenyan Nubians are forced to go through a lengthy, humiliating and expensive vetting process to acquire the Kenya National Identity Card (ID card) which is necessary to obtain recognition of their citizenship and to access the services that come with it. They state that the vetting process causes severe delays, leaves some Kenyan Nubians without any proof of citizenship, causes immense problems if documents are lost, and leaves many Kenyan Nubians with a tenuous citizenship status which can be changed at the whims of the government.

66. The Complainants argue that African human rights law prohibits any unjustified difference of treatment as discrimination. They argue further that Article 2 of the Charter entitles individuals to the enjoyment of the rights and freedoms guaranteed under the 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.

67. According to them, there is no need to prove an intention to discriminate, as the definition includes circumstances where an apparently neutral policy has the effect of an unjustified distinction.

68. The Complainants aver that government may only justify a difference in treatment in limited circumstances. They state that the African Commission has found that where the government seeks to provide justification for setting perimeters on the enjoyment of a right: *...there has to be at 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.*²⁴

69. The Complainants maintain that where a difference in treatment is justified for a legitimate aim, the interference must still be necessary and proportionate to that aim.

70. According to the Complainants, when seeking to acquire the ID cards that are necessary to demonstrate their Kenyan citizenship and for nearly all transactions in adult life, Nubians are treated differently from other Kenyans in a variety of ways including the following:

1. They are required to provide additional documents in support of their claims to Kenyan nationality, such as their grand-parents' identification documents, which other Kenyans do not have to provide;
2. Unlike other Kenyans, they must be questioned by the "vetting committee" and given their approval;
3. Unlike other Kenyans, they must visit the Magistrates' Court in order to swear an affidavit in support of their claim;
4. Unlike other Kenyans, they must pay a fee to the Court.

71. The Complainants submit that Nubians are treated differently on account of their ethnic and religious origins, which are impermissible grounds under Article 2 of the African Charter. They point out that only two other communities are subjected to vetting in order to obtain ID cards, namely Kenyan Somalis and Kenyan Arabs. They point out further that unlike Kenyan Nubians, these latter communities are both border Communities whose only similarity with the Nubians is their religion.

72. They maintain that far from being accorded special consideration, Kenyan Nubians have been systematically singled out for differential treatment, with the consequence of further entrenching discriminatory attitudes towards the community.

73. Kenyan Nubians according to the Complainants have established a *prima facie* case that They are treated differently because of their ethnicity and religion and that the burden of proof is on the Respondent State to provide an objective and reasonable justification for their differential treatment. They aver that International law makes clear that in cases of discrimination, once an applicant has established a difference in treatment, the burden is on the respondent government to prove that it was objectively justified, and that in the absence of a racially neutral explanation, it is legitimate to conclude that the difference in treatment is based on racial grounds.

Alleged Violation of Article 5 of the Charter

74. The Complainants submit that the restrictions imposed on Kenyan Nubians through the vetting process, excessive delays and other procedural obstacles in securing the ID card that is necessary to obtain recognition of their Kenyan citizenship, amount to an arbitrary deprivation of the right to effective nationality, preventing recognition of their legal status in violation of Article 5 of the Charter.

75. Kenyan Nubians, according to them have a right to nationality under international law, which governs the actions of the Kenyan government, and which is supported by the genuine and effective link that Nubians have developed with Kenya over many generations. They claim that they may not be arbitrarily deprived of that nationality, which in effect means that there must be a fair process that is in accordance with international law with respect to any proposed modification of their nationality status.

76. The Complainants maintain that the right to nationality is no longer the sole prerogative of the State. That the Respondent State is bound by limitations imposed by human rights standards within international law. They claim that international law's scope to limit state sovereignty in the regulation of citizenship was first established by the Permanent Court of International Justice (PCIJ) in 1923, ruling that the question of whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relevant question; it depends on the development of international relations.

77. They aver that the arbitrary deprivation of effective nationality faced by Kenyan Nubians fails to recognize their genuine and effective link to Kenya, as well as their lack of a connection to any other country. They argue that the importance of an individual's links to a country in determining citizenship related rights was first articulated by the International Court of Justice in the *Nottebohm* case in which the Court set forth some of the factual ties that give rise to a genuine and effective link, including: habitual residence of the individual concerned... the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in to his children, etc.²⁵

78. They argue that Kenyan Nubians have lived in Kenya for over a century. For several generations,

Kenya has constituted their sole country of habitual residence, in which all family and community ties have been rooted. As a community, Kenyan Nubians have thus lost all political, economic and social ties with Sudan, along with any viable claim of return to that country. They maintain that Kenya is the only country that Nubian elders, adults or their children have ever known.²⁶

79. The Complainants claim that lack of an alternative citizenship is also a relevant consideration. The Commission, they aver, has rejected arguments made by the State that individuals might have citizenship in third countries as they were not supported by evidence. The Commission found that the absence of an alternative citizenship raised aviolation of Articles 3(2) and 5 of the Charter.²⁷ On that basis, the Kenyan authorities' rejection of the claim to nationality of Kenyan Nubians arriving in the 1940s, as well as the continued uncertain citizenship status of all Nubians, is both unjustified and arbitrary in light of their "genuine and effective link" to Kenya, as well as their lack of any other citizenship.²⁸

80. They argue that by requiring Kenyan Nubians to go through the vetting process, delaying citizenship for many and denying it for some, Kenyan Nubians are arbitrarily deprived of the effective enjoyment of their nationality. The deprivation is arbitrary because it is discriminatory; it fails to respect due process guarantees of certainty, foresee ability, and judicial review; it violates the obligation to promote and protect minorities; and it leaves many Kenyan Nubians effectively stateless.

81. The Complainants assert that as a result of the vetting process, many Kenyan Nubians do not receive their ID card and are left essentially stateless, in violation of international law. They state that Nubians today still have a tenuous citizenship status, and unlike other Kenyans are required to go through the vetting process to obtain proof of their Kenyan nationality. They claim that the uncertainty brought about by the vagaries of the vetting process means that many Nubians are deprived of effective citizenship. They further claim that Nubians have no legitimate expectation that they will be given the documents needed to obtain recognition and access the rights that citizenship brings. The many Nubians who do not receive ID cards, and those who lose documents and as are sultare not able to prove their citizenship, are effectively stateless.

Alleged Violation of Article 14

82. The Complainants submit that Kibera has become the ancestral homeland for Nubians in Kenya; the place where they have buried their dead for generations. Their situation is unique, as unlike other tribes who live in Kibera, they have no other homeland in Kenya to go to. They argue that International law requires that the property rights of the Kenyan Nubians are respected such that they have security of tenure.

83. They aver that Nubians were settled in Kibera in the early 1900s but were considered Sudanese by the British colonial administration. Upon independence, successive governments maintained that they were aliens and refused to accept their property rights in Kibera, forcibly evicting them from their homes. Successive administrations insisted that Kibera was government land, and refused to provide any domestic utilities or public services, leaving the Kenyan Nubians to live in an enclave of poverty.

84. They argue that the refusal to recognize the property rights of Kenyan Nubians arises from the historical refusal to accept Nubians' citizenship and their ongoing tenuous citizenship status. Thus, Nubians' lack of any ancestral homeland in Kenya is often invoked by officials as one of the reasons for which Kenyan citizenship cannot be granted to them.²⁹ The link between denial of property rights and deprivation of nationality is further under scored by successive governments maintaining that Kibera is government land.³⁰ This position has resulted in routine forced evictions through the decades, and a deliberate failure to provide security of tenure to "squatters" inhabiting Kibera, a failure which has relegated Kenyan Nubians to a precarious existence.

85. The Complainants aver that the Kenyan Nubians seek recognition of their collective property rights in Kibera in order to protect themselves against further forced evictions and encroachments, which threaten

their cultural survival, and on the basis that, without a homeland in Kenya, the Nubian community effectively does not exist.

86. They claim that Kenyan Nubians of Kibera have the right under Article 14 of the Charter to legal protection for the property where they have lived for generations, and with which they have developed a profound and all-encompassing relationship as their ancestral home. However, as a result of the historical injustice whereby they were regarded as aliens and due to which they still have a tenuous citizenship status, the Government does not recognize their property rights.

87. The Complainants point out that the Commission recognizes land as property for the purposes of Article 14 of the Charter.³¹ The right to property includes the right to have access to one's property and not to have one's property invaded or encroached upon.³² The Commission has also recognized that owners have the right to undisturbed possession, use and control of their property however they deem fit.

88. The Complainants argue that Governments may only encroach upon the Article 14 rights of individuals if it is in the interest of public need or in the general interest of the community, and if the encroachment is proportionate. They state that there is no general interest in maintaining the Kenyan Nubians in their precarious state, at permanent risk of widespread forced evictions, which amount to a gross violation of human rights. Article 14 of the Charter establishes that an encroachment upon property will constitute a violation of the Charter unless it is shown that it is in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

89. They state that the African Commission has established that the justification of limitations on rights, such as those allowed under Article 14, must be strictly proportionate with, and absolutely necessary for, the advantages which follow.³³ The Commission has further emphasized that any limitations should be the least restrictive measures possible.³⁴

90. They outline a summary of encroachments upon Kibera, as follows:

1. Over the years, the 4,197 acres originally allocated to the Nubians has been reduced to 400 acres by government sales of land for developments.
2. With each new government concession granted to non-Nubians, the Nubian community has had to live in less space, such that they could no longer keep animals or farm, threatening their food security.
3. Recent government slum upgrading has further reduced the size of Kibera, but Kenyan Nubians who lived in those areas were generally not considered for occupancy of the new houses.
4. No notice was given of government-sponsored evictions, which were carried out using force and with the assistance of the police.
5. No provision was made for alternative housing.
6. No compensation was provided to those who were displaced.
7. Nubians only secured property titles by the intervention of non-Nubians.

91. The Complainants state that the African Commission has found that the expropriation of the land of a particular ethnic group as part of a program aimed at forcing them out of the country amounted to a violation of Article 14.³⁵ They argue that the Commission has also drawn inspiration from the definition of the term used by the United Nations Committee on Economic, Social and Cultural Rights, which defines the term as the permanent removal against their will of individuals, families and/or communities from the homes and/or lands which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.³⁶ The Commission has found that: Forced evictions, by their very definition, cannot be deemed to satisfy Article 14 of the Charter's test of being done 'in accordance with the law'. This provision must mean, at the minimum, that both Kenyan law and the relevant provisions of international law were respected.³⁷

92. The Complainants argue that any encroachment upon property rights must be carried out in accordance with "appropriate laws" in order to avoid a violation of Article 14, which includes domestic and international law. The forced evictions of the Kenyan Nubians from Kibera have not been in accordance

with law because (a) the failure to recognize the Nubians' ancestral claim to Kibera violates international law; (b) the requirements for due process have not been respected; (c) no provision for alternative housing has been provided or compensation paid and (d) the forced evictions are discriminatory.

Consequential violations

93. The Complainants submit that the discrimination to which Kenya Nubians are subjected also result to the violation of their rights to equal access to education, Art 17 (1), denial of equal access to effective health care, Art 16, denial of equal access to work, Article 15 and denial of freedom of movement: Article 12

Alleged Violation of Article 1

94. The Complainants argue that the Kenyan Government's failure to give effect to the rights raised in this Communication violates Article 1 of the Charter. They further argue that the right not to be discriminated against in access to nationality; the prohibition against statelessness; the respect for property rights; and the rights relating to all consequential violations arising in the present application must be protected effectively in practice as well as in theory.

95. The Complainants argue that under the African Charter, such obligations come within the duty to respect, protect, promote and fulfill rights under that instrument.

Respondent State's Submission on the Merits

96. In its submissions on admissibility, the Respondent State also addressed the initial issues raised by the Complainants on the Merits. It did not however make any specific observations on the Complainants' submissions on the Merits of the Communication despite being given the opportunity to do so on several occasions.

Alleged violation of Article 2

97. The Respondent State submits that it guarantees to all persons within its territory the right to non-discrimination on any ground including race, sex, color, language, religion, etc. It recalls that the right to non-discrimination on is enshrined in Section 70 of the Constitution of Kenya ((1963), which guarantees the enjoyment of fundamental rights and freedoms to all in Kenya, without distinction.

98. The Respondent State denies the allegation that the Nubians are discriminated against in the acquisition of citizenship rights on the basis of their affiliation to the Nubian Community. It states that the Kenyan Constitution does not provide for acquisition of Kenyan citizenship to communities, tribes, clans or groups of people but only to individuals. Any claim to citizenship must be examined on a case by case basis. It points out that this position is legally sound considering that a majority of Communities in Kenya, including the Nubian Community, have their counterparts in the neighboring countries such as Uganda and Sudan and a blanket qualification would precipitate the influx of the community into the country.

99. The Respondent State points out further that a person from the Nubian Community may not be a Kenyan citizen on the strength of that connection but an individual person who is from the Nubian community may be a citizen of Kenya under the provisions of the Constitution and the Kenya Citizenship Act, Cap 170 of the Laws of Kenya.

100. The Respondent State submits that as a general rule under Section 84 of the Kenyan Constitution, the prohibition of discrimination shall not extend to distinctions, exclusions, restrictions or preferences made by State Parties between citizens and non- citizens provided that such provisions do not discriminate against any particular nationality. It submits further that, non-indigenous Kenyan communities that do not qualify for automatic citizenship by birth fall under this provision and in considering whether people who fall under this category warrant the grant of Kenyan citizenship, the National Registration Bureau in Kenya, has put in place varied vetting procedures.

101. According to the Respondent State, members of African, Arab and European descent are subjected to the same vetting process as those of the Nubian Community where they are required to provide birth certificates of their parents and those of their grandparents to ascertain their suitability for Kenyan citizenship. The Communities that live along the border such as the Taita, Maasai, Somali, Luhya, and some coastal Communities are also subjected to similar vetting processes.

Alleged violation of Article 5

102. The Respondent State submits that in order to protect the dignity of everyone in its territory, the Constitution of Kenya provides that no person shall be subjected to torture or to inhuman or degrading punishment or treatment. Slavery, forced labor and corporal punishment are equally prohibited. The Respondent State outlines reforms it has undertaken in the prison sector and the rules that protect the integrity of detainees.

103. It avers that Kenya enacted The Statute Law (Repeals and Miscellaneous Amendment), Act, 1997, which expressly prohibits torture being used by the police to extract information/evidence. The Respondent State points out that the efforts of the Government to combat torture and other cruel, inhuman or degrading treatment or punishment have been supplemented by civil society organizations working in Kenya. It points out further that Kenya laws, whether statutory or administrative, are not discriminative but apply to all without distinction.

Alleged violation of Article 12

104. The Respondent State submits that the Kenyan Constitution deals with protection of freedom of movement and provides that no citizen of Kenya shall be deprived of his freedom of movement, the right to reside in any part of Kenya, to leave Kenya and immunity from expulsion from Kenya. This freedom may only be restricted in the interest of defence, public safety, order, morality and public health or in the enforcement of a court order.

105. It states that the right to freedom of movement applies to Kenyans and foreign nationals alike, so long as they are in the country lawfully. The Respondent State avers that members of the Nubian community who have successfully applied for Kenyan citizenship enjoy freedom of movement within Kenya in the same way as all other Kenyans following the issuance of National Identity Cards to them. It also avers that members of the Nubian community, who fall within the category of aliens, enjoy equal rights as any other legal aliens without any discrimination whatsoever.

106. The Respondent State argues that it is not proper for the Complainants to allege a violation of Article 12 of the Charter if they have not sought the procedures to acquire citizenship. The Respondent State maintains that Article 12 of the Charter allows states to discriminate vis a vis the movement of foreign persons to curb insecurity. The Kenyan Government as part of exercising territorial sovereignty within the meaning of customary international law has every right to determine its internal issues especially when it

comes to minimizing insecurity.

Alleged violation of Article 14

107. According to the Respondent State, Section 75 of the Constitution guarantees the right to protection from deprivation of property and provides that an individual may not be deprived of their property unless by law and when the state may compulsorily acquire property for public purposes by compensating the person deprived of the property. It maintains that members of the Nubian community are not exempted from enjoying this right as is reflected by a number of them who have titles to land as proof of ownership of property and security of tenure.

Alleged violation of Article 15

108. The Respondent State outlines various policies and programs aimed at creating jobs in both the formal and informal sectors in Kenya. It also outlines legislative measures aimed at promoting an enabling environment for business and industrial development. The Respondent State points out that it has various ILO conventions and enacted domestic legislation which guarantee just and favorable conditions of work. In the Respondent State's view, only the registration of an individual as a Kenyan citizen guarantees to them the right to work in any part of the country without any restrictions; a guarantee which it says extends to the Nubians.

Alleged Violation of Article 16

109. The Respondent State outlines various programs and mechanisms which it has put in place to ensure better and affordable healthcare for all Kenyans. These include access to free malaria treatment; the supply of free mosquito nets; access to free anti-retroviral treatment; the construction of new dispensaries and health clinics etc. It avers that these health benefits are available to all persons living in Kenya without distinction and denies the allegation that it has infringed the right of Nubians to access quality healthcare.

Alleged violation of Article 17

110. The Respondent State brings to the attention of the Commission various legislative and administrative measures adopted to give effect to the right to education. It points out that free and compulsory primary education has been offered in Kenya since 2003 and has at the time to [sic!] the Communication was submitted, benefitted about 7.6 million children. The Respondent State points out further that these benefits accrue to all children without distinction, contrary to the Complainant's allegations.

111. The Allard K. Lowenstein International Human Rights Clinic (hereinafter the Clinic) is a Yale Law School course that gives students first-hand experience in human rights advocacy and it has an interest in ensuring respect for the right of all people to a nationality and not to be stateless. The Clinic is particularly concerned that the deprivation of these rights is likely to undermine protection of the most fundamental rights enshrined in international human rights conventions, including the African Charter.

112. In its submission, the Clinic examines the importance and the protection of the right to nationality under international law, emphasizing the necessity for States to prevent statelessness within their borders. It submits that although the right to a nationality is not explicitly guaranteed in the African Charter., the Commission has recognized the critical role of this right in the protection of other fundamental human rights and the clinic urges that the Commission should find that there is an implicit right to nationality in the Charter.

113. Even if the right to nationality is not found to be implicit in the Charter, the Clinic submits that treaty and customary international law prohibits the denial of nationality on arbitrary or discriminatory grounds. It further outlines international and regional instruments which recognize the right to nationality, jurisprudence of various human rights jurisdictions on the right as well Declarations and Resolutions of various United Nations bodies.³⁸ In addition to a general right to a nationality, the Clinic also emphasizes on the position of international law on the right of children to a nationality because of the vulnerability of children without a nationality.

114. According to the Clinic, there is an obligation on states to grant their nationality to any person in their jurisdiction who would otherwise be stateless. Statelessness heightens the vulnerability of individuals and infringes on their ability to enjoy a broad spectrum of other rights. The international prohibition against statelessness extends not only to those who are *de jure* stateless, but also to those who are *de facto* stateless. An individual without a nationality is denied many of the domestic protections afforded to nationals as affirmed by the Commission in **Modise v Botswana**.

115. Given the critical role that the right to a nationality plays in protecting other rights explicitly guaranteed by the African Charter, the Clinic urges the Commission to affirm and protect the right to a nationality by finding it to be implicit in the African Charter. According to the Clinic, the right to nationality is essential for guaranteeing other rights protected in the Charter, such as the right to freedom of movement, the right to equality before the law and equal protection of the law, the right to the recognition of one's legal status, the right to participate in public affairs, the right to work, the right to education and the right to be equal with all other peoples.

116. The Clinic submits further that whether or not the Commission chooses to affirm that the right to nationality is implicit in the Charter, it is clear that states may not discriminate in law or in practice when providing people with or depriving them of nationality. According to the Clinic, requiring individuals of particular ethnic or national origins to meet different, more burdensome requirements than others in order to establish their nationality or to obtain birth certificates has been found to violate the prohibition against arbitrary and discriminatory treatment. It points out that States, have a *jus cogens* obligation, as well as international treaty obligations, to ensure that individuals are not denied nationality on arbitrary or discriminatory grounds. Even though a state's laws on their face may provide individuals with an equal right to nationality, enforcing these laws in an arbitrary or discriminatory way violates this international prohibition.

117. The Clinic concludes by submitting that if the facts in the present Communication are proven, the Commission should find that the Kenyan government has deprived the Nubians of their implied right to a nationality or find that Kenya employs discriminatory administrative practices that deny the Nubian people effective nationality and render them stateless.

The Commission's Assessment on the Merits

118. The Commission is called upon to determine whether the actions of the Kenyan Government in allegedly requiring Nubians to go through a lengthy vetting procedure before being issued with identity documents as well as the alleged encroachments on their land are contrary to the various provisions of the African Charter. The Commission is also called upon to determine whether there are other violations consequent upon the Respondent State's alleged discriminatory practices in the issuance of identity documents.

119. Although the Complainants outline several Articles of the Charter which they allege have been violated by the Respondent State, the Commission considers, taking into consideration the facts of the case and the arguments of the parties that the contentions properly fall within the confines of Articles 1, 2 and 3 (read together), 5, and 14 of the Charter. The Commission's assessment of the alleged consequential violations will be dependent on a finding of violation of Articles 2 and 5 of the Charter.

120. The Commission notes from the onset that the Respondent State has not made any specific observations on the Complainants' submissions on the Merits despite being given ample opportunity to do so in accordance with the Commission's Rules. In the absence of any specific observation, the Commission has relied on the Respondent State's initial submissions on the Admissibility which also addressed issues raised by the Complainants on the Merits of the Communication.

Alleged violation of Article 2 and 3

121. {{2,Article 2} establishes that:

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

122. Article 3 stipulates that:

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

123. The Commission observes that Articles 2 and 3 of the Charter establish what is generally known as the right to equality and non-discrimination. While the right to equality and equal protection of the law is a substantive right, non-discrimination is a general principle which permeates the enjoyment of all rights guaranteed in the Charter. The principle of equality and non-discrimination is fundamental for the safeguard of human rights and is enshrined in all major international and regional human rights instruments.³⁹

124. The principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international and national law. States are therefore under an obligation to combat discrimination both in law and in practice.⁴⁰

125. The Commission has defined discrimination in **Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe**, as:

*any 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.*⁴¹

126. The Commission observes that the principle of equality and non-discrimination does not require all individuals in similar circumstances to be necessarily treated in the same manner; it permits the different treatment of people similarly placed if such treatment is meant to achieve a rational and legitimate purpose that does not impair the fundamental dignity of the affected persons or unjustifiably infringe on their enjoyments of the rights and freedoms guaranteed in the Charter.

127. In the present Communication, the Complainants have established and submitted sufficient evidence to the effect that Kenyan Nubians are treated differently from other Kenyans in the acquisition of ID cards.⁴² They have outlined significant additional burdens that are imposed on them when they seek to acquire ID cards. In addition to being required to provide supporting documents, such as their grand-parents ID documents, which is not required of other indigenous Kenyan ethnic groups; Nubians must be vetted and approved by a Committee; they must swear an affidavit in support of their claim to an ID card before a Magistrate's Court and they are required to pay a fee to the Court.⁴³

128. The Complainants have pointed out that the only reason for such differential treatment is the ethnic and religious affiliations of the Nubians, which are prohibited ground for differential treatment under the Charter. They have pointed out further that the only other community that is subjected to this kind of differential treatment is the Kenyan Somalis, who unlike the Nubian, are border Communities.

129. The Respondent State on its part denies that Kenyan Nubians are discriminated against in the acquisition of identity documents and submits that its Constitution does not provide for the acquisition of Kenyan citizenship to communities, tribes, clans or groups of people but on an individual basis. It however admits that Kenyan Nubians, just like members of other African, Arab and European descent are subjected to the vetting process in order to determine their suitability for the acquisition of Kenyan citizenship. The justification for this, according to the Respondent State seems to be that a majority of Communities in Kenya, including the Nubian Community, have their counterparts in the neighbouring countries such as Uganda and Sudan and a blanket qualification would precipitate the influx of these communities in to the country.

130. From the above, the Commission notes that it is not in dispute that members of the Nubian community are treated differently from other Kenyans in the acquisition of ID documents which constitute proof of their nationality. It is also not in dispute that the only reason for this differential treatment is their ethnic and religious affiliations.⁴⁴

131. The Commission recalls that differential treatment on the basis of ethnic and religious affiliations is specifically prohibited under Article 2 of the Charter, the others being race, colour, sex, language, political or any other opinion, national and social origin, fortune and birth. The Commission considers that the reason for singling out these grounds is because they have historically been misused to oppress and marginalize peoples with these attributes, thereby demeaning the humanity and dignity inherent in them.⁴⁵ The Commission considers further that differential treatment on any of the grounds listed above, without objective justification and which has the effect of imposing burdens on a particular segment of society and impairing their dignity is unfair and discriminatory.

132. The Complainants have demonstrated that in order to acquire ID documents, significant burdens are placed on them merely on account of their ethnic and religious background. As a result of these burdens many individuals from the Nubian community face enormous hurdles in acquiring IDs. Without IDs, they are unable to enjoy a broad range of rights guaranteed in the Charter, such as the right to free movement, the right to education, the right to work under equitable and satisfactory conditions etc. The lack of IDs cards also effectively renders many Nubians stateless and liable at any point in time to expulsion or arrest. This certainly is an affront to their dignity as human beings deserving of equality with other Kenyans and equal protection of the laws governing Kenyan citizenship.

133. The Commission considers that adopting an arbitrary measure, such as the vetting process, which has no basis in Kenyan law, is prone to abuse, and which places significant burdens on a minority ethnic group and makes them vulnerable to further marginalization is irrational and consequently unjustifiable.

134. The above is a clear indication that Kenyan Nubians are unfairly discriminated against in the acquisition of identity documents solely on account of their ethnic and religious affiliations, which assails their dignity as human beings who are inherently equal in dignity. This position is further supported by the findings of the Kenyan Government's own human rights institution, the Kenya National Commission on Human Rights, which in a study found that:

*There is a strong institutionalised link between citizenship and ethnicity in the issuance of identity cards. The Study found that the registration system applied different and stricter rules with respect to Nubians, Kenyan Somalis and Kenyan Arabs as opposed to other Kenyan ethnic groups. This approach offends the tenets of equal treatment and has no place in a pluralistic and democratic society. Denying specific ethnic groups Identity Cards is not only discriminatory; it also enhances opportunities for rent seeking and further marginalizes these communities.*⁴⁶

135. In view of the above the Commission considers that the rights of Kenyan Nubians under Article 2 and 3 of the Charter have been violated.

Alleged violation of Article 5

136. Article 5 of the Charter stipulates as follow:

Every individual shall have the right to the respect of the dignity inherent in the human person and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading treatment or punishment shall be prohibited.

137. The Commission notes from the onset that the present Communication does not deal with the second limb of Article 5, namely, the prohibition of exploitation and degradation of man. The respect of the dignity inherent in the human person informs the content of all the personal rights protected in the Charter. The Commission's assessment will therefore primarily dwell on the right to the recognition of one's legal status (and its relation to a person's dignity) as this is the main thrust of the Communication.

138. The Commission recalls that the right to the recognition of one's legal status (or juridical personality)⁴⁷ is protected in many international and regional human rights instruments.⁴⁸ The right to the recognition of juridical personality implies one's capacity to be the holder of rights and obligations. The recognition of one's legal status is an indispensable requirement for the enjoyment of the rights enshrined in the Charter because it grants an individual recognition before the law.

139. The Inter-American Court on Human Rights has established in the case of *Yean Bosico v Dominican Republic* that *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.*⁴⁹ It also held in that case that nationality (or citizenship)⁵⁰ is a prerequisite for recognition of juridical personality.⁵¹ Nationality is the legal and political bond that connects a person to a specific State and allows the person to acquire and exercise specific rights and obligations by virtue of his/her membership in a political community. Nationality or citizenship establishes a formal connection between an individual and the State and brings the individual within the realm of the State's protection.

140. The Commission agrees with the position espoused above, namely that nationality is intricately linked to an individual's juridical personality and that denial of access to identity documents which entitles an individual to enjoy rights associated with citizenship violates an individual's right to the recognition of his juridical personality. The Commission considers that a claim to citizenship or nationality as a legal status is

protected under Article 5 of the Charter.⁵² The present Communication will therefore be approached from that standpoint.

141. The Complainants have submitted that the restrictions imposed on Kenyan Nubians through the vetting process, excessive delays and other procedural obstacles in securing the ID cards that are necessary to obtain recognition of their Kenyan citizenship, amount to an arbitrary deprivation of the right to effective nationality, preventing recognition of their legal status.

142. According to them, Kenyan Nubians have a right to nationality under international law which is no longer the sole prerogative of the state. They claim that Nubians have established an effective and genuine link to Kenya for over a century and have thus lost all political, economic and social ties with Sudan, along with any viable claim of return to that country. They have pointed out that by requiring Kenyan Nubians to go through the vetting process, delaying citizenship for many and denying it for some, Kenyan Nubians are arbitrarily deprived of the effective enjoyment of their nationality. The deprivation is arbitrary because it is discriminatory and fails to respect due process guarantees of certainty, foreseeability, and judicial review and it leaves many Kenyan Nubians effectively stateless.

143. The Respondent State, apart from denying the allegations generally, has not made any specific submissions on this issue. It has outlined provisions of its domestic law and practices in the fight against torture, which are of no relevance in the present case.

144. The Commission notes that it is not in dispute that by operation of Kenyan law, Nubians, just like other communities which were settled in Kenya prior to independence qualify for Kenyan citizenship on an individual basis. As proof, the Respondent State submitted a list of many Nubians who are citizens, some of whom are employed in its Public Service. The Commission wishes to emphasize that the issue in the present Communication is not that Nubians cannot obtain Kenyan citizenship, but that arbitrary standards and undue hurdles are allegedly put in place by the administration which impede their access as a community to identity documents which are proof of their citizenship.

145. The Commission recalls that States enjoy a wide discretion when it comes to determining who qualifies to acquire its nationality. However, the State's discretion is limited by its obligations to prevent statelessness and the prohibition of discrimination.

146. Regarding the obligation to prevent statelessness, international law as codified in the Convention Relating to the Status of Stateless Persons⁵³ and the 1961 Convention on the Reduction of Statelessness, amongst others embody this principle. The latter Convention requires states to use their laws and administrative procedures to eliminate and prevent statelessness and to grant its nationality to a person born in its territory who would otherwise be stateless.⁵⁴ It also provides that, with limited exceptions, parties to the Convention shall not deprive a person of his nationality if such deprivation would render him stateless⁵⁵ Although Kenya is not a party to any of the above mentioned Conventions, it is worthy to note that these conventions outline the position of international customary law on State obligations to prevent statelessness.

147. The Commission wishes to recall that the African Charter on the Right and Welfare of the Child, which Kenya has ratified, makes it obligatory for Kenya to ensure that its 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. The African Committee of Experts on the Rights and Welfare of the Child has found in the case of Institute for Human Rights and Development in Africa (IHRDA), and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya, that the above obligation is applicable to Kenya.⁵⁶ This entails that children born in Kenya of Nubian parents are entitled to Kenyan citizenship by operation of this principle given that they do not lay claim to another nationality.

148. The facts of the present case reveal that Kenya has been remiss in fulfilling its obligation to prevent Statelessness because its arbitrary administrative practices affect the ability of Nubians to obtain ID cards, which have the effect of placing them outside the State's juridical system, thereby rendering many of them

stateless.

149. Regarding the prohibition of discrimination, the Commission recalls that States may not discriminate in law or in practice when providing people with or depriving them of nationality. The Commission has already established in its assessment of Articles 2 and 3 above, that the practice of requiring members of the Nubian community, simply because of their ethnic and religious affiliations, to meet different and more burdensome requirements in order to obtain identity documents is discriminatory and places them in a situation of extreme vulnerability as regards the exercise and enjoyment of their rights.

150. The State's discriminatory practices results in many Nubians who face enormous challenges to obtain or replace their ID cards when they are lost. Some are left altogether without an identity card (legal document required to proof citizenship) which excludes them from the State's juridical system. As a result, they cannot benefit from the advantages associated with Kenyan citizenship and are unable to enjoy a range of rights and freedoms already outlined above.

151. By failing to take measures to prevent members of the Nubian Community from becoming stateless and by failing to put in place fair processes, devoid of discrimination and arbitrariness for the acquisition of identity documents, the Commission considers that Kenya has failed to recognize the legal status of Nubians, in violation of Article 5 of the Charter.

Alleged violation of Article 14

152. Article 14 of the African Charter provides that: *The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*

153. The Commission has established in **Sudan Human Rights Organization and Centre for Housing Rights and Evictions (COHRE) v Sudan, (the Evictions case)** that the right to property encompasses two main principles. The first one is of a general nature; it provides for the principle of ownership and peaceful enjoyment of property. The second principle provides for the possibility, and conditions of deprivation of the right to property. Article 14 of the Charter recognises that States are in certain circumstances entitled, among other things, to control the use of property in accordance with the public or general interest, by enforcing such laws as they deem necessary for the purpose.⁵⁷

154. The Commission notes that the Complainants' main contention in the present Communication is the non-recognition of the property rights of the Nubian Community over the Kibera settlement (as a Nubian homeland) and the arbitrary dispossession of their property through forced evictions. The Commission notes further that Kenyan Nubians seek recognition of their collective property rights in Kibera in order to protect themselves against further forced evictions and encroachments, which they claim, threaten their cultural survival.

155. The Commission is therefore called upon to determine whether Nubians can claim ownership over the Kibera Settlement and whether their right to property has been violated as a result of routine forced evictions from the settlement allegedly perpetrated by the Kenyan Government. To determine this, the Commission considers that the historical background that gave rise to the present situation must be fully taken into account.

156. The Commission recalls from the unchallenged documentary evidence before it that Nubians are descendants of Sudanese soldiers used by the British in their military campaigns of the early 20th century. In 1904, they were settled by the colonial administration in a military reserve in Kibera, comprising a surface area of 4197.9 acres (approx. 1700 hectares), which was meant to provide a home for the ex-soldiers. Kibera was surveyed as a military reserve and gazetted as such in 1917. Permits to reside in Kibera were given to Nubians as individuals. The text of the permits gave the Nubians permission to live in the area and to build a house but no title was conferred.⁵⁸

157. According to the Cater [sic!] Carter Land Commission Report:

*The legal position of the occupants of Kibera appears to be that they are tenants at will of the Crown and the tenancy is liable to termination by the Commissioner of Lands. On the other hand we cannot agree that they have no rights in equity. We consider that Government had a clear duty to these ex-askaris either to repatriate them or to find accommodation for them... In our judgment they ought not to be moved without receiving suitable land elsewhere and compensation for disturbance, and we consider that a similar obligation exists in respect of their widows, sons who are already householders at Kibera*⁵⁹

158. The Commission also recalls from the evidence that the option to repatriate the Nubians was abandoned by the colonial administration and they have since remained in Kibera for over a century as the undisputed inhabitants of the settlement.⁶⁰ Over this period of time, they have formed inextricable links to the land which according to them constitutes the only homeland they have ever known and where they bury their dead. The dynamics in the settlement have over the years become more complex with the influx of other communities into the settlement and the systematic hiving off of the land by the State for development purposes. The Nubians have however remained the dominant community in Kibera, albeit with no land rights - a situation which is purportedly linked to the non-recognition of their Kenyan citizenship.

159. While the colonial authorities and the Kenyan Government have recognised a clear moral obligation to resettle the Nubians, the Kenyan Government has over the years maintained that Kibera is State land and that Nubians cannot therefore lay claim to the area as their homeland. Nubians and other occupants of Kibera are therefore regarded as squatters on government land although they have been in occupation of the land for over a century.

160. The Commission observes that it cannot merely be said that the Nubians' possession of the land in Kibera was/is at the mercy of the Respondent State since the state itself clearly recognises a moral obligation to provide settlement for the Nubians. The Commission considers that the access/occupation and use rights granted by the Respondent State to the Nubians over Kibera for over a century, is enough for them to request and obtain official recognition and registration of at least some of the land as their communal property. This imposes an obligation on the Kenyan Government to take all reasonable measures to provide security of tenure over lands which the Nubians occupy in Kibera. That the land question in Kenya in general and Kibera in particular is complex cannot be used as an excuse by the Respondent State to leave the Nubians of Kibera in such a precarious situation of insecurity and uncertainty, which encourages infringement on the rights of the community by the government and individuals.

161. The Complainants have also submitted that the lack of security of tenure over the land which the Nubians occupy, has given rise to their routine forced eviction from the Kibera settlement. According to them, these evictions have been carried out without adequate notice and no alternative land or compensation was offered to the Nubians. Apart from a blanket denial of the allegations, the Respondent State has not made any specific observations regarding this issue.

162. The Commission observes that forced evictions often lead to personal and collective trauma, resulting in the loss of livelihoods, the destruction of social networks and other devastating effects. Forced evictions dismantle what individuals and communities have built, sometimes over a long period of time, plunging families and communities into misery.⁶¹

163. To be constantly faced with the prospects of forced evictions, as is the case with the Nubians of Kibera, is one of the worst forms of injustices that individuals, families and communities can be exposed to.

164. While the Commission observes that Governments might under certain circumstances legitimately forcibly move people from their land or houses for a variety of reasons, it considers that any such measures must strictly adhere to international human rights standards in order to prevent unnecessary hardship and suffering. Some of these standards have been succinctly outlined in General Comment No 7 of the Committee on Economic Social and Cultural Rights which provides as follow:⁶²

States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with affected persons, with a view to avoiding, or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those who are affected by eviction orders. States Parties shall also see to it that all individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected.

165. In the present Communication, it has been submitted that Nubians have severally been evicted from Kibera with no provision made for alternative housing; no compensation provided to the displaced and no notice of such evictions given to the occupants. The Respondent State has not refuted any of these allegations. It has not also shown the public interest that necessitated these evictions nor has the legal framework within which the evictions were carried out been advanced. It therefore appears to the Commission that evictions were carried out without due process of law and in total disregard of the Respondent State's international human rights obligations.

166. For the above reasons, the Commission considers that the property rights of the Nubians in Kibera have been encroached on, in violation of Article 14 of the Charter.

Consequential violations

167. The Complainants have submitted that the discriminatory treatment to which Nubians are subjected, which results in a tenuous citizenship status leaves the Nubians in a precarious situation and leads to a violation of other rights intricately linked to citizenship.

168. The Commission has already concluded in its assessment of Articles 2, 3 and 5 above that Nubians are discriminated against in acquisition of identity documents which effectively hampers their ability to enjoy a range of rights guaranteed in the Charter. As a result, the Commission will therefore not examine in detail the violations consequent on this discriminatory treatment. It suffices to note that it is common knowledge that in Kenya, those without national identity cards cannot vote or contest for public office, cannot be employed in the public service, and may not have access to public services such as healthcare and education. They may also not be able to register their marriages, may not be able to enter public buildings or open bank accounts, and may not be able to move freely within the country and undertake a host of other transactions that are necessary for a dignified life. All these affect the ability of Nubians to enjoy the rights guaranteed in Articles 12, 13, 15, 16 and 17(1) of the Charter.

Alleged violation of Article 1

169. Article 1 of the Charter stipulates that ...parties to the Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall adopt legislative or other measures to give effect to them. The Commission has held in previous Communications that a violation of any provision of the Charter by a State Party automatically engages its responsibility under Article 1.⁶³

170. The Commission considers that if a State Party fails to respect, protect, promote or fulfil any of the rights guaranteed in the Charter, this constitutes a violation of Article 1 of African Charter. In the present Communication, the Commission has reached the conclusion that the Respondent State's conduct is in violation of Articles 2, 3, 5, 12, 15, 16, 17 (1) and 18 of the Charter. The Commission therefore finds as a consequence a violation of Article 1 of the Charter.

Decision of the Commission on the Merits

171. Based on the above, the African Commission on Human and Peoples' Rights:

1. Finds that the Republic of Kenya has violated Articles 1, 2, 3, 5, 12, 13, 14, 15, 16,17(1) and 18 of the African Charter on Human and Peoples' Rights;
2. Requests the Republic of Kenya to
 - a) Establish objective, transparent and non-discriminatory criteria and procedures for determining Kenyan Citizenship;
 - b) Recognize Nubian land rights over Kibera by taking measures to grant them security of tenure;
 - c) Take measures to ensure that any evictions from Kibera are carried out in accordance with international human rights standards.
3. Inform the Commission, in accordance with Rule 112 (2) of the Commission's Rules of Procedure, within one hundred and eighty days (180) of the notification of the present decision of the measures taken to implement the present decision.

Done in Banjul, The Gambia at the 17th Extraordinary Session of the African Commission on Human and Peoples' Rights held from 19 - 28 February 2015.

1

1 See for example Communication 204 (1997), *Mouvement Burkinabé des droits de l'homme et des Peuples vs Burkina Faso*, Fourteenth Annual Activity Report, para 4,14 and 36.

2 Report 14/89, Case 9641 (Ecuador),12 April 1989], Annual Report of the Inter-American Commission on Human and Peoples' Rights,1988-1989, OEA/Ser.LV/II/76, Doc.10, pp.104-15.

3 Report 1a/88, Case 9755 (Chile), 12 September 1988, Annual Report of the Inter-American Commission on Human and Peoples' Rights,1987-1988, OEA/Ser.LV/II/74,Doc. 10,rev.1,pp.132-9.

4 Ibid.

5 Communication 228/99-The Law Office of Ghazi Suleiman/ Sudan, 33rd Ordinary Session, Sixteenth Annual Activity Report (2003) at para. 29.

6 See Dawda K Jawara/Gambia.

7 *Recontre Africaine Pour la Defense des Droits de l'Homme v. Zambia*, Comm.71/92, 21st Ordinary Session, Tenth Annual Activity Report (1997) at para.12.

8 See *Akdivar v. Turkey* at para.68.

9 Ibid.

10 Ibid.

11 Article 37(3)

× When the petitioner contends that he is unable to prove exhaustion as indicated in this Article, it shall be up to the government against which this petition has been lodged to demonstrate to the Commission that the remedies under domestic law have not previously been exhausted, unless it is clearly evident from the background information contained in the petition.

of the Regulations adopted in OAS Doc. OAE. Ser. L. V/II.82 doc. 6, rev.1 at 103(1992).

12 Exceptions and Exhaustions of Domestic Remedies (Art. 46(1)), 46(2)(A) and 46(2)(B) American Convention on Human Rights, Ser. A, No.11, Advisory Opinion OC-11/90 of (10 August 1990) at para.23; *Velasquez Rodriguez Case*, Ser. C, No.4(29 July 1988) at para. 166; and *Godinez Cruz Case*, Ser. C, No.5 (20 January 1999 (sic!) 1989) at para. 175.

13 *Loayza Tamayo Case*, Preliminary Objections, Ser. C,No.25 (31 January 1996) at para.40.

14 *Famara Kone v. Senegal*, Comm. No. 386/1989, views adopted 21 October 1994, at para5.3.

15 See for example the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, Communication No.155/96, para 37-39, 2001.

16 See for example, *Amnesty International v Sudan*, Communication Nos. 48/90, 50/91, 89/93; *Malawi African Association v Mauritania*, Communications 54/91, 61/91, 98/93, 164/93, 196/97, 210/98; and *Free Legal Assistance Group v Zaire*, Communications 25/89, 47/90, 56/91 and 100/93.

17 *Sir Dawda Jawara v The Gambia*, communication 147/95 and 149/96

18 Id. Para 31.

19 Id. Paras 32-34.

20 Id Para33.

21 See Rights International and Others v Sudan, ACHPR 215/98. See also 13th Activity Report: 1999-2000 at para.24.

22 Comms. 25/89, 47/90, 56/91 and 100/93 at para.36.

23 Comms. 25/89, 47/90, 56/91 and 100/93 at para.35-37 and Sudan Case at para.38.

24 (Sic!)

25 Nottebohm case (Liechtenstein v Guatemala), second phase, Judgment of 6 April 1995 (sic!) 1955, ICJ Reports 1955

26 Exhibit 37: Letter from District Commissioner of Nairobi to the Provincial Commissioner, 27 April 1931; Exhibit 42: Letter addressed to the Honorary Chief Commissioner of Nairobi, 1 September 1950; Exhibit 55: Korir A. Singo'ei and Adam H. Adam in conjunction with the Kenyan Nubian Council of Elders, *Cover Racism. The Kibera clashes: An Audit of Political Manipulation of Citizenship in Kenya And 100 years of Nubians' Landlessness*, 2002, at p.18.

27 Ibid.

28 Modise v. Botswana, see note 123 (sic!) above, at para. 86.

29 Exhibit 23: Affidavit of Mohammed Gore, at para. 27; Exhibit 8: Affidavit of Ali Hussein Mursall, at para. 19.

30 Exhibit 13: Affidavit of Ibrahim Athman Said, at para. 11: [i]n 2001 there was a fundraising event in Kibera when former President Moi and the Member of Parliament for the area declared the area is government land and consequently Nubians who had rented houses in the area had no right to collect rent from those tenants. Exhibit 46: Letter from the Officer in Charge of the Extra Provincial District of Nairobi to the Advocates S.R. Kapila and Kapila 19 November 1956; Exhibit 36: Letter from the Secretariat Nairobi to the Assistant Commandant of King's African Rifles, 7 June 1919; Exhibit 44: Notes on a Preliminary Survey of the Proposal to Reconstitute the Kibera Africa Settlement Area, 18 May1955; Exhibit 37: Letter from District Commissioner of Nairobi to the Provincial Commissioner, 27 April 1931.

31 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, African Comm. Decision of May 2009, Communicationno. 276/2003.

32 The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, (Ogoni Case), African Comm. Decision of October 2001, Comm. no.155/96 (2001), at para. 54.

33 .

34 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya.

35 Malawi African Association and Others v. Mauritania

36 The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, (Ogoni Case).

37 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya.

38 The following international and regional conventions for example protect the right to nationality: Article 15

× **(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.

of the Universal Declaration of Human Rights; Article 5(d)(iii)

× **(iii)** The right to nationality;

of the International Covenant in the Elimination of All Forms of Racial Discrimination; the Convention on the Reduction of Statelessness; the American Convention of Human Rights and the European Convention on Nationality

39 See for example Article 2

× Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

of the Universal Declaration of Human Rights, Article 2(1)

× **(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.

of the International Covenant on Civil and Political Rights, 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.

of the International Covenant on Economic, Social and Cultural Rights, Article 1(1)

× The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

of the American Convention of Human Rights, Article 14

× The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

of the European Convention on Human Rights and Fundamental Freedoms, Article 3 of the African Charter on the Rights and Welfare of the Child etc.

40 See Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRIGEN1Rev.1 at 26 (1994), para 1

41 Communication 29/04 - ZLHR & IHRDA v Zimbabwe (2006) ACHPR para 91 ; see also the Commission's decision in Communication 211/98 - Legal Resources Foundation v Zambia (2000) ACHPR para 63

42 Evidence to this effect includes amongst others the sworn affidavits of Ismail Dafala Salim, Ibrahim Athman Said, Arafat Ali and Amina Sebit Aminala.

43 Non-Nubians, except for Kenyan Arabs and Somalis are not subjected to vetting and are only required to produce the ID of one parent and a baptismal certificate to be issued with ID cards.

44 Exhibit 14: Affidavit of Ismail Ahmed Babalah, at para. Exhibit 22: Affidavit of Mariam Gharib Ahmed, at para 7; Exhibit 5: Affidavit of Adam Muhammed, at para. 10; Exhibit 21: Affidavit of Khaltuma Ismail Omar, at para. 12.

45 See the Commission's decision in Legal Resources Foundation v. Zambia, African Comm. Decision of May 2001, Comm. No. 211/98, (2001), at para. 63; See also the South Africa Constitutional Court decision in Harksen v Lane No 1998 (1) SA300 CC para53.

46 Kenya National Commission on Human Rights, An Identity Crisis: A Study on the Issuance of National Identity Cards, at 24. (2007). Available at: www.knchr.org/dmdocuments/FinalIDsReport.pdf

47 In the French version of the Charter, 'legal status' is translated as 'personnalité juridique' or 'juridical personality', which accords more with the terminology used in other human rights instruments. Juridical personality and legal status are therefore used interchangeably in the present Communication.

48 See among others, the Universal Declaration of Human Rights, Article 6

× Everyone has the right to recognition everywhere as a person before the law.

; the International Covenant on Civil and Political Rights, Article 16

× Everyone shall have the right to recognition everywhere as a person before the law.

; the American Declaration on the Rights and Duties of Man, Article XVII

× Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

, the American Convention on Human Rights, Article 3

× Every person has the right to recognition as a person before the law.

; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 3(1)

× Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights

49 See case of Yean Bosico v Dominican Republic I-ACtHR, Judgment of 8 Sept 2005, para178.

50 Nationality is conventionally used as a term of international law while citizenship is a term of constitutional law. The two are used interchangeably in this Communication.

51 Ibid psara 137.

52 See the Commission's Resolution 234 on the Right to Nationality adopted at the 53rd Ordinary Session in Banjul, The Gambia in which the Commission reaffirms that the right to nationality is a fundamental human right implied within Article 5 of the Charter and essential for the enjoyment of other fundamental rights. See also Communication 97/93 - John K Modise v Botswana, (2000) ACHPR, 14 AR. Para 89.

53 Convention Relating to the Status of Stateless Persons, opened for signature Apr. 26, 1954, 360U.N.T.S. 117.

54 Article 1

× **(1)** A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted: **(a)** at birth, by operation of law, or **(b)** upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this Article, no such application may be rejected. A Contracting State which provides for the grant of its nationality in accordance with sub-paragraph (b) of this paragraph may also provide for the grant of its nationality by operation of law at such age and subject to such conditions as may be prescribed by the national law.

55 Article 8

× **Article 8: (1)** A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless. **(2)** Notwithstanding the provisions of paragraph 1 of this Article, a person may be deprived of the nationality of a Contracting State: **(a)** in the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality; **(b)** where the nationality has been obtained by misrepresentation or fraud. **(3)** Notwithstanding the provisions of paragraph 1 of this Article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time: **(a)** that, inconsistently with his duty of loyalty to the Contracting State, the person **(i)** has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or **(ii)** has conducted himself in a manner seriously prejudicial to the vital interests of the State; **(b)** that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State. **(4)** A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this Article 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 of the Convention on the Reduction of Statelessness.

56 See Communication no. Com/ 002/2009 (2011) para 50

57 Communication 279/03 & 296/05 - Sudan Human Rights Organization & Centre for Housing Rights and Evictions v Sudan

58 The Carter Land Commission Report 1933 at para.598-599

59 The Carter Land Commission Report 1933 at para.601

60 This assertion does not negate the fact that Kibera comprises many other ethnic groups who moved into the settlement over time.

61 See UN Fact Sheet No 25: Forced Evictions and Human Rights, (1996) United Nations High Commissioner for Human Rights.

62 General Comment No 7 of the Committee on Economic Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing, (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997).

63 See Communication 279/03-296/05 - Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan (2010) ACHPR, para 227.