

*The Nubian Community in Kenya v.
The State of Kenya*

Communication 317/06

*Arguments on the Merits Submitted by the Open Society Justice Initiative,
the Institute for Human Rights and Development in Africa and the Centre
for Minority Rights Development*

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TABLE OF CONTENTS

I. INTRODUCTION	4
II. STATEMENT OF FACTS	5
NUBIANS IN KENYA.....	5
<i>Historical Background.....</i>	6
<i>The Promise of Kibera.....</i>	6
<i>Nubian Settlement in Kibera.....</i>	8
<i>Post-Independence Treatment of Kenyan Nubians as “Aliens”.....</i>	8
<i>Public Recognition of Nubians as the Original Inhabitants of Kibera.....</i>	9
NUBIANS ARE CITIZENS UNDER KENYAN LAW.....	10
THE VETTING PROCESS FOR NUBIANS TO OBTAIN AN ID CARD TO RECOGNISE CITIZENSHIP .	11
THE CONSEQUENCES OF THE DEPRIVATION OF EFFECTIVE CITIZENSHIP	14
<i>Poor Employment Prospects.....</i>	15
<i>Refusal to Issue Passports</i>	16
FAILURE TO RECOGNISE PROPERTY RIGHTS IN KIBERA	16
<i>Forced Eviction of Nubians from their Ancestral Homeland of Kibera</i>	16
THE CONSEQUENCES OF THE FAILURE TO RECOGNISE PROPERTY RIGHTS	19
<i>Lack of Income from Property Ownership</i>	20
<i>Poor Education Prospects</i>	20
<i>Poor Sanitation and Healthcare.....</i>	21
III. RELEVANT INTERNATIONAL LEGAL STANDARDS.....	22
THE PROHIBITION AGAINST DISCRIMINATION UNDER INTERNATIONAL LAW	22
<i>African Charter on Human and Peoples Rights (1981).....</i>	22
<i>International Covenant on the Elimination of All Forms of Racial Discrimination (1965).....</i>	22
<i>International Covenant on Civil and Political Rights (1966).....</i>	23
<i>International Covenant on Economic Social and Cultural Rights (1966).....</i>	24
<i>Convention on the Elimination of All Forms of Discrimination Against Women (1979).....</i>	24
<i>Convention on the Rights of the Child (1989)</i>	24
THE RIGHT TO NATIONALITY UNDER INTERNATIONAL LAW	25
<i>Universal Declaration of Human Rights (1948).....</i>	25
<i>International Covenant on Civil and Political Rights (1966).....</i>	25
<i>African Charter on the Rights and Welfare of the Child (1990).....</i>	25
<i>Convention on the Rights of the Child (1989)</i>	25
<i>American Convention on Human Rights (1969).....</i>	25
<i>European Convention on the Right to Nationality (1997).....</i>	26
THE PROHIBITION OF STATELESSNESS UNDER INTERNATIONAL LAW	26
<i>ECOSOC resolutions</i>	26
<i>General Assembly.....</i>	27
IV. STATEMENT OF ALLEGED VIOLATIONS OF THE CHARTER	27
A. DISCRIMINATION IN ACCESS TO NATIONALITY	28
1. PROHIBITION OF DISCRIMINATION UNDER THE CHARTER	28
2. DIFFERENCE IN TREATMENT: THE VETTING PROCESS FOR NUBIANS.....	30
3. DISCRIMINATION ON GROUNDS OF ETHNIC AND RELIGIOUS ORIGIN	30
4. BURDEN OF PROOF.....	32
B. ARBITRARY DEPRIVATION OF EFFECTIVE NATIONALITY	32

1. THE RIGHT TO NATIONALITY UNDER INTERNATIONAL LAW	32
2. THE RIGHT TO NATIONALITY IS NOT AT THE DISCRETION OF THE STATE	35
3. THE KENYAN NUBIANS HAVE A GENUINE AND EFFECTIVE LINK TO KENYA	36
4. THE KENYAN NUBIANS ARE <i>ARBITRARILY</i> DEPRIVED OF THEIR RIGHT TO NATIONALITY	38
<i>Discrimination</i>	38
<i>Procedural fairness, judicial review and foreseeability</i>	38
<i>Positive obligations to protect minority rights</i>	40
<i>Prohibition against statelessness</i>	41
C. STATELESSNESS	41
D. BREACH OF RESPECT FOR PROPERTY RIGHTS	44
1. KENYAN NUBIANS HAVE THE RIGHT TO LEGAL PROTECTION FOR THEIR PROPERTY	45
<i>Possession in lieu of title</i>	46
<i>Recognition of Nubians as the Original Inhabitants of Kibera</i>	48
2. THERE IS NO PUBLIC INTEREST IN FORCED EVICTIONS FROM KIBERA	48
3. THE FORCED EVICTION OF NUBIANS FROM KIBERA IS NOT IN ACCORDANCE WITH LAW	50
a) <i>The Forced Evictions do not recognise the ancestral claim of the Nubians</i>	51
b) <i>The Forced Evictions Have Not Followed Due Process</i>	51
c) <i>No Alternative Property was Provided or Compensation Paid</i>	52
d) <i>The Forced Evictions are Discriminatory</i>	54
E. CONSEQUENTIAL VIOLATIONS.....	55
1. DENIAL OF EQUAL ACCESS TO EDUCATION: ARTICLE 17(1)	55
2. DENIAL OF EQUAL ACCESS TO EFFECTIVE HEALTH CARE: ARTICLE 16	57
3. DENIAL OF THE EQUAL ACCESS TO WORK: ARTICLE 15	58
4. DENIAL OF FREEDOM OF MOVEMENT: ARTICLE 12.	59
5. DENIAL OF THE RIGHT TO PUBLIC PARTICIPATION: ARTICLE 13	61
F. DIGNITY AND DEGRADING TREATMENT	62
1. DIGNITY	62
<i>Nubians are denied personal development and life prospects</i>	63
<i>Nubians are denied their legal identity and existence</i>	63
2. DEGRADING TREATMENT	64
G. FAILURE TO GIVE EFFECT TO THE KENYAN NUBIANS' RIGHTS	65
V. CONCLUSION AND REMEDIES	67
VI. LIST OF DOCUMENTS.....	69

I. INTRODUCTION

1. Despite having been settled in Kibera more than 100 years ago, and qualifying as citizens under Kenyan law, historically, Kenyan Nubians throughout the country have not been recognized as citizens and treated as aliens, as a result of which the citizenship¹ status of many remains tenuous. Their treatment as “aliens” by the colonial authorities has been perpetuated since independence. Nubians are discriminated against, in that they are required to go through a long and complex vetting procedure to obtain the ID card that is necessary for recognition of their citizenship, and essential for everyday life. Many face substantial delays in obtaining proof of their citizenship, or will never succeed in doing so, and are left essentially stateless.
2. The Kenyan Government has never accepted the property rights of Nubians in their ancestral homeland of Kibera, insisting that they are squatters on government land, and forcibly evicting them. The government further discriminates against them by refusing to provide any utilities or public services to Kibera because they are “squatters,” leaving the Kenyan Nubians and those that share the effects of the discrimination against them to live in an enclave of poverty, marginalized from the rest of society and with few life prospects. While other groups living in Kibera have the option of returning to their homeland, the Nubians have only one ancestral homeland in Kenya – Kibera.
3. On behalf of the Kenyan Nubian community, the Institute for Human Rights and Development in Africa (“IHRDA”), the Open Society Justice Initiative (“the Justice Initiative”) and the Center for Minority Rights Development (“CEMIRIDE”) hereby submit this communication under Article 55 of the African Charter on Human and Peoples’ Rights (“African Charter”) against Kenya.
4. The Rights of Kenyan Nubians under the African Charter are violated both individually and collectively for the following reasons:
 - *A. Discrimination in Access to Nationality.* Kenyan Nubians are treated differently by public authorities to other Kenyans without justification, in that they are the only non-border ethnic group required to go through a complex and humiliating vetting process to secure the ID card that is essential to obtain recognition of their Kenyan citizenship, contrary to Articles 2, 3 and 19 of the African Charter.
 - *B. Arbitrary Deprivation of Nationality.* The vetting process leaves Kenyan Nubians with a tenuous citizenship status by which they are deprived of effective access to their Kenyan citizenship and left in an uncertain state as to whether they will be granted citizenship at all, contrary to Article 5 of the African Charter and international law.
 - *C. The Prohibition of Statelessness.* Those Kenyan Nubians who are unable to obtain the ID card which is essential to obtain recognition of their Kenyan citizenship are left stateless, a situation which is prohibited in international law.

¹ Throughout this submission, the terms “citizenship” and “nationality” are used interchangeably.

- *D. Breach of Respect for Property Rights.* As a result of the historical failure to recognise Nubians as citizens and their ongoing tenuous citizenship status, Kenyan Nubians have never been given legal protection for their ancestral homeland of Kibera, contrary to Article 14 of the African Charter.
- *E. Consequential violations.* The long history of discrimination with regard to Kenyan Nubians' citizenship and property rights has led to their marginalisation, which is perpetuated through the failure of the government to provide equal access to education, health care, work, movement, and political participation, leading to further violations of the African Charter.
- *F. Degrading Treatment.* The discriminatory deprivation of nationality and marginalisation of the Kenyan Nubians violates their right to dignity, and amounts to degrading treatment, contrary to Article 5 of the African Charter.
- *G. Failure to Give Legal Effect to Kenyan Nubians' Rights.* The failure to give legal effect to rights of citizenship and property violates Article 1 of the African Charter.

II. STATEMENT OF FACTS

Nubians in Kenya

5. The exact number of Nubians in Kenya is unknown, but estimates are in the term of tens of thousands.² A considerable proportion of Nubians live in the vast slum of Kibera, near Nairobi. The remaining Nubians live in settlements in the towns of Bondo (Nyanza), Kisumu (Nyanza), Kibos (Nyanza), Mumias (Western Province), Meru (Eastern Province), Isiolo (Eastern Province), Mazeras township near Mombasa, Eldama Ravine (Rift Valley Province), Tange-Kibigori, Sondu (Nyanza), Kapsabet (Rift Valley Province), Migori (Nyanza) and Kisii (Nyanza), since their arrival in Kenya in the early 1900s.³ The Nubians are predominantly Muslim in a country that is predominantly Christian.⁴

² See: UNHCR Global Report 2008, at p. 65. Available at: <http://www.unhcr.org/4a2d286d2.html>; Exhibit 76: Kenya National Commission on Human Rights, *An Identity Crisis: A Study on the Issuance of National Identity Cards*, at p. 10 (2007). Available at: www.knchr.org/dmdocuments/Final_IDSReport.pdf ("Kenya National Commission on Human Rights – *An Identity Crisis* – 2007") (indicating that "[t]oday over 100,000 Nubians live in Kenya and are scattered in several places in the country with the largest numbers found in Kibera (Nairobi)."); U.S. Department of State, 2008 Human Rights Report: Kenya. Available at: <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119007.htm>

³ Exhibit 69: Minority Rights Group International/Centre for Minority Rights Development, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity* (2005), at p. 16 ("MRG/CMRD – *Kenya Minorities* – 2005").

⁴ See: *Ibid.* p. 11 (stating that, having been colonized by a Christian nation, most Kenyans today profess to be Christians, although there is no state religion. Thus, followers of non-Christian religions are minorities. Muslims are a religious minority in Kenya, along with Buddhists, Hindus, and those Kenyans who practice traditional African religions); Exhibit 80: Douglas H. Johnson, "Tribe or Nationality? The Sudanese Diaspora and the Kenyan Nubians", 3 *Journal of East African Studies*, p. 112-131, 2009 ("Tribe or Nationality") (discussing the historical relevance of the Muslim faith of the Nubians).

Historical Background

6. The Kenyan Nubians are descended from the Nuba Mountains in what is now central Sudan. They were forcibly conscripted into the colonial British army in the early 1900s when Sudan was under British rule. As part of the King's African Rifles (also known as "Askaris"), a British colonial regiment, they were deployed throughout various parts of then British East Africa, including present-day Kenya, to assist the British in their military expeditions and later in the First and Second World Wars.⁵
7. 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.⁶ As subjects, they were considered British protected persons.⁷

The Promise of Kibera

8. In 1904 the British colonial authorities assigned Kibera to the Nubians to serve as their home. Kibera was surveyed as a military reserve and gazetted as such in 1917, which clarified that the area allocated was 4,197 acres.⁸ 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.⁹
9. A "Location Survey of Buildings and Shambas at Kibera" prepared by the District Surveyor in 1934 indicates that Kibera was divided into 397 plots, each of which was individually allocated to named Kenyan Nubians, together with an indication of the acreage allocated. At the centre of the map there is also a clear indication of the location of a cemetery.¹⁰
10. The emerging property rights arising from these allocations were supported by the 1933 Report of the Kenya Land Commission, otherwise known as the Carter Land Commission Report.¹¹ The Carter Land Commission held that:

"While we are fully satisfied of the necessity for moving the unauthorised residents of Kibera, we are not convinced of the necessity for moving the

⁵ *Ibid.*

⁶ Exhibit 56: Affidavit of Yunis Ali, Civil Suit No. 256, High Court of Kenya at Nairobi, 17 March 2003, at para. 6. See also: Exhibit 63: Prime Minister Raila Odinga, *Kibera upgrading project to go on*, Office of Public Communications (Office of Government Spokesperson), 10 September 2009, at p. 32 (commenting that "[u]nlike the Indians who had also been brought by the British for the purpose of constructing the Uganda railway, the Nubians were not accorded the privilege of British citizenship or owning property").

⁷ See paragraph 24 below.

⁸ Exhibit 38: The Carter Land Commission Report, at para. 598-599: "... this area was originally assigned to the King's African Rifles in 1904. There is nothing in the gazette to show for what reason so large an area was required, but it is common knowledge that one of the objects was to provide a home for the Sudanese ex-askaris.")

⁹ Exhibit 44: E. D. Fox, 'Notes on a preliminary survey of the proposal to reconstitute the Kibera African settlement area', 1955, at p. 1 ("E.D. Fox – Notes on a preliminary survey – 1955").

¹⁰ See Exhibit 39: Location Survey of Buildings and Shambas at Kibera, District Surveyor, 31 October 1934. It comprises of 397 plots, solely allocated to Kenyan Nubians.

¹¹ Exhibit 69: MRG/CMRD – *Kenya Minorities* – 2005, see note 3 above, at p. 16.

Sudanese.¹² Their past services to the Government entitle them to sympathetic consideration, and it is certain they would prefer to stay where they are. We shall presently show grounds for thinking that it would be to the advantage both of themselves and of government that they should be allowed to do so.”¹³

11. The Carter Commission further stated:

“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.”¹⁴

12. On the basis of the above, the Carter Commission recommended that Kibera should be reserved for the Nubians. It recognized that “Kibera was clearly designated to provide a home to the Sudanese ex-askaris” and “the government has a clear moral obligation to settle the Nubians”.¹⁵ Many Nubians have therefore lived in Kibera from the turn of the last century to the present time.¹⁶

13. After their demobilization from the King’s African Rifles, Kenyan Nubians periodically asked to be repatriated to Sudan, but were refused. In 1931 the colonial government refused such a request on the ground that the proposal would not be acceptable to the Sudanese government, even though Sudan remained under British colonial control.¹⁷ The Nubians, who by then retained no ties with Sudan and had no claim to land in that country, could not return independently to Sudan and were therefore left with no choice but to remain in Kibera. Further requests were rebuffed in 1939 and in 1950.¹⁸

¹² As noted in the following paragraphs, during the colonial period the Nubians are referred to as “Sudanese” and “ex-Askaris”.

¹³ Exhibit 44: E. D. Fox – Notes on a preliminary survey – 1955, see note 9 above.

¹⁴ Exhibit 38: The Carter Land Commission Report, 1933, at para. 601 (emphasis added).

¹⁵ Exhibit 23: Affidavit of Mohammed Gore, at para 11. *Ibid.* The Carter Land Commission Report.

¹⁶ Kenya Land Alliance, ‘The National Land Policy in Kenya. Addressing Historical Injustices’, Issues Paper no. 2/2004, 2004, at p. 14.

¹⁷ Exhibit 37: Letter from the District Commissioner of Nairobi to the Provincial Commissioner (27 April 1931); See also: Exhibit 55: Korir A. Singo’ei and Adam H. Adam in conjunction with the Kenyan Nubian Council of Elders, Covert Racism. *The Kibera clashes: An Audit of Political Manipulation of Citizenship in Kenya And 100 years of Nubians’ Landlessness* (2002), at p. 18.

¹⁸ Exhibit 40: Union of the Sudanese Headquarters Kibera, Letter to the Kenyan Governor petitioning for return to Sudan as speedily as possible in return for past military service (7 August 1939) & Acting Chief Secretary for the Governor of Kenya, Letter to the Union of the Sudanese Headquarters of Kibera indicating that the Kenya Government granted ex-service men holdings at Kibera in lieu of repatriation to Sudan and that repatriation benefits are not planned (22 August 1939); Exhibit 42: Letter addressed to the Honorary Chief Commissioner of Nairobi (1 September 1950).

Nubian Settlement in Kibera

14. Since the end of the Second World War numerous tribes have moved into Kibera. However, Nubians remain widely acknowledged in Kenyan society as the original inhabitants of that land. Various historical documents confirm this fact. For instance, government correspondence from 1945 recognizes Kibera as being “composed, with very few exceptions, of Sudanese.”¹⁹ This is echoed in government correspondence from 1954, which referred to the Kenyan Nubians of Kibera as the “persons who had been in undisputed occupation of the said lands.”²⁰
15. A letter from Ministry of Health and Housing to the Secretary to the Treasury and other departments in 1954 reveals the increasing acknowledgment of burgeoning rights that flowed from that undisputed occupation over time. It recalled the outcome of a meeting held on 27 July of that year, where “it [had been] decided not to move the Sudanese but to recommend to the Governor-in-Council that a permanent Sudanese settlement be established at Kibera”.²¹ The letter subsequently notes that “it was [also] decided that the area should eventually be handed over to the Nairobi City Council for incorporation within the City boundary”.²² Additional correspondence between government authorities in 1958 further recognized the Kenyan Nubians’ growing claims of ownership over Kibera by stating that:

“...if and when the Government makes a statement of its decision to settle the Kibera problem, opposition will be voiced from all quarters – from bona fide Sudanese ex soldiers as well as from the residents who have less right to be in Kibera.”²³

Post-Independence Treatment of Kenyan Nubians as “Aliens”

16. At Kenyan independence, in 1963, the citizenship status of the Nubians was not directly addressed, and for a long period of time they were consistently treated by the government as “aliens.” Kenyan government officials frequently justified this position by arguing that since the Nubians had no ancestral homeland within Kenya, they could not be granted Kenyan citizenship.²⁴ The Nubians are caught in a vicious circle: although they were allocated land by the colonial government, their claims to land have never been recognized by the independent Kenyan government, because they were not recognised as citizens.²⁵ Successive Kenyan governments have failed to take any concrete steps to address the Nubian situation.²⁶ The government still

¹⁹ Exhibit 41: Letter from Commissioner for Local Government, Lands and Settlement to the Town Clerk, Nairobi (26 March 1945)

²⁰ 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).

²¹ Exhibit 43: Letter from the Ministry of Health to the Secretary of the Treasury, the Secretary for African Affairs, and the Secretary of Defense, 13 September 1954.

²² *Ibid.*

²³ Exhibit 48: Letter from the Officer in Charge of the Extra Provincial District of Nairobi to the Permanent Secretary, Minister of African Affairs Nairobi, 1 August 1958 (emphasis added).

²⁴ Exhibit 76: Kenya National Commission on Human Rights – *An Identity Crisis* – 2007, see note 2 above, at p. 14.

²⁵ Tribe or Nationality, see note 4 above, at p. 112-131.

²⁶ *Ibid.*

maintains that any Nubians who arrived in Kenya after 1945 are not citizens, creating doubt as to the status of all Nubians in Kenya.²⁷

Public Recognition of Nubians as the Original Inhabitants of Kibera

17. However, there have been statements recognizing the legitimate property right of Kenyan Nubians. For example, in 1970, the then M.P. for Langata, Mr. Yunis Ali raised the following issues through a private members bill, which was adopted unanimously:

“[The Nubians] want Kibera. Of course, it was taken away from gradually; 4,000 acres Kibera has come to the present 1,150 acres. These remaining parts of Kibera, Mr. Speaker, we people of Kibera are putting it to the Government that this area should be surveyed, plot demarcated and given to *wanachi* [(citizens)]”.²⁸

18. In a 1993 parliamentary question (now) Prime Minister Raila Odinga criticized the failure to implement the 1970 Kibera land motion. The government replied that the motion had not been implemented due to government re-organisation, with the Minister accepting the cause of the problem:

“I am aware that the Nubian Community that was settled nearly 100 years ago in Kibera by the colonial government have not been issued with title deeds for the land that they occupy.”²⁹

19. In April 1994, Larders M.P. Mr. Farah Maalim of FORD-K again raised concern over the fact that “areas inhabited by Nubians all over the country had not benefited from title deeds as they were being discriminated against.”³⁰ More recently, Kenyan Government officials continue to issue statements suggesting that the Nubians occupy the land. Correspondence in 1999 between the District Officer of the Kibera Division and the Provincial Commissioner inquires as to “the acreage remaining unallocated in Kibera and [requests] special consideration during settlement, as the *original inhabitants*.”³¹
20. In 2007, during a public meeting at the State House, attended by the Nubian Council of Elders, the President promised them a collective title deed for 780 acres of Kibera, pledging that this deed should be issued within three days.³²

²⁷ *The Nubian Community in Kenya v. Kenya*, Government Response to African Commission Comm. No. 317/2006, see immediately prior to Section 1.2.2. (“Government Response to Comm. No. 317/2006, *The Nubian Community in Kenya v. Kenya*”).

²⁸ Hansard, Motion No. 133, 11 February 1970.

²⁹ Exhibit 53: Hansard, Question 516 on the issuance of the title deeds, Exchange between Mr. Raila, Dr. Otiedo-Kopiyo and Mr. Farah with the Assistant Minister for Lands Mr. Keino, p. 1420-1422, 15 July 1993.

³⁰ Exhibit 55: Korir A. Singo’ei and Adam H. Adam in conjunction with the Kenyan Nubian Council of Elders, Covert Racism. *The Kibera clashes: An Audit of Political Manipulation of Citizenship in Kenya And 100 years of Nubians’ Landlessness*” (2002), at p. 14; Motion No. 133 Hansard, 11 February 1970.

³¹ Exhibit 54: Letter from District Officer, Kibera Division to the Provincial Commissioner, Nairobi Area (28 July 1999) (emphasis added).

³² See: Exhibit 59: Letter from Kenyan Nubian Council of Elders to the Prime Minister and Member of Parliament for Langata Constituency Nairobi, 24 August 2009, recalling that on 19 November 2007, the Secretary of the Cabinet and Permanent Secretary in the Office of the President wrote to the Permanent

Unfortunately, despite the power of the President under the Government Lands Act which vests in him authority over all unoccupied land in Kenya,³³ the promise made to Kenyan Nubians remains unfulfilled.

21. In September 2009, Raila Odinga, as Prime Minister, expressly referred to the “unique occupation” of the Nubian community living in Kibera, in a statement concerning the future of Kibera:

“[Prime Minister Raila Odinga] said most land acquisition in informal settlements had been purely on temporary allotment whose lease expired at the whim of the government.

‘The government is the landlord of such public utility land and that is why those claiming ownership were given Temporary Allotment Licenses for then not to pay land rates and rents during their occupation,’ Odinga said.

He however said the Nubian community living in Kibera was exempted from the current arrangement due to their *unique occupation* in the slum which they claim as their only ancestral home unlike other groupings in the area.

‘We have taken the interest of every grouping in the slum into account and that is why we have set aside and processed a communal title deed for the Nubian people whose ancestral land lies within the slum,’ the PM said.”³⁴

Nubians are citizens under Kenyan law

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

Secretary of the Ministry of Lands with a Presidential directive that the Nubian community should be allocated 780 acres of land, and that they be issued the necessary title deed to that effect as soon as possible. See also: Exhibit 58: The Kenyan Nubian Council of Elders, 18 November 2007, Application for Registration for a Certificate Incorporation to the Kenyan Commissioner of Lands (stamped as received by the Office of the President on 19 November 2007) ; Exhibit 59: Letter from the Kenyan Ministry of the Lands to the Kenyan Nubian Council of Elders recalling name and diagrammatic representation requirements of the application and requesting completion (1 February 2008); Exhibit 59: Letter from Kenyan Nubian Council of Elders to the Kenyan Ministry of Lands indicating compliance with criteria recalled in the correspondence of 1 February 2008 (letter of 27 February 2008 – stamped received 4 March 2008); Exhibit 60: Letter from the Office of the President to the Nubian Council of Elders regarding the expedited registration of trust deed in Kibera, 27 May 2008; Exhibit 61: Letter from the Nubian Council of Elders to the Prime Ministers, 24 August 2009.

³³ Exhibit 85: Chapter 280 of Kenyan Laws, the Government Lands Act. Part II – Administration, Special Powers of the President, S.3(a) (stating that “[t]he President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may [...] make grants or dispositions of any estates, interests or rights in or over unalienated Government land”.)

³⁴ Exhibit 63: Prime Minister Raila Odinga, *Kibera upgrading project to go on*, Office of Public Communications (Office of Government Spokesperson), 10 September 2009. Available at: <http://www.communication.go.ke/news.asp?id=270> (emphasis added).

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

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

24. The British Nationality Act of 1949 defines a British protected person as one who, being a British subject, had a close relationship either through birth or descent with the UK and its remaining colonies. This group included indigenous populations and ethnic communities living in Kenya under colonial rule,³⁵ like the Nubians.
25. Section 89 of the Constitution provides that:

“Every person born in Kenya after 11th December 1963 shall become a citizen of Kenya if at the date of his birth one of his parents is a citizen of Kenya; except that a person shall not become a citizen of Kenya by virtue of this section if at the date of his birth –

 - a) his father possesses immunity from suit and legal process as is accorded to the envoy of a foreign state accredited to Kenya; or
 - b) his father is a citizen of a country with which Kenya is at war and the birth occurs in a place then under occupation by that country.”
26. Under this legal scheme, Kenyan Nubians who were born in Kenya before 11th December 1963 who had at least one parent who was born in Kenya are Kenyan citizens by operation of law, and those born in Kenya after that date are citizens if one of their parents was a citizen at the time of their birth. The few Kenyan Nubians born before or after 1963 of parents who were not born in Kenya or neither of whom were Kenyan citizens are still entitled to Kenyan citizenship through application.
27. Therefore, virtually all Kenyan Nubians descendant from those who were forcibly conscripted and displaced from Sudan and settled in Kenya by the British are entitled to Kenyan citizenship by law.³⁶

The Vetting Process for Nubians to obtain an ID Card to recognise Citizenship

28. Nubians are required to undertake a vetting process in order to obtain the national identity card that is necessary for recognition of their citizenship and essential for

³⁵ Exhibit 66: J. B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Acts Press, African Centre for Technology Studies, 1990).

³⁶ This would include those Nubians born outside Kenya before independence whose father did not become, and was not entitled to become, a Kenyan citizen upon independence.

everyday life.³⁷ Only two other communities are subjected to the vetting process, the Kenyan Somalis and Kenyan Arabs, both of whom share the same Muslim faith of the Nubians, but both of whom, unlike the Nubians, are communities that live near Kenya's borders.³⁸

29. Under the Registration of Persons Act, any person who has attained the age of 18 years and meets the requirements of citizenship under the Kenyan Constitution, shall be eligible for registration. Upon registration, Kenyan national identity ("ID") cards are issued. Under Section 8 of the Act, registration officials have the discretion to require an applicant to produce additional evidence of eligibility for nationality "as it is within the power of that person to furnish."³⁹
30. Section 8 is commonly used to require that, alone among non-border populations in Kenya, Kenyan Nubians undergo an extensive and burdensome "vetting" process prior to securing the ID card that is essential to prove the citizenship to which they are entitled under Kenyan law. Non-Nubians, on the other hand, do not need to undergo this vetting process, and "only need to produce the ID of one parent and a baptismal certificate from the church" to be issued with identification documents.⁴⁰
31. The vetting process typically consists of the following. First, a Kenyan Nubian candidate must first produce documents, including their parents' and grand-parents' identification documents, which in many cases do not exist.⁴¹ The candidate must then undergo questioning by a "vetting committee". The vetting committees are generally comprised of a District Officer (as chair and convener), a registration officer (as secretary), chiefs, village elders, and intelligence officers. Finally, the candidate must swear an oath before a Magistrate, and pay a fee.⁴²
32. In a report by the Kenya National Commission on Human Rights (KNCHR) the practice of vetting is described as "a requirement without any legal or official basis for the registration of applicants resident in urban settings and border districts."⁴³ Vetting committees are not established under the authority of the Registration of Persons Act,⁴⁴ and the report suggests that in trying to establish the legal basis of

³⁷ Nubians are also affected by other difficulties such as the refusal by hospital authorities to register births of Nubian children and failure by the State to issue late registration of births. See: 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*, at p. 43, 2002.

³⁸ Kenya National Commission on Human Rights – *An Identity Crisis* – 2007, see note 2 above.

³⁹ Exhibit 84: Registration of Persons Act, 1973 (Cap 107) as amended by the Registration of Persons (Amendment) Act 1987, at para. 8.

⁴⁰ Exhibit 2: Affidavit of Abdallah Sebit, at para. 11; Exhibit 8: Affidavit of Ali Hussein Mursall, at para. 8-9; Exhibit 73: Michael Mugwanga, "Application forms of IDs Run Out", *Kenya Daily Nation*, 21 January 2006.

⁴¹ Exhibit 76: Kenya National Commission on Human Rights – *An Identity Crisis* – 2007, see note 2 above.

⁴² *Ibid.* p. 22.

⁴³ *Ibid.* (emphasis added).

⁴⁴ *Ibid.* The vetting committees consist of politically selected elders and members of the Provincial Administration and Civil Service. Section 8 of the Registration of Persons Act empowers a Registration Officer to require "any person" registered under the Act to furnish such documentary or other evidence of the truth of the information given by that person. Any directive targeting an entire community for identity verification would be *ultra vires*.

the vetting committees, a number of informants talked about guidelines and circulars which could not be specified.⁴⁵

33. There are also complaints as to the lack of transparency in the vetting exercise. These accusations are mainly made against elders and chiefs in the committees.

“Some residents in Wajir, for example, thought that the role of the vetting committee was to collect money for the chiefs. In Turkana, applicants talked of paying “pesa ya wazee” (elders’ fee) to the vetting committee. Some had been discouraged to apply for ID cards because they could not afford to pay the money. One of the explanations given for this was that the elders were not usually paid their allowances on time. Further, that the allowances were not commensurate to the work done by the elders.”⁴⁶

34. There are significant delays in the process:

“The length of time that the vetting procedure takes can be as little as two weeks. But some people go up to four years without getting their IDs. ...All the delay comes from the Registrar of Persons. On 15 March 2005 the Nubian Vetting Elders wrote to complain to the District Registrar of Persons because some people had submitted their applications in 1995, 1996 or 1997 and still hadn’t received their cards. Many others had been waiting for a few years. [...] Of course in the 1990s the Vetting Committee was not established. But the Registrar of Persons never told the applicants to go through the vetting committee when it was established. The Registrar of Persons just kept quiet, so the applicants always thought that their IDs were coming.”⁴⁷

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

“I have participated in the two vetting process for my children. First the elders vet the child in Kibera where they produce a letter certifying that the child is indeed a Nubian whom they know. Then the child has to go to Nyayo House for further vetting at before a panel of 10 or 12 people. At this point the child has to produce their birth certificate, parents’ ID cards, and school leaving certificate. On certifying that the documents are the child’s, and that he has duly answered all the questions, than you go to Milimani Court to be sworn in and pay Kshs 500.”⁴⁸

36. An elder from the Nubian Vetting Committee in Kibera concludes:

“The Nubians face more rigorous processes and scrutiny. It takes very long to obtain an ID and in some cases Nubians are simply denied IDs. This ensures further marginalization of the Nubians.”⁴⁹

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Exhibit 2: Affidavit of Abdallah Sebit, at para. 12-13.

⁴⁸ Exhibit 34: Affidavit of Zuhura Adam, at para. 6.

⁴⁹ Exhibit 76: Kenya National Commission on Human Rights – *An Identity Crisis* – 2007, see note 2 above, at page 11.

37. Affidavits collected for the purpose of this case, along with supporting evidence from the KNHRC report, point to discrimination on religious grounds as an additional obstacle to securing ID cards. Shafir Ali Hussein, for instance, believes that he has faced hurdles in securing a birth certificate for his child because of his Muslim name.⁵⁰ When Mariam Gharib Ahmed's niece, a Kenyan Nubian, wanted to obtain an ID card, she had to indicate in the form that her tribe is Duruma in order to get the ID.⁵¹ Adam Hussein Adam was told in confidence to change his name so that he would not have problems in obtaining a passport.⁵²

38. The above considerations have led the Kenyan National Commission on Human Rights to assert that:

“The difficulty experienced in the legal status of Nubians is caused by two factors: the first is that Kenyan citizenship is linked to ethnic identity and Nubians are yet to receive official recognition as a Kenyan ethnic grouping. The second factor is the constitutional failure to provide definite transitional clauses with respect to citizenship status of immigrants who had obtained residence in Kenya several years prior to independence. Consequently, there has been a systemic violation against Nubians and other Kenyans deemed of foreign origin since independence with respect to citizenship law and issuance of identity cards.”⁵³

39. The KNHRC concluded that there was such uncertainty in the vetting process as to leave scope for abuse.⁵⁴ It concluded that the treatment of the Nubian community amounted to “institutionalized discrimination”:

“While it is not a border situation, every person belonging to the Nubian community has to be vetted [...]. The Nubians are not classified among the recognized ethnic groups in Kenya. For this reason, all Nubians are vetted. The underlying assumption of vetting of Nubians, is that they are foreigners unless proven otherwise.”⁵⁵

The Consequences of the Deprivation of Effective Citizenship

40. The vetting process means that citizenship is uncertain for most Nubians, causing severe delays in getting their ID cards, which some of the Nubians never receive. This deprivation of effective access to their citizenship robs Kenyan Nubians of the consequential rights and benefits of citizenship. Kenyan Nubians are denied equal access to access to employment, the right to vote and work in the formal sector, and the right to travel. As a result, most Nubians remain extremely poor and marginalized from mainstream society.

⁵⁰ Exhibit 22: Affidavit of Mariam Gharib Ahmed, at para. 5; Exhibit 29: Affidavit of Shafir Ali Hussein, at para. 15.

⁵¹ Exhibit 22: Affidavit of Mariam Gharib Ahmed, at para. 8.

⁵² Exhibit 4: Affidavit of Adam Hussein Adam, at para. 6.

⁵³ Exhibit 76: Kenya National Commission on Human Rights – *An Identity Crisis* – 2007, see note 2 above, at p. 14.

⁵⁴ *Ibid.* p. 22.

⁵⁵ *Ibid.* p. 10.

41. ID cards are required for nearly all official transactions. Beyond securing employment in the formal sector and voting, the lack of ID bars individuals from opening a bank account or to seek a range of public services.⁵⁶ Lack of ID also restricts entrance into certain government offices,⁵⁷ and when applying for any license, permit or other government document.⁵⁸ The most serious problem caused by lack of a national ID is police harassment: security agents often demand to be shown national IDs to forestall arrest.⁵⁹
42. The anxiety experienced by Nubian children vis-à-vis the very limited future prospects they face due to the numerous obstacles in securing ID cards is evident in the testimony of Arafa Ali, who has stated that:
- “I am worried about getting an ID card when I turn 18. ID cards are important because I will need one to get a job or open a bank account.”⁶⁰

Poor Employment Prospects

43. Nubians are denied employment in the armed forces, as such recruitment operates on the basis of a quota system for each “home district” outside Nairobi. Nubians of Kibera have never been allocated any such “home district”.
- “We [the Nubians] feel discrimination in employment because our children are not recruited in the armed forces and police. Employment to the police and the army is given through quotas but when it comes to the Nubians we are not given any quota. When recruitment is done in Nairobi our children go but they are not selected because they are Nubian.”⁶¹
44. Nubians who wish to start businesses encounter severe difficulties. Hussein Mursall, for instance, points out that:
- “Other tribes have other businesses. Most Nubians are unemployed. Quite a number of my own brothers and sisters are unemployed, still living in Kibera. The problem is security of funds. We can’t get loans from the banks. If you own a property, own land, you can mortgage your title deed the bank and they give you money to start off your business. Nobody has title to any of the land in Kibera. Other tribes don’t have title here either, but they may own land elsewhere. Take for example a Kikuyu: if a Kikuyu owned land here, it would be extra, because he has his own home, where he originates. If he gets one in Nairobi, he would have two. This is unfair to the Nubians, because we don’t have any land elsewhere.”⁶²

⁵⁶ See: Exhibit 75: Lucas Barasa, *Row on ID Cards Tender Rages*, Daily Nation, 7 February 2006.

⁵⁷ Exhibit 76: Kenya National Commission on Human Rights – *An Identity Crisis – 2007*, see note 2 above, at p. 6; Exhibit 22: Affidavit of Mariam Gharib Ahmed, at para. 13.

⁵⁸ Exhibit 74: Gitonka Muriuki, “Demands by Officers to See ID Cards Illegal”, *Kenya Daily Nation*, 6 February 2006.

⁵⁹ *Ibid.* & Exhibit 32: Affidavit of Zena Ahmed, at para 7.

⁶⁰ Exhibit 10: Affidavit of Arafa Ali, at para. 6.

⁶¹ Exhibit 27: Affidavit of Salama Ibrahim, at para. 17.

⁶² Exhibit 8: Affidavit of Ali Hussein Mursall, at para. 19.

Refusal to Issue Passports

45. As a result of their uncertain citizenship status and the difficulties that they have in obtaining official documents, Nubians cannot travel freely, affecting their employment prospects even more. Amina Sebit Aminala describes that:

“I was offered the job of a nutritionist in Southern Sudan but I couldn’t take up the appointment because I had no permanent passport to travel to Sudan. I don’t know if the job is still available. I need the job because my husband passed away. I am the bread winner of my family.”⁶³

46. Other statements clearly point to isolated cases of success in securing passports as a product of connections within the immigration department, rather than by way of right. Mariam Gharib Ahmed describes her story as follows:

“I got my passport in 1999 but only because I knew somebody at immigration. I know if I had followed the normal procedure I would not have gotten my passport, that is definite, because anybody with a Muslim name, like me, has to go for vetting.”⁶⁴

47. The inability of Nubians to travel affects other aspects of their lives. Jaffar Ahmed Musa applied for a new passport on 6 October 1999 for the purpose of performing Hajj, but did not receive his passport for over over 5 years.⁶⁵

Failure to Recognise Property Rights in Kibera

48. As a result of the historical failure to recognise Nubians as citizens and their ongoing tenuous citizenship status, Kenyan Nubians have never been given legal protection for their ancestral homeland of Kibera, contrary to Article 14 of the African Charter. The failure to recognise property rights for Nubians in Kibera has led to forced evictions on a massive scale, with no alternative housing provided and no compensation paid.

Forced Eviction of Nubians from their Ancestral Homeland of Kibera

49. Kenyan Nubians consider Kibera to be their ancestral homeland. Removal from Kibera would sever their roots from the only homeland that anyone in living memory has ever known, and would threaten their existence as a community. It is also the resting place for several generations of Nubians, further deepening the spiritual and emotional connection to the land.⁶⁶ However, Nubians have been forcibly evicted from Kibera for decades.

⁶³ Exhibit 9: Affidavit of Amina Sebit Aminala, at para. 10.

⁶⁴ Exhibit 22: Affidavit of Mariam Gharib Ahmed, at para. 5. See also: Exhibit 14: Affidavit of Ismail Ahmed Babalah, at para. 7; 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.

⁶⁵ Exhibit 18: Affidavit of Jaffar Ahmed Musa, at para. 4, 7, 10-11.

⁶⁶ Exhibit 50: Letter from the District Commissioner of Nairobi Area to the Permanent Secretary, Ministry of Health and Housing, 21 April 1964 ([t]here is a reference to a Sudanese cemetery by colonial authorities in 1964. The Nubians are the only community to bury their dead in Kibera. All other communities are required to have deceased individuals buried in the Nairobi cemetery or are simply returned to their home village for burial.)

50. Over the years, the failure to recognise property rights has resulted in the vast majority of the land originally allocated to the Nubians in 1904, and gazetted as 4,197 acres in 1917, to be parceled off to third parties, without consultation or consent. With each new concession, more Nubians faced eviction, and the community was forced to sustain itself on less space.⁶⁷ As early as the 1970s, so much land had been taken from the Nubians that they were no longer able to keep animals or to grow their own food as subsistence farmers as they had done for generations. This has since posed a serious threat to their food security.⁶⁸
51. In more recent years, much of the parceling off of Kibera has been linked to slum upgrading efforts.⁶⁹ In 1967, Nubian houses at Galalima were destroyed to build Olympic Estate. In 1971, part of the Toi area was destroyed to build the Fort Jesus Estate. In 1973, shambas (homes and farms) in the Lomle area were demolished to build Ayani Estate.⁷⁰ The clearance of Nubian communities continued in 1979 with the further demolition of Nubian shambas at Langata to make way for new estates, but without any arrangements made for their relocation.⁷¹ In 1980, part of the community of Toi was demolished to make space for an open air market,⁷² and Nubians were evicted from their community of Kambilendu to make way for an extension of the Moi Girls' Secondary School.⁷³
52. Kenyan Nubians who had lived in the demolished properties were generally not considered for occupancy of the new houses, or the new homes were too expensive for them. In one particular instance, only 30 units were assigned to Nubians out of 300 new homes. While non-Nubians were allocated two-bedroom houses with

⁶⁷ See: Exhibit 8: Affidavit of Ali Hussein Mursall, at para 12. The community is not given adequate notice in most cases. Records of forced evictions and parcelling out of Kibera land to third parties is also established as fact in the following reports: Exhibit 70: Centre on Housing Rights and Evictions (COHRE), *Listening to the Poor? Housing Rights in Nairobi, Kenya*, 2005, at p. 33-26 (“COHRE – Listening to the Poor – 2005”); Exhibit 62: Newspaper article “*DO says demolition of Kibera to go on*”; 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*”, at p. 8, 11, 36 & 41 (2002); Exhibit 57: The Kenyan Nubian Council of Elders, Letter to the Director of Physical Planning and Ministry of Lands and Settlement (1 March 2004) (Nubians contesting further parcelling of land – in that case to Oxfam); See also: John Mbaria, “Kibera and the Politics of Dispossession,” *The East African*, 15 July 2002.

⁶⁸ Exhibit 23: Affidavit of Mohammed Gore, at para. 7, 12-13, 17; Exhibit 8: Affidavit of Ali Hussein Mursall, at para. 19.

⁶⁹ Exhibit 8: Affidavit of Ali Hussein Mursall, at para. 12. They are not given adequate notice in most cases. See: Exhibit 5: Affidavit of Adam Muhammed, at para. 3-4.

⁷⁰ Exhibit 23: Affidavit of Mohammed Gore, at para 15; Exhibit 1: Affidavit of Abdalla Ali Yusuf, at para. 10.

⁷¹ Exhibit 23: Affidavit of Mohammed Gore, at para 15; Exhibit 6: Affidavit of Ahmed Adam, at para. 7 & 10 (indicating that Ahmed Adam’s family was a victim of the eviction. He lost a son and while “other people from major ethnic groups were relocated to the Mpeketoni Division in Lamu but none of the evicted 200 Nubians were relocated to date, the Nubians had nothing.”) See also: Exhibit 1: Affidavit of Abdalla Ali Yusuf, at para. 10; Exhibit 5: Affidavit of Adam Muhammed, at para. 3.

⁷² Exhibit 23: Affidavit of Mohammed Gore, at para. 15; Exhibit 5: Affidavit of Adam Muhammed, at para. 3.

⁷³ Some of the evictions were carried out with violence. See: Exhibit 23: Affidavit of Mohammed Gore, at para. 15.

toilets, the 30 Nubian homes were only a single room, irrespective of how many children they had and the number of houses demolished.⁷⁴

53. No compensation is provided for the loss of their homes, despite the recognition by both the colonial and Kenyan governments that there should be compensation.⁷⁵ Without compensation, very few Kenyan Nubians have been able to afford to buy any of the houses in these new settlements.⁷⁶ Ismail Ramadhan, among others, explains:

“Initially the Nubians occupied 4,197 acres in Kibera. A typical Nubian family had five acres of land from which they got their living. Over the years a lot of this land has been hived off in the name of building modern estates to replace the villages. In spite of the government’s stated policy which was expected to benefit the Nubians, the Nubians ended up marginalized. Once the government had redeveloped the estates, they established allocation criteria which were so demanding that they disqualified the Nubians. For example, they required the allottees to deposit some amount of money which most Nubians could not afford because they were not well off.”⁷⁷

54. As a result of the systematic encroachments upon their land, the land in Kibera originally assigned to the Nubians in 1904 and gazetted as 4,197 acres in 1917 has been reduced to less than 400 acres, with the majority of Nubians effectively being left landless and without security of tenure:⁷⁸

“Even though my family has been occupying the house long before I was born we are still temporary occupants. I have no title to the house. The authorities have not given us title because we are Nubians. I know people from other ethnic groups who have title deeds.”⁷⁹

55. Individually, without security of tenure, Kenyan Nubians remain vulnerable to further evictions, and continue to live a precarious existence. Collectively, in the

⁷⁴ Exhibit 13: Affidavit of Ibrahim Athman Said, at para. 18-19.

⁷⁵ Exhibit 36: Letter from the Secretariat Nairobi to the Assistant Commandant of King’s African Rifles, 7 June 1919. As outlined in paragraph 11 above, the Carter Commission concluded that the Nubians should be compensated. In 1957, the Officer-in-Charge of the Nairobi Extra Provincial District emphasized that “[t]he Sudanese must be compensated and in my opinion compensated generously.” Exhibit 47: Letter from the Officer in Charge of the Extra Provincial District of Nairobi to Secretary for Local Government, Health and Housing Nairobi, 30 July 1957. Government correspondence in the 1950s concludes that “[i]n strict law they do not appear to have any right to occupy Kibera, but in equity, they would seem to have a claim for generous treatment which would involve compensation for demolished dwellings, shambas, and a disturbance element.” Exhibit 44: E. D. Fox – Notes on a preliminary survey – 1955, see note 9 above, at para. 32. See also: Exhibit 45: Letter from the Officer in Charge of the Extra Provincial District of Nairobi to Secretary for African Affairs, 11 November 1955, at para. 1.

⁷⁶ Exhibit 51: Picture of the Minister for Lands and Settlement receiving the Memorandum from the Kibera village delegation. African Standard, (5 September 1968); Exhibit 62: Newspaper article “*DO says demolition of Kibera to go on.*”

⁷⁷ Exhibit 16: Affidavit of Ismail Ramadhan, at para. 11.

⁷⁸ Exhibit 23: Affidavit of Mohammed Gore, at para. 19.

⁷⁹ Exhibit 14: Affidavit of Ismail Ahmed Babalah, at para. 12; Exhibit 12: Affidavit of Fatuma Ismail Mahmud, at para. 15; Exhibit 8: Affidavit of Ali Hussein Mursall, at para. 13; Exhibit 24: Affidavit of Mohammed Ramadhan Fadhil, at paras 8, 11; See also: Exhibit 12: Affidavit of Fatuma Ismail Mahmud; Exhibit 24: Mohammed Ramadhan Fadhil (this individual does not have his own land).

absence of a homeland, Kenyan Nubians continue to be treated as foreigners in the only country they – and generations before them – have ever known. Officials invoke their lack of any ancestral homeland in Kenya as one of the reasons for which Kenyan citizenship cannot be granted to them.⁸⁰ One member of the community described the absence of a homeland in the following terms:

“...we can not have citizenship without a home. All Kenyan tribes derive their citizenship from the fact that they belong to a certain part of Kenya. Settlement and citizenship in Kenya are tied together. Even if Nubians get Kenyan citizenship today, without having land we will feel insecure. Land was one of the factors that lead people to fight for independence. We, the Nubians, were in the past concentrating on the deprivation of land, thinking that if the land question were settled, it would be the same as recognition of citizenship. Yet if citizenship were recognized for all the Nubians, it would be like a recognition that they must have their own land. Many Nubians, as individuals, have been able to get citizenship and enjoy all the rights of Kenyan citizenship – except they don’t have land. The link between these two things explains the government’s resistance to recognize the citizenship of the Nubians.”⁸¹

The Consequences of the Failure to Recognise Property Rights

56. The refusal by the Kenyan government to recognise the Nubians claim to their ancestral homeland in Kibera is closely linked with the tenuous citizenship of Kenyan Nubians.⁸² Because the government does not recognise the Nubians’ property claims they are treated as squatters, and the government provides no domestic utilities such as water, sewerage or electricity.⁸³ In addition, there are only very limited public services such as schools and health care. A study by the United Nations reveals that only 44% of Kibera’s residents have a regular income.⁸⁴ In addition, they suffer poor health and nutrition, literacy and educational performance, and physical infrastructure.⁸⁵
57. This situation condemns Nubians to live in abject poverty in Kibera, further marginalizing them. Nubians in the rest of Kenya are clustered in similar

⁸⁰Exhibit 23: Affidavit of Mohammed Gore, at para. 27; Exhibit 8: Affidavit of Ali Hussein Mursall, at para. 19.

⁸¹Exhibit 23: Affidavit of Mohammed Gore, at para. 27. See also: Exhibit 8: Affidavit of Ali Hussein Mursall, at para. 19.

⁸²Exhibit 76: Kenya National Commission on Human Rights – *An Identity Crisis* – 2007, see note 2 above, at p. 14.

⁸³Exhibit 70: “COHRE – Listening to the Poor – 2005”, see note 67 above, at p. 23. About 94 percent of households in Kibera lack basic physical and social infrastructure and security of tenure.

⁸⁴Exhibit 71: UN-HABITAT/Government of Kenya, *Kibera Social and Economic Mapping: Household Survey Report* (February 2005), at pg. 5 (hereafter “Kibera Mapping”). Available at: www.unhabitat.org

⁸⁵Several reports detail statistics of the poor living conditions of residents of Kibera, which has the largest concentration of Nubians in Kenya. See generally: Exhibit 79: Centre on Housing Rights and Evictions (COHRE), *Rapid Assessment of the Water and Sanitation Situation within Informal Settlements in Nairobi* (2008) (“Rapid Assessment”). Available at: www.cohre.org; Exhibit 62: Newspaper article “*DO says demolition of Kibera to go on*”; Exhibit 71: Kibera Mapping, *Ibid.*; Exhibit 67: African Population and Health Research Centre (APHRC), *Population and Health Dynamics in Nairobi’s Informal Settlements: Report of the Nairobi Cross-sectional Slums Survey (NCSS) 2000* (2002) (“Population and Health Dynamics”). Available at: www.aphrc.org

enclaves.⁸⁶ Nubians are prevented from leaving their enclaves because their lack of identity documents means they are vulnerable to harassment if they leave, whereas inside the enclave they are relative safe from official harassment.⁸⁷

58. Though the denial of property rights for Kenyan Nubians living outside Kibera is not as categorical, a significant number of Nubians across Kenya nevertheless also live as squatters.⁸⁸ For the sake of clarity and focus, the present application focuses explicitly on the land claims of Kibera, on the basis of it constituting the gravest violation of Article 14.

Lack of Income from Property Ownership

59. The only asset of the Kenyan Nubian community in Kibera is the land that they live on, and many Nubians survive by renting their houses to non-Nubian Kenyans.⁸⁹ The government has made public statements that because Nubians have no legal title to Kibera, their tenants do not need to pay rent, causing immense problems:

“Since 2001, tenants in my house have been refusing to pay [rent] following the Presidential declaration that Kibera is government land. It was in a public meeting that the area Member of Parliament (MP) stated that rents in Kibera are too high. The President responded by saying Kibera is government land and no one should be getting high rents on houses. What followed were ethnic conflicts and near rebellion where tenants refuse to pay rent.”⁹⁰

Poor Education Prospects

60. Because the government regards the residents of Kibera as illegal squatters it provides virtually no schools in the enclave, resulting in poor educational prospects for Nubians. In a 2005 survey of Kibera, UN-HABITAT found that of the 2,400 respondents who were interviewed, only 45% had completed primary education and a mere 20% had continued to the secondary level.⁹¹ The general level of primary school enrollment across Kenya is 79%, and secondary school enrollment is 50%.⁹²

⁸⁶ Exhibit 69: MRG/CMRD – *Kenya Minorities* – 2005, see note 3 above, at p. 4.

⁸⁷ Exhibit 81: Bronwen Manby, *Struggles for Citizenship in Africa* (Open Society Institute, 2009); See also: Exhibit 77: Open Society Justice Initiative, “Kenyan Nubians: Without Papers, Who Are You?”, *Report on Developments 2005-2007*, at p. 18 (2007).

⁸⁸ See: Exhibit 72: Centre on Housing Rights and Evictions (COHRE), *Listening to the Poor? Housing Rights in Nairobi, Kenya* (2006) (“COHRE –Listening to the Poor – 2006”). Exhibit 17: Affidavit of Issa Abdulfaraj, at para. 19 & 20 (stating that “... at Kibera, the Nubian settlement was 4197 acres about a century ago. It is now reduced to less than 600 acres with the rest having been taken over systematically with developments, which benefit the other tribes. A similar situation obtains at Kisii, Eldama Ravine, Meru, Mazeras, Mumias and all other Nubian settlements” and further reporting continuous forced eviction of Kenyan Nubians from their land as a result in the additional settlements of Mazeras, Eldama Ravine, Kisii, Kibos, Kibigori, Meru, Kitale, Kapsabet and Kibera in Nairobi). See: Exhibit 17: Affidavit of Issa Abdulfaraj, at para. 23 (regarding Eldama Ravine specifically); Exhibit 23: Affidavit of Mohammed Gore, at para. 8.

⁸⁹ *Ibid.* p. 125 (“[Abdalla Ali Ramadhan] cannot be formally employed without an ID card, something which significantly contributes to unemployment and poverty amongst Nubians.”).

⁹⁰ Exhibit 34: Affidavit of Zuhura Adam, at para. 10.

⁹¹ Exhibit 71: Kibera Mapping, see note 84 above, at p. 14.

⁹² Exhibit 82: UNICEF, *Info by Country: Kenya*. Available at: http://www.unicef.org/infobycountry/kenya_statistics.html.

UN-HABITAT concluded that as a result of these low-levels of education, the majority of Kibera residents “cannot access the competitive jobs in the formal (modern) sector,” and are instead relegated to lower-paying informal economic activities.⁹³ Other researchers studying the well-being of adolescents residing in Kibera found that girls were much more likely to drop out of school than boys, and that both genders most often left school because their families could not afford the school fees.⁹⁴

61. The hardships involved in securing education for Nubian children are captured in the following statement from Mrs. Kadara Sebit, who speaks of her grandson Ibrahim:

“Previously I had enrolled Ibrahim in a village school but I moved him to Toyi Primary School when primary education was made free by the government. I paid only KSh 1000 for a desk. I also provide his school uniforms. The standard of the school is low and if I have the opportunity, I would take him to a better school. The better schools are expensive, charging about KSh 10,000 as fees which I cannot afford. All such schools are outside Kibera.”⁹⁵

62. Zakia Yusuf talks about how the quality of the education is very low and the facilities are overcrowded:

“My son is complaining because the school is not good. They will turn children out from school if they do not have the money. The teachers say the children are too much. There are 1,000 children in the school, and the school is overcrowded. The books are not enough at school. There are 80 kids in his class. The teacher cannot reach all of them, the classes are filled so it’s impossible.”⁹⁶

Poor Sanitation and Healthcare

63. The government provides virtually no public services to Kibera, affecting the health of the inhabitants. Given the poverty of the Kenyan Nubians, private clinics are prohibitively expensive. The lack of adequate health care provision further contributes to the poor health of the population. As Zura Abdul Aziz, who has lived her entire life in Kibera explains:

“I have never seen the City Council or government collecting garbage or cleaning. The standing water breeds mosquitoes which can cause disease. There is no system for sewage in Kibera, but there are such systems in other surrounding areas.”⁹⁷

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

⁹³ *Ibid.*

⁹⁴ Exhibit 78: Annabel S. Erulkar and James K. Matheka, *Adolescence in the Kibera Slums of Nairobi Kenya* (Population Council, 2007), at p. 9. Of the 1,675 adolescents aged 10 to 19 who were interviewed, 43% of girls were out of school, compared to 29% of boys.

⁹⁵ Exhibit 20 : Affidavit of Kadara Sebit, at para. 9-12.

⁹⁶ Exhibit 31: Affidavit of Zakia Yusuf, at para. 10.

⁹⁷ Exhibit 35: Affidavit of Zura Abdulaziz, at para. 13.

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

The sanitary conditions in our neighborhood are poor. There are not enough toilets. There are no drains and waste water from our neighbor’s houses runs in front of my house. These insanitary conditions make Ibrahim fall sick often. We have a toilet which is also used by the community. My household maintains the toilet.”⁹⁸

III. RELEVANT INTERNATIONAL LEGAL STANDARDS

The prohibition against discrimination under international law

African Charter on Human and Peoples Rights (1981)

65. The African Charter, ratified by Kenya on 23 January 1992, prohibits discrimination in the following terms:

“Article 2

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

Article 3

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

Article 19

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

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

66. Article 5(d)(iii) of this Covenant, ratified by Kenya on 13 September 2001, states that:

“Article 5 (d)(iii)

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

- (a) The right to equal treatment before the tribunals and all other organs administering justice;

⁹⁸ Exhibit 20: Affidavit of Kadara Sebit, at para. 10-12.

- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
 - (i) The right to freedom of movement and residence within the border of the State; [...]
 - (iii) The right to nationality; [...]
 - (v) The right to own property alone as well as in association with others;
 - (vi) The right to inherit;
- (e) Economic, social and cultural rights, in particular:
 - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training.”

International Covenant on Civil and Political Rights (1966)

67. Kenya ratified this Covenant on 1 May 1972.

“Article 2 (1)

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

Article 24

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

[...]

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

International Covenant on Economic Social and Cultural Rights (1966)

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

“Article 2(2)

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

Convention on the Elimination of All Forms of Discrimination Against Women (1979)

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

“Article 9

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

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

Convention on the Rights of the Child (1989)

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

“Article 2

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

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

The right to nationality under international law

Universal Declaration of Human Rights (1948)

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

International Covenant on Civil and Political Rights (1966)

72. Kenya ratified this Covenant on 1 May 1972.

“Article 24

[...]

- (2) Every child shall be registered immediately after birth and shall have a name.
- (3) Every child has the right to acquire a nationality.”

African Charter on the Rights and Welfare of the Child (1990)

73. The ACRWC was ratified by Kenya on 25 July 2000. Article 6(3) of the Charter provides that “every child has the right to acquire a nationality.” Article 6(4) of the Charter says :

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

Convention on the Rights of the Child (1989)

74. Article 7 of the CRC, ratified by Kenya on 30 July 1990, underscores the particular strength of the right to nationality with regard to children under international law by providing that:

- (1) The child shall be registered *immediately after birth* and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
- (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless. [Emphasis added]

American Convention on Human Rights (1969)

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

“(1) Every person has the right to a nationality.

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

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

76. The right in question is accorded such importance so as to constitute a non-derogable right under Article 27 of that Convention.

European Convention on the Right to Nationality (1997)

77. This Convention, exclusively dedicated to the protection of the right to nationality, provides protection against the arbitrary deprivation of nationality.⁹⁹ It also includes rules governing the acquisition of nationality¹⁰⁰ and the right to review,¹⁰¹ among several other provisions. The Convention’s Explanatory Note further elaborates on the correlating obligation to avoid statelessness – an obligation that it references as having crystallised as customary international law.¹⁰²

The prohibition of statelessness under international law

ECOSOC resolutions

78. The Economic and Social Council of the United Nations has passed two resolutions that are relevant to the right of everyone to a nationality and the prohibition of statelessness.

“Resolution 319 (III), B, PP3 & 4, 16 Aug 1950

Taking note of article 15 of the Universal Declaration of Human Rights concerning the right of every individual to a nationality,

Considering that statelessness entails serious problems both for individuals

and for States, and that it is necessary both to reduce the number of stateless persons and to eliminate the causes of statelessness.”

“Resolution 319(B)(III), PP7, 16 Aug 1950

Invites States to examine sympathetically applications for naturalization submitted by stateless persons habitually resident in their territory and, if necessary, to re-examine their nationality laws with a view to reducing as far as possible the number of cases of statelessness created by the operation of such laws.”

⁹⁹European Convention on Nationality, entry into force, 30 January 2000, at art. 4(c).

¹⁰⁰ *Ibid.* art. 6.

¹⁰¹ *Ibid.* art. 12.

¹⁰² Explanatory Report: European Convention on Nationality, at para. 33. Available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/166.htm>. (stating, in reference to article 4(b) of the European Convention on Nationality, that “[t]he rules on nationality of each State Party shall be based on the following principles: (a) everyone has the right to a nationality; (b) statelessness shall be avoided; (c) no one shall be arbitrarily denied of his or her nationality; (d) neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.”)

General Assembly

79. The UN General Assembly has adopted resolutions supporting the importance of nationality and the prohibition of statelessness.

“General Assembly Resolution 50/152, OP16, 21 Dec 1995

16. *Calls upon* States to adopt nationality legislation with a view to reducing statelessness, consistent with the fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality and by eliminating provisions that permit the renunciation of a nationality without the prior possession or acquisition of another nationality, while at the same time recognizing the right of States to establish laws governing the acquisition, renunciation or loss of nationality”

“General Assembly Resolution 61/137 of 2007

Emphasizes that prevention and reduction of statelessness are primarily the responsibility of States, in appropriate cooperation with the international community.”

IV. STATEMENT OF ALLEGED VIOLATIONS OF THE CHARTER

80. Through its acts and omissions, the Kenyan authorities have subjected Kenyan Nubians to numerous human rights violations:

- *A. Discrimination in Access to Nationality.* Kenyan Nubians are treated differently by public authorities to other Kenyans without justification, in that they are the only non-border ethnic group required to go through a complex and humiliating vetting process to secure the ID card that is essential to obtain recognition of their Kenyan citizenship, contrary to Articles 2, 3 and 19 of the African Charter.
- *B. Arbitrary Deprivation of Nationality.* The vetting process leaves Kenyan Nubians with a tenuous citizenship status by which they are deprived of effective access to their Kenyan citizenship and left in an uncertain state as to whether they will be granted citizenship at all, contrary to Article 5 of the African Charter and international law.
- *C. The Prohibition of Statelessness.* Those Kenyan Nubians who are unable to obtain the ID card which is essential to obtain recognition of their Kenyan citizenship are left stateless, a situation which is prohibited in international law.
- *D. Breach of Respect for Property Rights.* As a result of the historical failure to recognise Nubians as citizens and their ongoing tenuous citizenship status, Kenyan Nubians have never been given legal protection for their ancestral homeland of Kibera, contrary to Article 14 of the African Charter.
- *E. Consequential violations.* The long history of discrimination with regard to Kenyan Nubians’ citizenship and property rights has led to their marginalisation, which is perpetuated through the failure of the government to

provide equal access to education, health care, work, movement, and political participation, leading to further violations of the African Charter.

- *F. Degrading Treatment.* The discriminatory deprivation of nationality and marginalisation of the Kenyan Nubians violates their right to dignity, and amounts to degrading treatment, contrary to Article 5 of the African Charter.
- *G. Failure to Give Legal Effect to Kenyan Nubians' Rights.* The failure to give legal effect to rights of citizenship and property violates Article 1 of the African Charter.

A. DISCRIMINATION IN ACCESS TO NATIONALITY

81. Kenyan Nubians are treated differently because of their ethnicity and their religion, for which there is no justification, amounting to unlawful discrimination in violation of Articles 2, 3 and 19 of the African Charter on Human and Peoples' Rights.
82. Kenyan Nubians are forced to go through a lengthy, humiliating and expensive vetting process to acquire the ID card which is necessary to obtain recognition of their citizenship and to access the services that come with it. 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 whim of the government.
83. In addition, as outlined in Section D below, the historical treatment of Kenyan Nubians as aliens means that their property rights to their ancestral homeland of Kibera have never been recognized, leading to the marginalization that they face today.

1. Prohibition of discrimination under the Charter

84. African human rights law prohibits any unjustified difference of treatment as discrimination.
85. Article 2 of the African 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." In addition, Article 3 guarantees the equality of every individual before the law, and Article 19 guarantees the rights of all peoples to be equal.
86. The African Commission has defined discrimination as:

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

of the African Charter stipulates the principle of non discrimination, which is essential to the spirit of the African Charter.”¹⁰³

87. 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. Section 82(1) of the Kenyan Constitution similarly provides that “subject to sub-sections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect”.¹⁰⁴

88. The Commission has emphasized the importance of the prohibition of discrimination, due to the need to establish equality and the serious consequences for the individual who is discriminated against:

“Equality or the lack of it affects the capacity of one to enjoy many other rights. For example, one who bears the burden of disadvantage because of one’s place of birth or social origin suffers indignity as a human being and as an equal and proud citizen. [...] Finally, the Commission should take note of the fact that in a growing number of African States, these forms of discrimination have caused violence and social and economic instability, which has benefited no one. It has cast doubt on the legitimacy of [...] the democratic credentials of states.”¹⁰⁵

89. The government may only justify a difference in treatment in limited circumstances. 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 a two-stage process. First, the recognition of the right and the fact that such a right has been violated. Second, that such a violation is justifiable in law.”¹⁰⁶

90. The Commission concluded that in such circumstances:

“[N]o State Party to the Charter should avoid its responsibilities by recourse to the limitations and ‘claw-back’ clauses in the Charter. It was stated following developments in other jurisdictions, that the Charter cannot be used to justify violations of sections of it. The Charter must be interpreted holistically and all clauses must reinforce each other. The purpose or effect of any limitation must also be examined, as the limitation of the right cannot be used to subvert rights already enjoyed. Justification, therefore, cannot be derived solely from popular will, as such cannot be used to limit the responsibilities of State Parties in terms of the Charter.”¹⁰⁷

¹⁰³ *Meldrum v. Zimbabwe*, African Comm. Decision of April 2009, Comm. No. 294/2004, at para. 9. Available at: <http://www.ihrda.org/images/294-04%20ZLHR%20IHRDA%20v%20ZIMBABWE%20-%20Meldrum%20eng.pdf>. (emphasis added).

¹⁰⁴ Constitution of the Republic of Kenya, section 82(1). (emphasis added).

¹⁰⁵ *Legal Resources Foundation v. Zambia*, African Comm. Decision of May 2001, Comm. No. 211/98 (2001), at para. 63. Available at: <http://hrlibrary.ngo.ru/africa/comcases/211-98.html>

¹⁰⁶ *Ibid.* para. 67.

¹⁰⁷ *Ibid.* para. 70 (making reference to the following statement by the U.N. Human Rights Committee that is derived from paragraph 15 of General Comment 25 in a footnote within the decision: “[p]ersons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence, or descent, or by reason of political affiliation...”).

91. Where a difference in treatment is justified for a legitimate aim, the interference must still be necessary and proportionate to that aim. The African Commission has found that “[t]he reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly **proportionate** with and absolutely **necessary** for the advantages which are to be obtained.”¹⁰⁸ The Commission concluded that “a limitation may never have as a consequence that the right itself becomes illusory.”¹⁰⁹

2. Difference in treatment: the Vetting Process for Nubians

92. As outlined in the facts section, 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:¹¹⁰

- 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.
- Unlike other Kenyans, they must be questioned by the “vetting committee” and given their approval,
- Unlike other Kenyans, they must visit the Magistrates’ Court in order to swear an affidavit in support of their claim.
- Unlike other Kenyans, they must pay a fee to the Court.

93. In its 2007 report, the Kenyan National Commission on Human Rights (KNCHR) concluded that:

“The process of vetting ... Nubians ... is discriminatory and violates the principle of equal treatment. Such a practice has no place in a democratic and pluralistic society.”¹¹¹

94. Despite formal recognition of Nubians as the 43rd Kenyan tribe finally being confirmed for the very first time in the 2009 census, discriminatory government policies in the identification process remain intact, with the effect of denying Nubians security of citizenship status and perpetuating discriminatory attitudes towards Nubians from other Kenyans by maintaining their second class status.

3. Discrimination on grounds of ethnic and religious origin

95. Nubians are being treated differently on account of their ethnic and religious origins, which are impermissible grounds under Article 2 of the African Charter.

¹⁰⁸ *Media Rights Agenda and Others v. Nigeria*, African Comm. Decision of 31 October 1998, Comm. Nos. 105/93, 128/94, 130/94, 152/96, at para. 69. Available at:

http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152-96.html (emphasis added).

¹⁰⁹ *Ibid.* para. 70.

¹¹⁰ The vetting process also applies in some form to Kenyan Somalis and Kenyan Arabs, both of whom are – unlike the Kenyan Nubians – border communities. It applies to no other Kenyan communities. See paragraph 96 below.

¹¹¹ Exhibit 76: Kenya National Commission on Human Rights – *An Identity Crisis* – 2007, see note 2 above.

96. The vetting requirement is imposed on account to their ethnicity and on account of their Muslim faith.¹¹² Only two other communities are subjected to vetting in order to obtain ID cards, Kenyan Somalis and Kenyan Arabs, who are both one of the few other communities in Kenya to share the Muslim faith, although unlike the Kenyan Nubians they both live in communities near the borders of Kenya.¹¹³
97. Racial discrimination has been defined as a “particularly invidious kind of discrimination” which:
- “in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.”¹¹⁴
98. On this basis, it has been established that “very weighty reasons” would be required for any difference of treatment on the basis of race or ethnicity to be viewed as compatible with international standards.¹¹⁵ The scope of differential treatment is further narrowed by the fact that the prohibition against racial discrimination constitutes a rule of customary international law.¹¹⁶ As such, it has attained the status of a *jus cogens*, or peremptory norm, on account of being “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”¹¹⁷
99. 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. Publicly to single out a particular ethnic group for deprivation of citizenship amounts to degrading treatment, as outlined in Section F, part 2.

¹¹² Exhibit 14: Affidavit of Ismail Ahmed Babalah, at para. 7. See also: 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.

¹¹³ Exhibit 76: Kenya National Commission on Human Rights – *An Identity Crisis* – 2007, see note 2 above.

¹¹⁴ *D.H. and Others v. The Czech Republic*, ECtHR (GC) Judgment of 13 November 2007, at para. 176; *Timishev v. Russia*, ECtHR Judgment of 13 December 2005, at para. 56; *Nachova and Others v. Bulgaria*, ECtHR (GC) Judgment of 6 July 2005, at para. 145.

¹¹⁵ This threshold is reserved for no other ground under international law except for sex discrimination. See: *Burghartz v. Switzerland*, ECtHR Judgment of 22 February 1994, at para. 27.

¹¹⁶ In addition to African human rights law prohibiting discrimination, the bar on racial and ethnic discrimination is enshrined in many international and regional human rights instruments. See: International Covenant on Civil and Political Rights, entered into force on 23 March 1976, U.N. doc. A/6316, art. 2 & 26 (“ICCPR”); European Convention of Human Rights, entered into force on 3 September 1953, art. 14 (“ECHR”). See also: *Regina v. Immigration Officer at Prague Airport and another*, ex parte *European Roma Rights Centre and others*, 9 December 2004, [2004] UKHL 55, at para. 46 (stating that “the great theme which runs through subsequent human rights instruments, national, regional and international, is the legal right of equality with the correlative right of non-discrimination on the grounds of race. . . It is true that in the world, as we know it, departures from this norm are only too many. But the international community has signed up to it. The moral norm has ripened into a rule of customary international law. It is binding on all states.”)

¹¹⁷ Vienna Convention on the Law of Treaties, entered into force on 27 January 1980, U.N. doc. A/CONF.39/11/Add.2, art. 53.

4. Burden of proof

100. The Kenyan Nubians have established a *prima facie* case that they are treated differently because of their ethnicity and religion. The burden of proof is on the government to provide an objective and reasonable justification for their differential treatment.
101. 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,¹¹⁸ 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.”¹¹⁹ A *prima facie* case may be demonstrated by drawing inferences from “the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact”.¹²⁰
102. The statistics, authoritative reports, historical documents and affidavits outlined in the facts section above together serve to meet the requirement for establishing a *prima facie* case. The government has failed to offer any objective justification.

B. ARBITRARY DEPRIVATION OF EFFECTIVE NATIONALITY

103. 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.
104. Kenyan Nubians 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 may not be arbitrarily deprived that nationality, which 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.

1. The Right to Nationality under International Law

105. Article 15 of the Universal Declaration of Human Rights states that “everyone has the right to a nationality.” Article 24 of the ICCPR protects the rights of every child to acquire a nationality, as does Article 7(1) of the Convention of the Rights of the Child. Article 6(4) of the African Charter on the Rights and Welfare of the Child, ratified by Kenya in 2000, provides that “every child shall acquire the nationality of the State in the territory of which he has been born.”¹²¹

¹¹⁸ See: for example, *D.H. and Others v. The Czech Republic*, see note 114 above, at para. 179.

¹¹⁹ *Ibid.* para. 138.

¹²⁰ *Ibid.* para. 178.

¹²¹ Article 60 of the Charter calls upon the Commission to draw inspiration from international law and from the provisions of various instruments ratified by parties to the Charter. See also: American Convention on Human Rights, art. 20, and the European Convention on Nationality, see note 99 above.

106. The African Commission has found a violation of the Charter where the nationality of an individual was decided on a basis that was arbitrary.¹²² The Commission also found that the deprivation of citizenship was a violation of the Charter where the government argued that the individual was a citizen of a different country, but without providing any evidence to that effect.¹²³ The Commission also found a violation of Article 12 where a particular ethnic group were deprived of their citizenship and evicted from their houses.¹²⁴
107. The United Nations Commission on Human Rights has recognized the importance of the right to nationality as “an inalienable human right,”¹²⁵ and called upon all States “to refrain from taking measures and enacting legislation that discriminates against persons or groups of persons on grounds of race, colour or national or ethnic origin by nullifying or impairing the exercise, on an equal footing, of their right to nationality, and to repeal such legislation if it already exists.”¹²⁶ Its successor, the UN Human Rights Council, later joined the UN Commission in recognizing “that arbitrary deprivation of nationality, especially on discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, is a violation of human rights and fundamental freedoms”.¹²⁷ The Committee on the Elimination of Racial Discrimination has also firmly established that “deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of State Parties’ obligations to ensure non-discriminatory enjoyment of the right to nationality”.¹²⁸
108. The Inter-American Court of Human Rights defines nationality as “an inherent right of all human beings,”¹²⁹ and the legal bond that guarantees individuals the full enjoyment of all human rights as a member the political community. The Inter-American Commission has also emphasized that:

¹²² *Legal Resources Foundation v. Zambia*, see note 105 above, at para. 71.

¹²³ *Modise v. Botswana*, African Comm. Decision of November 2000, Comm. No. 97/93, at para. 88.

¹²⁴ *Malawi African Association and Others v. Mauritania*, African Comm. Decision of 11 May 2000, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), at para. 126. Available at: <http://hrlibrary.ngo.ru/africa/comcases/54-91.html>

¹²⁵ U.N. Commission on Human Rights Resolution, *Human Rights and Arbitrary Denial of Nationality*, U.N. Doc. E/CN.4/1997/36, 11 April 1997, at para. 1. Available at: <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/389eb9feb6002f35802566440049d031?OpenDocument> (“Human Rights Commission Resolution – E/CN.4/1997/36”)

¹²⁶ *Ibid.* para. 1-3.

¹²⁷ *Ibid.* para. 2. See also: U.N. Human Rights Council Resolution, *Human rights and arbitrary deprivation of nationality*, U.N. Doc. A/HRC/RES/13/2, 14 April 2010, at para. 2. Available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.RES.13.2.AEV.pdf> (“Human Rights Council Resolution – A/HRC/RES/13/2”).

¹²⁸ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-Citizens*, 10 January 2005, at para. 14. Available at: <http://www.unhcr.ch/tbs/doc.nsf/0/e3980a673769e229c1256f8d0057cdd?OpenDocument>

¹²⁹ *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, IACtHR Advisory Opinion of 19 January 1984, Ser. A No.4, at para. 32. Available at: <http://www.law.georgetown.edu/rossrights/docs/cases/CostaRica.pdf>

“[Nationality] is one of the most important rights of man, after the right to life itself, because all other prerogative guarantees and benefits man derives from his membership in a political and social community – the States – stem from or are supported by this right.”¹³⁰

109. International law places particular emphasis on the right to a nationality enjoyed by children, starting with the African Charter on the Rights and Welfare of the Child, which specifically provides for the right of every child to acquire a nationality,¹³¹ and also the obligation for State Parties:

“to ensure that their Constitutional legislation recognize 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”.¹³²

110. The Committee on the Rights of the Child has also affirmed the need for States to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born.¹³³ The Committee on the Rights of the Child has also warned that the failure to register children's birth “implies the non-recognition of these children as persons before the law, which will affect the level of enjoyment of their fundamental rights and freedoms.”¹³⁴ International human rights organs have thus recognized that prompt registration of birth is essential to enable data and place of birth to be conclusively established, thereby activating certain rights, including those which are dependent on nationality and personality status.¹³⁵

¹³⁰ Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Chile*, IACtHR report of 11 February 1977, OEA/Ser.L/V/II/40 Doc. 10, ch. IX, at para. 10. Available at: <http://www.cidh.oas.org/countryrep/Chile77sp/indice.htm> (in spanish) (“Inter-American Commission – Third Report on the Situation in Chile (1977)”).

¹³¹ African Charter on the Rights and Welfare of the Child, entered into force 29 November 1999, OAU doc. CAB/LEG/24.9/49 (1990), art. 6(3). See also: U.N. Convention on the Rights of the Child, entered into force 2 September 1990, U.N. doc. A/44/49(1989), art. 7 (stating that “[t]he child should be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality . . .”).

¹³² African Charter on the Rights and Welfare of the Child, *Ibid.*

¹³³ UN Committee on the Rights of the Child, *General Comment 17: Article 24*, 7 April 1989, at para. 8. Available at: <http://www.unhcr.org/refworld/docid/45139b464.html>

¹³⁴ U.N. Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Madagascar*, U.N. Doc. CRC/C/15/ADD.26, 14 October 1994, at para. 10. Available at: <http://www1.umn.edu/humanrts/crc/MADAGAS7.htm>; U.N. Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Syrian Arab Republic*, UN Doc. CRC/C/15/Add.212, 7 July 2003, at para. 33. Available at: <http://www.wfrrt.net/humanrts/crc/syrianarabrepublic2003.html>; U.N. Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Democratic Republic of the Congo*, U.N. Doc. CRC/C/15/Add.153, 7 September 2001, at para. 28 & 29. Available at: <http://www.wfrrt.net/humanrts/crc/congo2001.html>.

¹³⁵ See: U.N. Committee on the Rights of the Child, General Comment 17, see note 133 above, at para. 7. (providing that “every child has the right to be registered immediately after birth and to have a name. In the Committee’s opinion, this provision should be interpreted as being closely linked to the provision concerning the right to special measures of protection and it is designed to promote recognition of the child's legal personality”); *ibid.* at para. 8 (“States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is

2. The Right to Nationality is not at the Discretion of the State

111. The right to nationality is no longer the sole prerogative of the State. Kenya is bound by limitations imposed by human rights standards within international law.¹³⁶
112. 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 "[t]he 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."¹³⁷ Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws affirmed this principle:
- “While it is for each State to determine under its own laws who are its nationals, such laws shall be recognized by other States only insofar as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.”¹³⁸
113. The International Law Commission, in an attempt to codify developing norms of customary international law, has confirmed the above principles by affirming that:
- “[A]lthough nationality is essentially governed by national legislation, the competence of States in this field may be exercised only within the limits set by international law [...]. As a result of this evolution in the field of human rights, the traditional approach based on the preponderance of the interests of States over the interests of individuals has subsided.”¹³⁹

born”). The Committee on the Rights of the Child has repeatedly underscored the integral role of birth registration and issuance of birth certificates in accessing the right to nationality. See, e.g., U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Bhutan*, U.N. Doc. CRC/C/15/ADD.157, 7 September 2001, at para. 34 (stating that “the Committee is concerned that the failure of timely birth registration can have negative consequences on the full enjoyment by children of their fundamental rights and freedoms”).

¹³⁶ This point has been stressed inter alia by the Human Rights Council in its resolutions. See: Human Rights Council Resolution – A/HRC/RES/13/2, see note 127 above, at pre-ambular para. 4 (“recognizing the authority of States to establish laws governing acquisition, renunciation or loss of nationality in accordance with international law [...]”). See also: Human Rights Council Resolution 7/10, Human rights and arbitrary deprivation of nationality, at pre-ambular para. 4. Available at:

<http://www.unhcr.org/refworld/pdfid/49997add1d.pdf> (“recognizing the right of States to establish laws governing the acquisition, renunciation or loss of nationality, in accordance with international law...”).

¹³⁷ *Nationality decrees issued in Tunis and Morocco – Advisory Opinion*, Permanent Court of International Justice Advisory Opinion of 4 October 1922, at para. 24.

¹³⁸ League of Nations, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, at p. 89. Available at: <http://www.unhcr.org/refworld/docid/3ae6b3b00.html>. (“Hague Convention on Conflict of Nationality Law”).

¹³⁹ U.N. International Law Commission: Report on the Work of its Fifty-First Session, *Draft Articles on Nationality of Natural Persons in Relation to State Succession*, U.N. Doc. A/54/10, 3 April 1999. Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4512b6dd4>. See also: U.N. General Assembly, Resolution 63/118 on the Nationality of natural persons in relation to the succession of States, U.N. Doc. A/RES/63/118, 15 December 2009. Available at: <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N08/477/87/PDF/N0847787.pdf?OpenElement> (deciding to include in the agenda of the 66th session of the General Assembly in 2011 the question of the form that might be given to the draft articles).

114. More recently, the obligation of States “to establish laws governing the acquisition, renunciation or loss of nationality in accordance with international law” has been further reaffirmed by UN Human Rights Council resolutions.¹⁴⁰
115. It follows that in the half century since the right to nationality was articulated in Article 15 of the Universal Declaration of Human Rights, three clear international legal prohibitions – or limitations – on the sovereign right of states to regulate citizenship have emerged: the prohibition against racial discrimination; the prohibition against statelessness; and the prohibition on arbitrary laws and practices governing acquisition, deprivation and change of nationality. The Inter-American Court of Human Rights has most recently affirmed these prohibitions in the realm of nationality law:
- “Although the determination of who is a national of a particular state continues to fall within the ambit of state sovereignty, states’ discretion must be limited by international human rights that exist to protect individuals against arbitrary state actions. States are particularly limited in their discretion to grant nationality by their obligations to guarantee equal protection before the law and to prevent, avoid, and reduce statelessness.”¹⁴¹
116. The general principles of law regarding these three prohibitions as detailed in these submissions, along with the illustrations of Kenya’s violations of these principles, highlights the urgent need for stronger legal protection to safeguard these rights under the Charter.

3. The Kenyan Nubians have a Genuine and Effective link to Kenya

117. 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.
118. 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*¹⁴² 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

¹⁴⁰ See note 136 above, Human Rights Council Resolution 13/2 and Human Rights Council Resolution 7/10.

¹⁴¹ *Yean and Bosico v. the Dominican Republic*, IACtHR Judgment of 8 September 2005, at para. 142. Available at: <http://www1.umn.edu/humanrts/iachr/C/130-ing.html>; See also: *Ivcher Bronstein v. Peru*, IACtHR Judgment of 6 February 2001, at para. 86 & 88. Available at: <http://www.unhcr.org/refworld/docid/44e496434.html> (asserting that “international law imposes certain limits on a State’s discretion and [...] in the regulation of nationality, it is not only the competence of States, but also the requirements of the integral protection of human rights that intervene.”)

¹⁴² *Nottebohm case (Liechtenstein v Guatemala)*, second phase, Judgment of 6 April 1995, ICJ Reports 1955, at p. 13. Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=printdoc&docid=3ae6b7248>

life, attachment shown by him for a given country and inculcated into his children, etc.”¹⁴³

119. More recently, Article 18 of the European Convention on Nationality recognizes “genuine and effective link”, habitual residence and the will of the individual as factors to be taken into account by states when granting or maintaining nationality of citizens in situations of state succession.¹⁴⁴
120. The International Law Commission (ILC) in its draft Articles on Nationality of Natural Persons in Relation to State Succession of States, further calls upon each State to “grant a right to opt for its nationality to persons concerned who have an appropriate connection with that State if those persons would otherwise become stateless [...]”.¹⁴⁵ In this regard, the criteria of “habitual residence, appropriate legal connection [...], or the birth in the territory” have been established by the ILC to define categories of persons entitled to nationality of a State concerned.¹⁴⁶
121. 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.¹⁴⁷ Kenya is the only country that Nubian elders, adults or their children have ever known.
122. This is also the case for the small minority of Nubians who arrived in the 1940s, whom the Government firmly rejects as Kenyans.¹⁴⁸ The Commission has found that the retrospective application of a strict *jus soli* principle for granting citizenship may be arbitrary:

“It cannot be denied that there are Zambian citizens born in Zambia but whose parents were not born in what has become known as the Republic of Zambia following independence in 1964. [...] To suggest that an indigenous Zambian is one who was born and whose parents were born in what came (later) to be

¹⁴³ *Ibid.* p. 13.

¹⁴⁴ European Convention on Nationality, see note 99 above, at art. 18(2)(a).

¹⁴⁵ International Law Commission, *Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, Report of the International Law Commission on the Work of Its Fifty-First Session*, U.N. Doc. A/54/10 (1999), reprinted in [1999] 2 Y.B. Int'l L. Comm'n, part 2, art. 11(2) (“ILC Draft Articles”) (emphasis added). Available at:

http://untreaty.un.org/ilc/texts/instruments/english/commentaries/3_4_1999.pdf. See also: General Assembly Resolution 63/118, *Nationality of Persons in Relation to the Succession of States*, U.N. Doc. A/RES/63/118. Available at: <http://www.undemocracy.com/A-RES-63-118.pdf>.

¹⁴⁶ ILC Draft Articles, *Ibid.* para. 10 (relating to art. 11(2)).

¹⁴⁷ 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.

¹⁴⁸ Government Response to Comm. No. 317/2006, *The Nubian Community in Kenya v. Kenya*, see note 27 above, at immediately prior to Section 1.2.2.

known as the sovereign territory of the State of Zambia may be arbitrary and its application of retrospectivity cannot be justifiable according to the Charter.”¹⁴⁹

123. The lack of an alternative citizenship is also a relevant consideration. The Commission has rejected arguments made by the State that individuals might have citizenship in third countries as they were not supported by evidence.¹⁵⁰ The Commission found that the absence of an alternative citizenship raised a violation of Articles 3(2) and 5 of the Charter.¹⁵¹
124. 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.

4. The Kenyan Nubians are *Arbitrarily* Deprived of their Right to Nationality

125. By requiring them 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, foreseeability, and judicial review; it violates the obligation to promote and protect minorities; and it leaves many Kenyan Nubians effectively stateless.

Discrimination

126. The process for recognition of citizenship of Kenyan Nubians is arbitrary because it is discriminatory. As outlined in Section A above, Kenyan Nubians are subjected to the vetting process because of their ethnicity and their religion, as a result of which many of them are left with an uncertain citizenship status, denying them effective nationality.
127. The UN Human Rights Council and its predecessor have both affirmed that the “arbitrary deprivation of nationality on racial, national, ethnic, religious, political or gender grounds is a violation of human rights and fundamental freedoms.”¹⁵²

Procedural fairness, judicial review and foreseeability

128. Any process for granting or acknowledging citizenship must respect due process guarantees in order not to be arbitrary. These include (1) a clear legal basis for the grant or refusal of citizenship, (2) a requirement that the decision is subject to judicial review, and (3) a requirement that the process is certain and foreseeable.
129. The African Commission has found that a clear procedure and the possibility of judicial review must apply if the decision as to citizenship is not to be arbitrary:

¹⁴⁹ *Legal Resources Foundation v. Zambia*, see note 105 above, at para. 71.

¹⁵⁰ *Modise v. Botswana*, see note 123 above, at para. 86.

¹⁵¹ *Ibid.* para. 88.

¹⁵² Human Rights Commission Resolution – E/CN.4/1997/36, see note 125 above; Human Rights Council Resolution – A/HRC/RES/13/2, see note 127 above.

“While the decision as to who is permitted to remain in a country is a function of the competent authorities of that country, this decision should always be made according to careful and just legal procedures, and with due regard to the acceptable international norms and standards.”¹⁵³

130. The UN Human Rights Committee has found that “the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice.”¹⁵⁴
131. This includes the concepts of accessibility and foreseeability. The European Court of Human Rights has established that for a measure to be “in accordance with the law” it must only have some basis in domestic law, but the quality of the law in question must be sufficient that it is both accessible to the person concerned and foreseeable as to its effects.¹⁵⁵ In terms of accessibility, the Court has stated that the individual “must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case.”¹⁵⁶
132. As outlined in paragraphs 28 to 40 above, the vetting process has no formal basis in domestic law.¹⁵⁷ There is great confusion over roles within vetting committees, as well the lack of awareness about guidelines governing these bodies, creating scope for abuse, and violating obligations of procedural fairness.¹⁵⁸ The level of discretion afforded to officials within the vetting process and the delays involved mean that it is impossible to be certain of the legal rules applicable to a given case.¹⁵⁹ There is no ability for Nubians to foresee how long it will take them to be granted citizenship, or whether they will ever get it, continuing the uncertainty that Nubians have faced for so long. Furthermore, as demonstrated by the failed attempts of the Nubians to take their case to court, there is no effective judicial review of decisions that deny them nationality. The process leads to injustice.
133. While some Kenyan Nubians have managed to secure ID cards the process is still an arbitrary one, as the basis on which they received them is entirely uncertain. Kenyan Nubians report that those who secure ID cards or passports without

¹⁵³ *Modise v. Botswana*, see note 123 above, para. 83. See also: *Legal Resources Foundation v. Zambia*, see note 105 above, at para. 41 (raising due process issues); *Malawi African Association and Others v. Mauritania*, see note 124 above, at paras. 82-83; *Union Inter-Africaine des Droits de l’Homme, Federation Internationale des Ligues des Droits de l’Homme and Others v. Angola*, African Commission of Human and Peoples’ Rights, Judgment of 11 November 1997, Comm. No. 159/96, at para. 11. Available at: <http://www1.umn.edu/humanrts/africa/comcases/159-96.html>.

¹⁵⁴ *A. v. Australia*, U.N. Human Rights Committee Views of 30 April 1997, U.N. Doc. CCPR/C/59/D/560/1993, at para. 9.2. Available at: <http://www1.umn.edu/humanrts/undocs/html/vws560.html>

¹⁵⁵ *Amann v. Switzerland*, ECtHR (GC) Judgment of 16 February 2000, at para. 50.

¹⁵⁶ *Silver and Others v. United Kingdom*, ECtHR Judgment of 25 March 1983, at para. 87

¹⁵⁷ Exhibit 76: Kenya National Commission on Human Rights – *An Identity Crisis* – 2007, see note 2 above, at p. 22.

¹⁵⁸ *Ibid.*

¹⁵⁹ Exhibit 83: Interview with the Director of Civil Registration, Joyce W. Mugo, in *The Star*, 19 April 2010, *Why it is Vital to Register Births and Deaths*. See: sub-heading entitled “My question to you is what is proof of citizenship”, where Ms Mugo states: “[a]s concerns documents that prove citizenship, *the law is not very clear*. Most Kenyans associate the national identity card as being proof of citizenship.” (emphasis added).

difficulty are often those with connections at the immigration department. However, dependence on government contacts does not constitute access to ID cards by way of right as required by law. It is imperative that Kenyan Nubians be able to obtain ID cards in the same manner as all other citizens.

Positive obligations to protect minority rights

134. The process for granting citizenship is arbitrary not only because it fails to treat Nubians in the same way as other Kenyans, but also because it fails to take into account the positive obligation on the Kenyan government to protect a vulnerable minority group.
135. Protection of minorities is based on three requirements: Non-exclusion, non-assimilation and non-discrimination.¹⁶⁰ The first requirement is to protect the **existence** of minorities. The UN Working Group on Minorities (WGM) has defined this in a broad way so as to include their presence in a particular place:

“their physical existence, their continued existence on the territories on which the minorities live, and the continued access to the material resources required to continue their existence on those territories. They shall neither be physically excluded from the territory nor be excluded from access to the resources required for their livelihood. ... Forced population transfers intended or with the effect to move members of minorities away from the territory on which they live would constitute serious breaches of contemporary international standards”.
136. The second requirement is to protect the **identity** of minorities. In this regard, the WGM has held that this includes not only an obligation not to interfere with their identity, but also to protect them from assimilation:

“Identity is essentially cultural, and requires not only tolerance but a positive attitude of cultural pluralism by the state and the larger society. Required is not only acceptance but also respect for the distinctive characteristics and contribution of minorities in the life of the national society as a whole. Protection of the identity means not only that the state shall abstain from policies which have the purpose or effect of assimilating the minorities into the dominant culture, but also that it shall protect them against activities by third parties which have assimilatory effect. [...]”¹⁶¹
137. The third requirement is to encourage conditions for the **promotion** of their identity. This positive obligation “goes beyond mere protection, and requires special measures intended to facilitate the maintenance, reproduction and further development of the culture of the minorities”.¹⁶²
138. As will be seen in Section E below with regard to consequential violations, some Kenyan Nubians report having been encouraged by officials to change their name in

¹⁶⁰ Asbjørn Eide, *Working paper: Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Minorities, Fourth session 25-29 May 1998, Section III.

¹⁶¹ *Ibid.* (emphasis added).

¹⁶² *Ibid.*

order to facilitate the process of securing ID.¹⁶³ Other facts and evidence under this section demonstrate that the historical refusal to accept the Nubians as Kenyan has severely undermined their ability to fully participate in all segments of society.¹⁶⁴ The explicit exclusion of Kenyan Nubians from mainstream society, and suggested attempts towards their assimilation violate basic principles of minority rights. The difficulties faced by numerous Kenyan Nubians in securing their nationality – due to factors inextricably linked to the above – further emphasizes the arbitrariness of the deprivation of nationality.

Prohibition against statelessness

139. Lastly, the deprivation of nationality is by definition arbitrary when it leaves an individual stateless, a situation which is prohibited under international law, and which is dealt with in the next section.

C. STATELESSNESS

140. 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.
141. Kenya has ratified several international treaties in which it agrees to the general prohibition on statelessness. These include the Convention on the Rights of the Child, ratified on 30 July 1990, Article 7 of which requires that children have the right to acquire a nationality and requires States Parties to ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments, in particular where the child would otherwise be stateless.¹⁶⁵ In addition, Kenya ratified the African Charter on the Rights and Welfare of the Child on 25 July 2000, Article 6(3) of which provides that “every child has the right to acquire a nationality.”¹⁶⁶ Article 6(4) of the Charter establishes the obligation for States Parties “to ensure that their Constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.”
142. Statelessness is defined as any group or individual “who is not considered as a national by any State under the operation of its law”.¹⁶⁷ International law suggests that “A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.”¹⁶⁸

¹⁶³ See section E: para. 224 below.

¹⁶⁴ See section E: para. 206-207 (lack of access to education); para. 212-213 (lack of health care services); para. 218-219 (poor employment prospects); para. 225-226 (referencing freedom of movement); para. 230-232 (lack of participation in elections).

¹⁶⁵ U.N. Convention on the Rights of the Child, see note 131 above, art. 7(1)-(2).

¹⁶⁶ African Charter on the Rights and Welfare of the Child, see note 131 above, art. 6(4).

¹⁶⁷ U.N. Convention on the Reduction of Statelessness, *entry into force* 13 December 1975, art. 1.

¹⁶⁸ *Ibid.* art. 8(1) .

143. Both the UN Economic and Social Council (ECOSOC) and the UN General Assembly have called upon states to reduce the number of stateless persons in their territory and to eliminate causes of statelessness,¹⁶⁹ especially where the causes are created by operation of nationality laws. States are encouraged to be sympathetic when considering applications for naturalisation submitted by stateless persons habitually resident in their territory,¹⁷⁰ and both ECOSOC and GA have called upon states to amend and re-examine nationality laws, especially in relation to provisions governing the acquisition, renunciation or loss of nationality with a view to reducing statelessness.¹⁷¹ The General Assembly has emphasised that States are primarily responsible for preventing and reducing statelessness.¹⁷²
144. The Human Rights Committee has echoed the remarks of the ECOSOC and the General Assembly in two recent Resolutions.¹⁷³ It urged all States to adopt and implement nationality legislation with a view to avoiding statelessness, consistent with fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality and statelessness as a result of State succession.¹⁷⁴ Finally, it encouraged States to accede to the Convention on the Reduction of Statelessness and the Convention relating to the Status of Stateless Persons.¹⁷⁵
145. The pernicious impact of statelessness has long been recognized. The United Nations conducted a study of statelessness in 1949 which concluded that:
- “The fact that the stateless person has no nationality places him at an abnormal and inferior position which reduces his social value and destroys his own self-confidence.... It is not in the interest of the State to keep stateless persons in a position of inferiority and insecurity which lowers their standing and makes their assimilation more difficult... Stateless persons... are refused enjoyment of numerous rights. In the majority of countries, then, stateless persons are more or less on the fringe of the law.”¹⁷⁶
146. The United Nations has also recognised that groups and individuals are often rendered effectively stateless by bureaucratic procedures that prevent them from exercising their right to nationality, even if it is not explicitly forbidden:

¹⁶⁹ ECOSOC Resolution 319 (III), B, 16 Aug 1950, p. 3 & 4; General Assembly Resolution 50/152, U.N. Doc. A/RES/50/152, 9 February 1996. Available at: <http://www.un.org/documents/ga/res/50/ares50-152.htm> (“General Assembly Resolution 50/152”).

¹⁷⁰ ECOSOC Resolution 319(B)(III), *Ibid.*

¹⁷¹ ECOSOC Resolution 319(B)(III), *Ibid.* General Assembly Resolution 50/152, see note 169 above.

¹⁷² General Assembly Resolution (Res. 61/137), U.N. Doc. A/RES/61/137, 25 January 2007. Available at: http://www.iom.ch/jahia/webdav/shared/shared/mainsite/policy_and_research/un/61/A_RES_61_137_EN.pdf

¹⁷³ U.N. Human Rights Council Resolution – A/HRC/RES/13/2, see note 127 above, at para 3; U.N. Human Rights Council Resolution 10/13, *Human rights and arbitrary deprivation of nationality*, 26 March 2009, at para. 3. Available at: <http://www.unhcr.org/refworld/docid/4bce9da22.html> (“U.N. Human Rights Council Resolution 10/13 – 26 March 2009”).

¹⁷⁴ *Ibid.* para. 4.

¹⁷⁵ *Ibid.* para. 5.

¹⁷⁶ *A Study of Statelessness*, UN Ad Hoc Committee on Refugees and Stateless Persons, 1 August 1949, UN Doc E/1112/Add.1, at p. 8. Available at: www.unhcr.org/refworld/docid/3ae68c2d0.html

“Even when stateless persons are not debarred from enjoyment of a right, they are in practice often deprived of it inasmuch as it is dependent on the fulfilment of certain formalities, such as production of documents, intervention of consular or other authorities, with which, since they do not enjoy the protection of a national authority, they are not in a position to comply.”¹⁷⁷

147. Those who are left outside the state are vulnerable to abuse, poverty, and marginalization in all its forms.¹⁷⁸ The impact of statelessness is:

“a corrosive, soul-destroying condition that can colour almost every aspect of a person’s life. People who are not recognised as citizens of any state may be unable to enjoy a whole range of basic human rights.”¹⁷⁹

148. Statelessness robs the individual of state protection and increases the sense of alienation that minorities may feel, leaving them even more vulnerable:

“As well as providing people with a sense of belonging and identity, [citizenship] entitles the individual to the protection of the state and provides a legal basis for the exercise of many civil, political, and economic rights... As a whole, individuals not recognized as citizens of the State in which they reside constitute an extremely vulnerable group. Scattered in different provisions of hard and soft law, the rights of non-citizens are inadequately enforced and often overridden by concerns of national security, culture purity, economic welfare and public health.”¹⁸⁰

149. The UN Commission on Human Security underlined the importance of citizenship for the respect of other rights and the advancement of human security, stating that:

“Citizenship, a person’s membership in a particular state, is at the centre of democratic governance. It determines whether a person has the right to take part in decisions, voice opinions and benefit from the protection and rights granted by a state. But the outright exclusion and discriminatory practices against people and communities – often on racial, religious, gender or political grounds – makes citizenship *ineffective*. Without it, people cannot attain human security. So, deepening democratic principles and policies requires inclusive citizenship practices.”¹⁸¹

150. Kenyan Nubians were historically considered “aliens” by the colonial administration and by successive post-colonial governments, and left stateless. 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. The uncertainty brought about by the vagaries of the vetting process

¹⁷⁷ *Ibid.* p. 14

¹⁷⁸ Arendt, H., *The Origins of Totalitarianism*, Schocken Books: New York, (2004).

¹⁷⁹ Louise Arbour and Antonio Guterre, *The Hidden World of Stateless People*, Office of the High Commissioner for Human Rights, 28 November 2007. Available at:

<http://www.reliefweb.int/rwarchive/rwb.nsf/db900sid/EGUA-79DPYC?OpenDocument&Click=>

¹⁸⁰ Constantin Sokoloff, *Denial of Citizenship: A Challenge to Human Security*, for the Advisory Board on Human Security of the U.N. Commission on Human Security, 2005, at p. 36.

¹⁸¹ Commission on Human Security, *Human Security Now*, 2003, at p. 133. Available at: <http://humansecurity-chs.org/finalreport/English/FinalReport.pdf> (emphasis added)

means that many Nubians are deprived of effective citizenship. They have no legitimate expectation that they will be given the documents needed to obtain recognition of their nationality and access the rights that citizenship brings. The many Nubians who do not receive ID cards, and those who lose documents and so are not able to prove their citizenship, are effectively stateless. For those who may have arrived in the 1940s, the government still maintains that they are not Kenyan citizens.¹⁸²

151. The Kenyan Government carries the additional responsibility of granting citizenship to these individuals' grand-children and great-grand children born since Kenya's ratification of the African Convention on the Rights and Welfare of the Child, and the UN Convention on the Rights of the Child.¹⁸³

D. BREACH OF RESPECT FOR PROPERTY RIGHTS

152. 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. International law requires that the property rights of the Kenyan Nubians are respected such that they have security of tenure for their homes and Kibera is recognized as their ancestral homeland.
153. 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 Kenyan Nubians from their homes. They 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.
154. The refusal to recognise 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

¹⁸²See: para. 122-124 above (detailing government claims that Kenyan Nubians that arrived in the 1940s are not Kenyan citizens and citing *Legal Resources Foundation v. Zambia* – see note 105 above, at para. 71 – for the principle that the African Commission has previously found that such a retroactive application of the principle of *jus soli* is arbitrary).

¹⁸³See: U.N. Convention on the Rights of the Child, see note 131 above, at art. 7 (the convention was ratified by Kenya on 30 July 1990 and states that “(1) [t]he child shall be registered *immediately after birth* and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents; (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”) (emphasis added). See also: African Charter on the Rights and Welfare of the Child, see note 131 above, at art. 6(3)-(4). (the convention was ratified by Kenya on 25 July 2000 and Article 6(3) of the Charter provides that “every child has the right to acquire a nationality,” and establishes the obligation for States Parties “to ensure that their Constitutional legislation recognize 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.”).

granted to them.¹⁸⁴ The link between denial of property rights and deprivation of nationality is further underscored by successive governments maintaining that Kibera is government land.¹⁸⁵ 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.¹⁸⁶

155. In 1933, the Report of the Kenya Land Commission, otherwise known as the Carter Land Commission Report, concluded that the Nubians were entitled to sympathetic consideration, and that “it would be to the advantage both of themselves and of government that they should be allowed to [stay in Kibera].”¹⁸⁷ The Carter Commission stated that the Nubians

“ought not to be moved without receiving suitable land elsewhere and compensation for disturbance, and ... that a similar obligation exists in respect of their widows, sons who are already householders at Kibera.”¹⁸⁸

156. Despite these recommendations, no provision was ever made for the long-term settlement of Kibera Nubians, nor was any alternative housing made available or compensation ever paid for subsequent encroachments.

157. 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.

1. Kenyan Nubians have the Right to Legal Protection for their Property

158. 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 recognise their property rights.

159. The African Commission recognizes land as property for the purposes of Article 14 of the Charter.¹⁸⁹ The right to property includes the right to have access to one’s

¹⁸⁴Exhibit 23: Affidavit of Mohammed Gore, at para. 27; Exhibit 8: Affidavit of Ali Hussein Mursall, at para. 19.

¹⁸⁵ 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 May 1955; Exhibit 37: Letter from District Commissioner of Nairobi to the Provincial Commissioner, 27 April 1931.

¹⁸⁶ See: para. 49-55 above.

¹⁸⁷ Exhibit 44: E.D. Fox – Notes on a preliminary survey – 1955, see note 9 above.

¹⁸⁸ Exhibit 38: The Carter Land Commission Report, see note 14 above (emphasis added).

property and not to have one's property invaded or encroached upon.¹⁹⁰ The Commission has also recognised that "owners have the right to undisturbed possession, use and control of their property however they deem fit".¹⁹¹

160. The African Commission has recognized a positive obligation for the government to respect the right to property, which entails that:

"[T]he State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders [...] And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs."¹⁹²

Possession in lieu of title

161. This positive obligation extends to preventing any encroachment by third parties such as property developers:

"Its obligation to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter even goes further than a roof over ones head. It extends to embody the individual's right to be let alone and to live in peace-whether under a roof or not."¹⁹³

162. In the Endorois case, the Commission was considering the Article 14 rights of a community who were unable to prove ownership under domestic law to lands from which they had been forcibly evicted. The Commission found that the right to property may exist even where domestic law does not recognise it, and approved the following principle of law set out by the European Court of Human Rights:

"The Court notes that it is not required to decide whether or not in the absence of title deeds the applicants have rights of property under domestic law. [...] Although [the applicants] did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivate the land belonging to the latter... [A]ll these economic resources and the revenue that the applicants derived from them

¹⁸⁹ *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, Communication no. 276/2003. Available at:

http://indigenouspeoplesissues.com/attachments/3879_ACHPR%20Communication%20276%20of%202003.pdf ;

Malawi African Association and Others v. Mauritania, see note 124 above, at para. 128.

¹⁹⁰ *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.

Available at: <http://www1.umn.edu/humanrts/africa/comcases/155-96.html>

¹⁹¹ *Huri-Laws v. Nigeria*, African Comm. Decision of 23 October to 6 November 2000, Comm. no. 225/98, at para. 52. Available at: <http://www1.umn.edu/humanrts/africa/comcases/225-98.html>

¹⁹² *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (Ogoni Case), see note 190 above, at para. 45.

¹⁹³ *Ibid.* para. 61.

may qualify as “possessions” coming within the scope of the protection afforded by [the right to property].”¹⁹⁴

163. In the *Endorois* case, the Commission also adopted the view of the Inter-American Court of Human Rights that “mere possession of the land should suffice to obtain official recognition of community ownership” of ancestral land in the case of indigenous peoples.¹⁹⁵ That conclusion was reached after considering the unique and enduring ties that bind indigenous communities to their ancestral territory.¹⁹⁶ In this connection, the Court held that:

“The relationship of an indigenous community with its land must be recognized and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival. For such peoples, their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations.”¹⁹⁷

164. Furthermore, the Court has held that similar principles extend in certain instances to non-indigenous communities. In the case of *Moiwana v Suriname*, the Court held that while Moiwana community members were not indigenous to the region, they had settled the contested land in the late 19th Century. In the generations that had lived on the land until the time of their forced eviction in 1986, they had developed “a profound and all-encompassing relationship to their ancestral lands.”¹⁹⁸ This principle was expressly accepted by the African Commission in the *Endorois* decision.¹⁹⁹

165. A decisive factor for the Court was the fact that “they [were] inextricably tied to these lands and the sacred sites that [were] found there and their forced displacement ha[d] severed these fundamental ties”.²⁰⁰ In equal measure, the Court pointed to the fact that:

“Many of the survivors and next of kin locate their point of origin in and around Moiwana Village. Their inability to maintain their relationships with their ancestral lands and its sacred sites deprived them of a fundamental aspect of

¹⁹⁴ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, see note 189 above, at para. 189 (citing *Doğan v. Turkey*, ECtHR Judgment of 29 June 2004, at para. 139).

¹⁹⁵ *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR Judgment of August 31, 2001, at para. 151. Available at: <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>; *Moiwana Village v. Suriname*, IACtHR, Judgment of 15 June 2005, at para. 131. Available at: <http://www1.umn.edu/humanrts/iachr/C/145-ing.html> (emphasis added)

¹⁹⁶ *Moiwana Village v. Suriname*, *Ibid.* See also: *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *Ibid.* para. 149 & 151.

¹⁹⁷ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, see note 189 above, at 190 & 207-209; *Moiwana Village v. Suriname*, *Ibid.*; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, see note 191 above, at para. 151.

¹⁹⁸ *Moiwana Village v. Suriname*, *Ibid.* para. 132.

¹⁹⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, see note 189 above, at para. 198.

²⁰⁰ *Ibid.*

their identity and sense of well being. Without regular commune with these lands and sites, they are unable to practice and enjoy their cultural and religious traditions, further detracting from their personal and collective security and sense of well being.”²⁰¹

Recognition of Nubians as the Original Inhabitants of Kibera

166. While the Kenyan authorities maintain their stance that Kibera is classified as Government land and that they are therefore free to evict Nubians with no compensation, there is widespread recognition that the Nubians are the original inhabitants of Kibera and that they have occupied the area since the early 1900s. As noted in paragraphs 14 to 15 and 17 to 21 above, government correspondence from the 1950s refers to the Nubians as “in undisputed occupation” of Kibera, and suggests that a “permanent Nubian settlement should be established in Kibera.” Government officials such as the Provincial Commissioner have referred to the need for “special consideration” for the Kenyan Nubians as the “original inhabitants” of Kibera. In 2007, the President of Kenya pledged that they would be given title to their land within three days, although the pledge was not honored. In 2009 the Prime Minister said that the Nubian community should be treated differently to others in Kibera due to their “unique occupation in the slum which they claim as their only ancestral home, unlike other groupings in the area.”
167. In this time the Nubians have come to form inextricable ties to Kibera. The Nubians of Kibera view this land as their homeland. It is the land on which numerous generations have been born, lived and died as a community; of the dozen tribes now living in Kibera, the Nubians are the only tribe to bury their dead on Kibera land.²⁰²
168. The Nubians have established their right to property under Article 14 of the Charter with respect to Kibera.

2. There is No Public Interest in Forced Evictions from Kibera

169. 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. 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.
170. Article 14 of the Charter establishes that an encroachment upon property will constitute a violation of Article 14 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.”²⁰³

²⁰¹ *Ibid.*

²⁰² Exhibit 50: Letter from the District Commissioner of Nairobi Area to the Permanent Secretary, Ministry of Health and Housing, 21 April 1964.

²⁰³ African Charter on Human and People’s Rights, entered into force on 21 October 1986, OAU doc. CAB/LEG/67/3 rev.5, art. 14.

171. 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”.²⁰⁴ The Commission has further emphasized that any limitations should be the least restrictive measures possible.²⁰⁵
172. A summary of encroachments upon Kibera, as recalled from the Facts section, includes the following:
- 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.
 - 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.
 - 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.
 - No notice was given of government-sponsored evictions, which were carried out using force and with the assistance of the police.
 - No provision was made for alternative housing.
 - No compensation was provided to those who were displaced.
 - Nubians only secured property titles by the intervention of non-Nubians.
173. Forced evictions when carried out on a systematic and massive scale amount to a gross violation of human rights law, for which there can be no public interest.
174. 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 14.²⁰⁶ 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.”²⁰⁷ The Commission has found that:

²⁰⁴ *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples’ Rights Decision of 15 November 1999, Comm. Nos. 140/94, 141/94, 145/95, (1999), at para. 42. Available at: <http://www1.umn.edu/humanrts/africa/comcases/140-94.html>

²⁰⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, see note 189 above, at para. 214.

²⁰⁶ *Malawi African Association and Others v. Mauritania*, see note 124 above, at para. 127.

²⁰⁷ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, (Ogoni Case), see note 190 above, at para. 63. (citing Committee on Economic, Social and Cultural Rights, General Comment No. 7 on the right to adequate housing and forced evictions of 1997 – see note 213 below).

“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.”²⁰⁸

175. This echoes the opinion of the UN Committee on Economic Social and Cultural Rights that “instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”²⁰⁹ The UN Commission on Human Rights has twice stated that forced evictions constitute a gross violation of human rights, and in particular the right to adequate housing.²¹⁰ The African Commission, as confirmed in the Endorois decision, has joined the UN Commission on Human Rights in recognizing that the numerous violations that result from forced evictions together amounted to a gross violation of human rights.²¹¹
176. Moreover, the fact that the encroachments threaten the **cultural survival** of the community by undermining Kenyan Nubians’ ability to live together as a collective confirms a further failure on the part of authorities to adopt the least restrictive measures possible, not to mention an additional violation of the obligation to respect and protect the property rights of Kenyan Nubians as a collective. In failing to meet these obligations, the human security of Kenyan Nubians is fundamentally undermined. This not only threatens their individual well-being, but also their right to existence as a community.

3. The Forced Eviction of Nubians from Kibera is not in Accordance with Law

177. 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.

²⁰⁸ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, see note 189 above, at para. 218.

²⁰⁹ U.N. Committee on Economic, Social and Cultural Rights, *General Comment 4: The right to adequate housing*, U.N. Doc. E/1992/23, 6th session, 1991, at para. 18, annex III at 114. Available at: <http://www.unhchr.ch/tbs/doc.nsf/0/469f4d91a9378221c12563ed0053547e?Opendocument>

²¹⁰ See: U.N. Commission on Human Rights Resolution 1993/77, UN Doc. E/C.4/RES/1993/77, 10 March 1993. Available at: http://www.unhabitat.org/downloads/docs/1341_66115_force%20evic%20chr1.htm; Commission on Human Rights Resolution 2004/28, UN Doc. E/C.4/RES/2004/28, 2004.

²¹¹ *Ibid.* See also: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, see note 189 above, (citing U.N. Commission on Human Rights Resolution 1993/77, UN Doc. E/CN.4/1993/RES/77 and U.N. Commission on Human Rights Resolution 2004/28, UN Doc. E/CN.4/2004/RES/28, which reaffirm that the practice of forced eviction as a gross violation of human rights and, in particular, a violation of the right to adequate housing.)

a) The Forced Evictions do not recognise the ancestral claim of the Nubians

178. The forced eviction of Kenyan Nubians does not recognise their ancestral claim to Kibera and is therefore contrary to international law.
179. The Government maintains the position that Kibera consists of Government land, and that on this basis no rights of ownership by the Kenyan Nubians or other parties can accrue. However, as has been accepted by the Prime Minister, designation of Kibera as government land does not extinguish the ancestral rights of the community to Kibera. Moreover, historical circumstances and moral obligations linked to their forced conscription during colonial times distinguish them from any other community raising alternative claims to this land.²¹²
180. As argued under Section D, part 1, international law recognizes that the absence of legal title in domestic law does not negate the possibility of securing official recognition of community ownership in order to comply with Article 14, and that such rights should be respected for both indigenous communities and non-indigenous communities where their claims extend over several generations, particularly in instances where profound and all-encompassing relationship to their ancestral lands exists.
181. The Kenyan Nubian community living in Kibera for over a century has come to form inextricable ties to that land. It constitutes the sacred resting place of several generations of the Nubian community, it is the only homeland they have ever known, and it is the only location which allows them to live as a community. The Carter Commission concluded that there was a clear “moral obligation” for the government to settle the Nubians. The Prime Minister of Kenya has accepted that Kibera is “their ancestral homeland, unlike other groupings in the area.”
182. In the absence of having relocated the community to alternative lands in the several decades that followed their initial settlement, Kenyan Nubians have only formed stronger claims to Kibera. Kenya’s failure to recognize Kenyan Nubians’ ancestral rights to Kibera on that basis fails to be in accordance with international law.

b) The Forced Evictions Have Not Followed Due Process

183. The forced evictions and destruction of property experienced by Kenyan Nubians in Kibera have failed to meet basic principles of due process.
184. International law, as recognized in the jurisprudence of the African Commission, requires that there must be a process to
“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.”²¹³

²¹² See: Timothy Parsons, “Kibra is our Blood: The Sudanese Military Legacy in Nairobi’s Kibera Location 1902-1968,” 30.1 *International Journal of African Historical Studies* (1997).

²¹³ U.N. Committee on Economic Social and Cultural Rights, General Comment No. 7: the Right to Adequate Housing – Forced Evictions – Article 11(1), 16th session – 1997, at para. 14 & annex IV at 113.

185. Appropriate procedural protection under international law also encompasses:

“(a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.”²¹⁴

186. In this case, the Government has failed to uphold any of the above conditions ahead of evictions involving members of the Kenyan Nubian community.²¹⁵ The forced evictions to which the Kenyan Nubians have been subjected have not been carried out in accordance with the law as required by Article 14 of the Charter.

c) No Alternative Property was Provided or Compensation Paid

187. The Kenyan authorities have failed to provide alternative housing arrangements for the evicted Kenyan Nubians or to pay compensation to them, contrary to Article 14 of the Charter.

188. The International Covenant on Economic, Social and Cultural Rights that, “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.”²¹⁶ Furthermore, under General Comment No. 7, the Committee on Economic, Social and Cultural Rights has further emphasized that:

“Evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the

Available at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/959f71e476284596802564c3005d8d50?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/959f71e476284596802564c3005d8d50?Opendocument) (“U.N. CESCR – General Comment No. 7 – Adequate Housing – Forced Evictions”) (emphasis added).

²¹⁴ *Ibid.*

²¹⁵ Abraham Korir Singo’ei, “Promoting Citizenship in Kenya: the Nubian Case”, in Brad Blitz and Maureen Lynch, *Statelessness and the Benefits of Citizenship: A Comparative Study*, Chapter 3, p. 41 (2008); See: Exhibit 72: COHRE – Listening to the Poor – 2006, see note 88 above, at p. 39 & 45 (providing information that indicates that the Nubian community was not treated in accordance with applicable international standards). See also: 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*, p. 8 (2002); Exhibit 7: Affidavit of Ahmed Musa, at para. 4; Exhibit 6: Affidavit of Ahmed Adam, at para. 8-9.

²¹⁶ U.N. Committee on Economic Social and Cultural Rights, General Comment No. 4: the Right to Adequate Housing – Article 11(1), 6th session – 1991, at para. 8(a). Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument)

maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”²¹⁷

189. Detailed recommendations regarding compensation payable to displaced or evicted persons have been developed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.²¹⁸ These recommendations, which have been recalled in African Commission jurisprudence, set out the following principles for compensation on loss of land:

“Displaced persons should be (i) compensated for their losses at full replacement cost prior to the actual move; (ii) assisted with the move and supported during the transition period in the resettlement site; and (iii) assisted in their efforts to improve upon their former living standards, income earning capacity and production levels, or at least to restore them.”²¹⁹

190. With particular concern for minorities who may have a long connection to the land, the recommendations also note that:

“Land, housing, infrastructure and other compensation should be provided to the adversely affected population, indigenous groups, ethnic minorities and pastoralists who may have usufruct or customary rights to the land or other resources taken for the project.”²²⁰

191. Other regional tribunals also recognize the right to compensation in the case of expropriation of property.²²¹

192. While the Carter Commission stressed in 1933 that the allocation of land to Nubians was on the basis of tenants at will of the Crown rather than on that of ownership, it also emphasized – already at that juncture – that it was incorrect to say that the Nubians had no rights in equity to the land in Kibera.²²² Further emphasis was placed on the Government’s duty to either to repatriate them or to find

²¹⁷ U.N. CESCR – General Comment No. 7 – Adequate Housing – Forced Evictions, see note 213 above, at para 16.

²¹⁸ U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Guidelines on International Events and Forced Evictions, UN Doc. E/CN.4/Sub.2/1995/13, 17 July 1995, at para. 16(b) & (e) (U.S. Sub-Commission on Prevention of Discrimination and Protection of Minorities – Guidelines on International Events and Forced Evictions). See also: *Doğan v. Turkey*, ECtHR Judgment of 29 June 2004, at para. 154 (applying the Guidelines on International Events and Forced Evictions that were adopted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities).

²¹⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, see note 189 above, at para. 237. Available at:

http://indigenouseoplesissues.com/attachments/3879_ACHPR%20Communication%20276%20of%202003.pdf

²²⁰ U.S. Sub-Commission on Prevention of Discrimination and Protection of Minorities – Guidelines on International Events and Forced Evictions, see note 218 above, at para. 16 (e).

²²¹ In the European Court of Human Rights, for instance, compensation must be fair compensation, and the amount and timing of payment is material to whether a violation of the right to property is found. See: *Katikaridis and Others v. Greece*, ECtHR Judgment of 24 October 1996. See also: American Convention on Human Rights, entered into force on 18 July 1978, art. 23(2) (providing that “no-one shall be denied of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”)

²²² Exhibit 38: Carter Land Commission Report, 1933, at p. 601.

accommodation for them.²²³ It was also found that “they ought not to be moved without receiving suitable land elsewhere and compensation for disturbance”.²²⁴

193. Even the most minimal requirements impose the obligation of providing alternative land or housing. The applicants submit that none of the above conditions have been met by the Kenyan authorities: for decades Kenyan Nubians of Kibera have been evicted with inadequate notice or compensation. They have been systematically overlooked as beneficiaries of slum upgrading schemes, and more importantly, have been not been consulted by Kenyan authorities on the adequacy of such schemes vis-à-vis their ancestral claim to Kibera.²²⁵ However, as described in paragraph 53 above, no compensation is paid to Nubians for land from which they are displaced.

d) The Forced Evictions are Discriminatory

194. The failure to recognise the property rights of Kenyan Nubians in their ancestral homeland of Kibera is a direct result of the discriminatory policies of the Colonial authorities which were adopted by successive post-independence governments which also treated Nubians as aliens and refused to recognise their property rights in Kibera. This has led to the marginalised and precarious situation in which they find themselves today, and the understanding that Nubians are “not Kenyan” persists:

“Over the years, land allocation and “planning” has been left to the provincial administration who have not only engaged in selective allocation of the land (by favouring other communities and neglecting the Nubians), but have also systematically encouraged and benefitted from land-related corruption. This reflects a belief (which in some cases unconscious among officials in the Kenya government) that the Nubians are not true Kenyans and so do not warrant land allocation.”²²⁶

195. This has forced the Kenyan Nubians of Kibera to live as squatters on State land, and on this basis, to be denied entitlement to any domestic utilities such as water, electricity, paved roads, height sewers, and streetlamps. Kibera continues to be under-provisioned in terms of public services such as schools, clinics, and hospitals; and not provided for at all in terms of policing. In the words of Ibrahim Athman Said:

“In the sector occupied by the Nubian community there are no roads, medical facilities, no electricity, no proper drainage system whereas in other areas like Ayani Estate there are good roads, pipe water, street lights etc.”²²⁷

196. The Kenyan Nubians seek to remedy an historical injustice deeply rooted in the relics of colonialism, and their claim should be assessed in light of the African Charter’s preamble, which underscores the “duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity ... , and undertaking

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ See: para. 50-51 above.

²²⁶ John Mbaria, “Kibera and the Politics of Dispossession,” *The East African*, 15 July 2002.

²²⁷ Exhibit 13: Affidavit of Ibrahim Athman Said, at para. 7.

to eliminate colonialism, neo-colonialism...and all forms of discrimination.” In this regard, the discriminatory aspect of their claim not only fails to be in accordance with the anti-discrimination provisions set out under Section 82 of the Kenyan Constitution, but also fails to be in accordance with the fundamental principles of the African Charter.

E. CONSEQUENTIAL VIOLATIONS

197. As a result of the historical and discriminatory failure to recognise Kenyan Nubians as anything other than “aliens” and their still tenuous citizenship status caused by the vetting process, Kenyan Nubians find themselves in a precarious situation, condemned to live in enclaves of poverty such as Kibera, further marginalized from society. This has resulted in the discriminatory violation of numerous other rights under the Charter, including the rights of equal access to education, access to health care for vulnerable groups, and access to work, together with the rights to freedom of movement and public participation.
198. The African Commission has emphasized that one of the reasons to promote equality is to forestall the consequences of failing to do so:
- “Equality or the lack of it affects the capacity of one to enjoy many other rights. For example, one who bears the burden of disadvantage because of one’s place of birth or social origin suffers indignity as a human being and as an equal and proud citizen.”²²⁸
199. The Inter-American Commission has recognized that:
- “[Nationality] is one of the most important rights of man, after the right to life itself, because all other prerogative guarantees and benefits man derives from his membership in a political and social community – the States – stem from or are supported by this right.”²²⁹
200. Further to the request of the Kenyan Nubians for the recognition of their property rights in Kibera, in order to protect them from further evictions and encroachments, the government should also provide appropriate utilities and services to Kibera.

1. Denial of Equal Access to Education: Article 17(1)

201. Because the government considers the Nubians and others to be squatters in Kibera it has provided inadequate access to, and facilities for, education of children in Kibera. The lack of effective schooling for Nubian children violates the right of equal and effective access to education. The schools in Kibera are inadequate to

²²⁸*Legal Resources Foundation v. Zambia*, see note 105 above, at para. 63. See also: *Modise v Botswana*, see note 123 above, at para 88; *Malawi African Association and Others v. Mauritania*, see note 124 above, at para. 126; *Amnesty International v. Zambia*, African Comm. of Decision of 5 May 1999, Communication. No. 212/98 (2000), at para. 43 & 45. Available at: <http://www1.umn.edu/humanrts/africa/comcases/212-98.html>

²²⁹ Inter-American Commission – Third Report on the Situation in Chile (1977), see note 130 above, at para. 10.

deal with the size of the population, parents often cannot pay the costs of stationery and uniforms in order for their children to attend school, and Nubian children have little or no prospect of any secondary education, unlike other children in Kenya.

202. Much of the neglect and underfunding of schools in Kibera stems from the historical refusal to recognise Kenyan Nubians as full citizens, as well as the related refusal to accept their property rights in Kibera.
203. As outlined in paragraphs 60 to 62 above, while primary education is now provided for free by the Government of Kenya, there are insufficient schools in Kibera to take all the children, meaning that classes are very crowded. Their parents are often unable to afford the cost of stationery and uniforms, preventing the children from attending school. Secondary education is not provided for free, and there is little chance for Nubian children to continue their education as their parents are too poor to afford it.
204. Article 17(1) of the African Charter provides for the right of every individual to education. Article 11(3) of the African Charter on the Rights and Welfare of the Child, also ratified by Kenya, provides additional detail on the contours of the right to education, in particular with regard to access to secondary education and the importance of supporting vulnerable groups such as the Nubians, by requiring that:
- “State parties to the present Charter ... take all appropriate measures with a view to achieving the full realization of this right and shall in particular: [...]
- encourage the development of secondary education in its different forms and to progressively make it free and accessible to all; [...]
- Take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.”
205. The UN Committee on Economic, Social and Cultural Rights has outlined that the accessibility of education has three overlapping dimensions:
- “(i) *Non-discrimination* - education must be accessible to all, *especially the most vulnerable groups*, in law and fact, without discrimination on any of the prohibited grounds;
- (ii) *Physical accessibility* - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme);
- (iii) *Economic accessibility* - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available ‘free to all’, States parties are required to progressively introduce free secondary and higher education.”²³⁰

²³⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment 13 on the Right to Education*, UN Doc. E/C.12/1999/10, 8 December 1999, at para. 6(b)(i), (ii) and (iii) (emphasis added).

206. The Kenyan government's failure to guarantee effective access to education for Kenyan Nubians in Kibera violates Article 17(1) of the Charter. The lack of any objective or reasonable justification for this failure is particularly striking in light of the role of education as an indispensable means of realizing other human rights. This is particularly so as an "empowerment right", whereby education serves as the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.²³¹
207. The lack of schools in Kibera institutionalizes the economic marginalization of Kenyan Nubians and disadvantages them in paying for the costs of education, failing to ensure equal access to education for an already marginalized group.

2. Denial of Equal Access to Effective Health Care: Article 16

208. As a result of the marginalization of Kenyan Nubians they are denied non-discriminatory and effective access to healthcare, in violation of their rights under the Charter.
209. As previously established, the insecurity that arises from Kenyan Nubians uncertain status is rooted in the Kenyan Government's assertion that the land in Kibera – where many Nubians live – is government land and that the Nubians' continuous occupation of it is therefore illegal.²³² Consequently, the Kenyan Government systematically refuses to provide clean drinking water, sanitation, or health care for Kibera's residents, as they do not consider it a "residential" area.
210. The right of equal access to health care has been recognized by the UN as being closely related to and dependent upon the realization of other human rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right of equal access to health care.²³³
211. Together, the statements of the Nubians reflect a reality that falls short of the minimum standards allowed by the Charter and other international standards, including the underlying principles of the right of equal access to health care, which is:

“an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and

²³¹ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Dominican Republic*, UN Doc. A/HRC/13/3, 4 January 2010, at para. 87(37).

²³² Exhibit 70: COHRE – Listening to the Poor – 2005, see note 67 above.

²³³ U.N. Committee on Economic, Social and Cultural Rights, *General Comment 14 on the Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/2000/4, 11 August 2000, at para. 3. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En)

housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.”²³⁴

212. As outlined in paragraphs 63 to 64 above, the government has failed to provide any public health services to residents of Kibera. The first public health clinic opened in 2009, but it is a maternity clinic only. Kenyan Nubians and other residents of Kibera must pay to visit private clinics which they cannot afford due to their economic marginalization.
213. The government has failed in their duty to ensure adequate access to health services in particular to the “most vulnerable or marginalized sections of the population” that is within safe physical reach. The right of equal access to health care should require the government to make a special effort for such a marginalized group. In fact, they have made none.

3. Denial of the Equal Access to Work: Article 15

214. The difficulties that are associated with obtaining their ID cards interferes with Kenyan Nubians’ right to secure employment on a non-discriminatory basis, as without ID cards, they are barred from access to employment in the formal sector.
215. While some elements of the right to work are subject to progressive realization due to the limits of available resources, State parties are bound to other obligations

²³⁴ *Ibid.* para. 11 & 12 (establishing the interrelated and essential elements of the right of equal access to health care , which include: “(a) *Availability*. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs. (b) *Accessibility*. Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions: *Non-discrimination*: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds. *Physical accessibility*: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas[...] *Economic accessibility (affordability)*: health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups... *Information accessibility*: accessibility includes the right to seek, receive and impart information and ideas concerning health issues [...] (c) *Acceptability*. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate [...] (d) *Quality*. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality...”)

towards this right with immediate effect. One of the primary obligations upheld by the Committee in this regard is the “obligation to guarantee that [the right to work] will be exercised without distinction of any kind”.²³⁵

216. The African Commission has emphasized the guarantee of non-discrimination in the access of the right to work, finding that one purpose of Article 15 was “to ensure that States respect and protect the right of everyone to have access to the labour market without discrimination”.²³⁶
217. International law affords further legal protection to vulnerable groups by calling upon States to “refrain from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including [...] members of minorities”.²³⁷ The right to work is recognized as a fundamental right that is essential for realizing other human rights. It is also a right that forms an inseparable and inherent part of human dignity.²³⁸
218. As outlined in paragraphs 43 to 44 above, many Kenyan Nubians have poor employment prospects as a result of their uncertain citizenship status. They cannot apply for jobs in the public sector without ID cards, and many other positions require some form of documentation. They cannot join the armed forces. Their lack of security of tenure makes it extremely difficult for businesses to obtain the financial services that are necessary for modern life.
219. The different treatment to which Kenyan Nubians are subjected in the issuance of identification documents directly undermines their ability to access employment in violation of Article 15 of the Charter.

4. Denial of Freedom of Movement: Article 12.

220. The difficulties in obtaining passports for Kenyan Nubians leave them unable to travel, violating their freedom of movement.
221. For those who are unable to obtain ID cards, or who lose them and are not able to replace them, freedom of movement is limited by the police harassment due to lack

²³⁵ U.N. Committee on Economic Social and Cultural Rights, General Comment No. 18 the Right to Work, 24 November 2005, at para. 19. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.GC.18.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.GC.18.En?OpenDocument) (“U.N. CESCR General Comment No. 18 – The Right to Work”).

²³⁶ *Garreth Anver Prince v. South Africa*, U.N. Human Rights Committee Views of 13 October 2007, *Comm. No. 255/2002*, at para. 46 (emphasis added). Available at: <http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/ac824e16154a0621c1256d3d003321f6/d7239edc63325662c12573f400496901?OpenDocument>

²³⁷ U.N. CESCR General Comment No. 18 – The Right to Work, see note 235 above, at para. 23. See also: Core Obligations under General Comment No. 3 (1990) of CESCR which calls upon States “to ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life in dignity” . . . “to avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups.”

²³⁸ U.N. CESCR General Comment No. 18 – the Right to Work, *Ibid.* para 1.

of identity cards that is frequent within the community.²³⁹ As a compulsory document under Kenyan law, security agents often demand to be shown ID cards to forestall arrest.²⁴⁰ Most Kenyan Nubians who are denied ID cards or who are waiting for ID cards to be issued are therefore subject to arrest if they cannot produce the required document.

222. Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents.²⁴¹ The African Commission has found that unfair restrictions on the issuance of passports constitute a violation of the right to freedom of movement and the right of ingress and egress provided for under Article 12 of the Charter.²⁴²
223. While the right to freedom of movement may be subject to proportionate restrictions where provided for by law, the UN Human Rights Committee has stated that “the application of the restrictions permissible under Article 12 needs to be consistent with the other rights guaranteed under the Covenant and with the fundamental principles of equality and non-discrimination”.²⁴³
224. The discrimination that Kenyan Nubians face in attempting to obtain passports is demonstrated by a number of Kenyan Nubians reporting to be told in confidence to simply change their name in order “not [to] have the same problems,”²⁴⁴ and by the fact that, of the few who do manage to secure passports, many amongst them are issued temporary documents without just cause.²⁴⁵
225. Freedom of movement is also “an indispensable condition for the free development of a person.”²⁴⁶ The importance of this for Kenyan Nubians is captured in the lost opportunities revealed by the evidence outlined in paragraphs 45 to 47 above, be it in relation to education abroad,²⁴⁷ the fulfillment of religious duties (e.g. hajj),²⁴⁸ the fulfillment of various employment opportunities as outlined in arguments

²³⁹ Exhibit 73: Michael Mugwanga, “Application forms of IDs Run Out”, *Kenya Daily Nation*, 21 January 2006.

²⁴⁰ Exhibit 75: Lucas Barasa, “Row on ID Cards Tender Rages”, *Kenya Daily Nation*, 7 February 2006.

²⁴¹ United Nations Committee on Human Rights, *General Comment No. 27: Freedom of Movement*, U.N. Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, at para. 9. Available at:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6c76e1b8ee1710e380256824005a10a9?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument)

(“General Comment No. 27 – Freedom of Movement”)

²⁴² *Ibid.* para. 70.

²⁴³ *Ibid.* para. 18.

²⁴⁴ Exhibit 4: Affidavit of Adam Hussein Adam, at para. 6.

²⁴⁵ Exhibit 9: at para. 8-9, 14, 21 & 23 (Amina Sebit Aminala applied for a permanent passport but was refused one. She was given a temporary passport which expires in November. She needs a permanent passport to visit the Sudan. (para. 8-9); Mohammed Ramadhan Fadhal’s daughter lost her ID card on February 14, 2001. She applied for an ID card but is yet to be given a permanent ID card. She was only issued with a temporary document (para. 14, 21, 23)).

²⁴⁶ General Comment No. 27 – Freedom of Movement, see note 241 above, at para 1.

²⁴⁷ Exhibit 5: Affidavit of Adam Muhammed, at para. 9 (indicating that he was denied an ID card and a passport and, as a result, lost an opportunity to further his education in Egypt on a scholarship); Exhibit 30: Affidavit of Sheikh Ahmed Ramadhan, at para. 8 (indicating that he lost an opportunity to pursue advanced religious studies abroad because he could not get a passport).

²⁴⁸ See: Exhibit 19: Affidavit of Juma Bin Ismail Rubey, at para. 10-21.

submitted under Article 15,²⁴⁹ or for the fulfillment of various family commitments.²⁵⁰

226. By subjecting Kenyan Nubians to the risk of arbitrary arrests if stopped without their ID cards, and by arbitrarily denying or delaying the issue of Nubians passports and other identification documents, the Kenyan authorities severely curtail both the internal and external dimensions of the right to freedom of movement under the African Charter.

5. Denial of the Right to Public Participation: Article 13

227. Kenyan Nubians who are not able to obtain an ID card are denied the right to public participation.
228. The right to public participation, which “lies at the core of democratic government based on the consent of the people”,²⁵¹ recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service.²⁵² As such, the ability to participate in public life is central to the democratic principles underpinning both the African Charter and the Constitutive Act of the African Union.²⁵³
229. The African Commission has recognized the right to freely participate in the government of one’s country, either directly or through elected representatives, as one of “the most cherished fundamental rights.”²⁵⁴ Though the rights guaranteed under Article 13 are not absolute, any restrictions must be justifiable on objective and reasonable criteria.²⁵⁵ The Commission has explained that:

“Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or

²⁴⁹ See: submissions relating to Article 15, para. 214-219 above. Exhibit 29: Affidavit of Shafir Ali Hussein, at para. 19: (indicating that he was offered a job in Saudi Arabia. After filling the passport application form for this purpose, he was required to return on several occasions to follow up on the application, but without ever managing to secure his secure his travel document and that he lost the job as a result).

²⁵⁰ See: Exhibit 27: Affidavit of Salama Ibrahim, at para. 9 (indicating that he does not have passport and consequently he cannot travel to Tanzania and Uganda to address issues surrounding her father’s properties in these countries).

²⁵¹ United Nations Committee on Human Rights, *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service*, at para. 1. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument)

²⁵² *Ibid.* at para. 2-3.

²⁵³ The Constitutive Act of the African Union, 11 July 2000, art. 3(g) (establishing one of the Union’s objectives as “promot[ing] democratic principles and institutions, popular participation and good governance”) and art. 4(m) (stating that the Union shall function with respect for democratic principles, human rights, the rule of law and good governance). Available at: http://www.chr.up.ac.za/hr_docs/documents/African_Union_Constitutive_Act.pdf

²⁵⁴ *Modise v. Botswana*, see note 123 above, at para. 96.

²⁵⁵ *Mouvement Ivoirien des Droits Humains v. Cote D’Ivoire*, African Comm. Decision of July 2008, at para. 79. Available at: http://www.achpr.org/english/Decison_Communication/Cote%20d%27Ivoire/Comm.%20246-03.pdf (drawing specifically from General Comment 25 of the HRC).

descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person's candidacy.”²⁵⁶

230. In the present case, many Kenyan Nubians who are otherwise eligible to vote and to stand for election are excluded as a consequence of being discriminated in their access to the ID cards which are necessary for taking part. Sample accounts of those affected by this consequential violation include that of Sheikh Ahmed Ramadhan, who could not vote during Kenya's 2002 general elections and the referendum on the proposed new constitution because he had no national identity card.²⁵⁷ Abdi Juma Abdalla, who has been similarly affected, has stated that:

“Lack of an identity card has negatively affected me on numerous occasions. I cannot vote, especially in a referendum that was done on 21st November 2005. This happened despite the fact that I have been patriotic enough to vote in all previous general elections.”²⁵⁸

231. In connection with this, the impact of curtailed voting rights has proven to gravely undermine the ability for Kenyan Nubians to succeed as electoral candidates. For example, Mohammed Gore claims that he was not elected because the majority of those who would have voted for him, the Kenyan Nubians, had no ID cards and could not vote as a result. Gore aspired to become a Councilor to represent his constituency in the Nairobi City Council.²⁵⁹
232. The Kenyan Government's failure to secure the above, in addition to its failure to address the underlying discriminatory grounds resulting in Kenyan Nubians' exclusion from the political process, constitutes a violation of Article 13 of the Charter.

F. DIGNITY AND DEGRADING TREATMENT

233. The public singling out of Kenyan Nubians for differential treatment in access to citizenship based on a long history of ethnic discrimination, violates their dignity, protected by Article 5 of the Charter.

1. Dignity

234. Dignity is one of the essential objectives of the African Charter.²⁶⁰ The intrinsic value of individual human dignity is seen as the underlying principle upon which all other human rights stand. A measure or policy impinging on the character of this right is therefore unlikely to ever be construed as justified and proportionate to a legitimate aim. The right to dignity is broadly protected, in Article 1 of the German Federal Constitution, in the EU Charter of Fundamental Rights, and in the Canadian

²⁵⁶ *Ibid.*

²⁵⁷ Exhibit 30: Affidavit of Sheikh Ahmed Ramadhan, at para. 12.

²⁵⁸ Exhibit 3: Affidavit of Abdi Juma Abdalla, at para. 6.

²⁵⁹ Exhibit 23: Affidavit of Mohammed Gore, at para. 28.

²⁶⁰ African Charter on Human and People's Rights, see note 203 above, at pre-ambular para. 2.

Charter of Rights and Freedoms. Dignity is one of the founding values in the South African Constitution, section 10 of which states that “everyone has inherent dignity and the right to have their dignity respected and protected.” The Supreme Court of India has held that the right to life “includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life.”²⁶¹

Nubians are denied personal development and life prospects

235. The arbitrary deprivation of effective nationality results in profound disadvantages for Kenyan Nubians, relegates them to the margins of society, and prevents them from realizing their life’s ambitions and full human potential.
236. In the context of statelessness, the UNHCR has highlighted that “the ability of people to realize the rights associated with nationality provide an indispensable element of stability of life, whether at the personal, societal or international levels.”²⁶² The Inter-American Court has found that individuals must have “access to conditions that guarantee a dignified existence” and must “prevent its agents from violating it.”²⁶³ These conditions for a dignified life are essential for the “full and harmonious development of [the human] personality.”²⁶⁴ The Court concludes:

“The concept of “life plan” is akin to the concept of personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. *Strictly speaking, those options are the manifestation and guarantee of freedom.* An individual can hardly be described as truly free if he does not have options to pursue in life and to carry that life to its natural conclusion. Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard.”²⁶⁵

237. By depriving Kenyan Nubians of many consequential rights as a result of their inability to secure ID cards, the Kenyan Government has failed to guarantee conditions necessary for a dignified existence. The Nubians are left in a perilous situation of insecurity wherein they are excluded from the usual protections of the State.

Nubians are denied their legal identity and existence

238. The arbitrary deprivation of an individual’s nationality denies their very existence, violating their right to dignity.
239. The Inter-American Court has held that, “a stateless person, *ex definitione*, does not have recognized juridical personality, because he has not established a juridical and

²⁶¹ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* (1981) 2 SCR 516.

²⁶² UNHCR, *The State of the World’s Refugees: A Humanitarian Agenda*, ch. 6, p. 20. Available at: <http://www.unhcr.org/4a4c72719.html>

²⁶³ *Villagran Morales v. Guatemala*, IACtHR, Judgment of 19 November 1999, at para. 144 (emphasis added).

²⁶⁴ *Ibid.* para. 191.

²⁶⁵ *Loayza Tomayo v. Peru*, IACtHR Reparations Judgment of 27 November 1998, at para. 148. (emphasis added).

political connection with any State.”²⁶⁶ For a stateless individual, “the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual’s condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals.”²⁶⁷

240. On this basis, the inherent dignity of the Kenyan Nubians is undermined by virtue of the fact that they do not enjoy a legal identity as full and equal human beings. The dignity of Kenyan Nubians has been further undermined, over several generations, as a result of the systematic refusal to acknowledge their existence as a community.²⁶⁸

2. Degrading Treatment

241. Where conduct is a particular affront to dignity it may amount to degrading treatment. The deprivation of effective nationality on the basis of ethnicity or religion singles out a particular race for unjustified treatment and relegates them to second class status in Kenyan society. Such severe discrimination amounts to degrading treatment.

242. In the case *East African Asians v United Kingdom* the European Commission of Human Rights found that a policy which refused to grant British nationality to individuals because of their ethnicity amounted to degrading treatment.²⁶⁹ The case concerned immigration laws that refused to accept that Asians who were citizens of the “United Kingdom and the Colonies” living in East Africa should have the right to enter the United Kingdom.²⁷⁰ The Commission found that the legislation treated the applicants differently because of their race, and concluded that:

“a special importance should be attached to discrimination based on race, and that to publicly single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.”²⁷¹

243. The Kenyan Nubians have similarly been subjected to a racially discriminatory process that deprives them of effective access to their Kenyan citizenship, treatment which is such an affront to their dignity as to be degrading.

²⁶⁶ *Ibid.* para. 178

²⁶⁷ *Yean and Bosico v. the Dominican Republic*, see note 141 above, at para. 179.

²⁶⁸ See para. 43-45 above and affidavits cited in support of those paragraphs.

²⁶⁹ *East African Asians v. United Kingdom*, Eur. Comm. on Human Rights, Decision of 14 December 1973.

²⁷⁰ The relevant laws were passed at a time when policies of ‘Africanization’ in east Africa were depriving Asians of their livelihoods. The applicants could not rely on the prohibition of discrimination in Article 14 of the ECHR because the right of entry (the subject of the case) was not protected under the ECHR and Article 14’s prohibition of discrimination is limited to the rights and freedoms of the Convention. The European Commission on Human Rights nevertheless held that the claims were admissible under article 3 of the ECHR.

²⁷¹ *East African Asians v. United Kingdom*, see note 269 above, at para. 207.

G. FAILURE TO GIVE EFFECT TO THE KENYAN NUBIANS' RIGHTS

244. The Kenyan Government's failure to give effect to the rights raised in this communication violates Article 1 of the Charter.
245. 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. In order to fulfill this requirement, the procedures must be clear, without undue delay, and with no financial obstacles that unduly restrict the recognition of nationality.²⁷² Individuals must be able to access the procedures in place without any fear of discrimination. Due process safeguards must be in place to allow for review or appeal in instances where the above guarantees have not been met.
246. Under the African Charter on Human and Peoples' Rights, such obligations come within the duty to respect, protect, promote and fulfill rights under that instrument. This principle was unequivocally upheld in the *Ogoni* decision, where the Commission stated that:

“At a primary level, the obligation to *respect* entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.”²⁷³

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

²⁷² Comparable principles relating to availability and accessibility can be found in relation to the rights to education, housing and health. See: U.N. Committee on Economic Social and Cultural Rights, General Comment 13: the Right to Education, U.N. Doc. E/C.12/1999/10, 9 December 1999, para. 6(a)-(b). Available at:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/ae1a0b126d068e868025683c003c8b3b?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/ae1a0b126d068e868025683c003c8b3b?Opendocument)

U.N. Committee on Economic Social and Cultural Rights, General Comment 4: The Right to Adequate Housing, 13 August 1999, at para. 8(c)-(e). Available at:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument)

U.N. Committee on Economic Social and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4, 11 August 2000, at para. 12(a)-(b). Available at:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument)

²⁷³ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, (Ogoni Case), see note 190 above, at para. 45. See also: *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, African Comm. Decision of October 1995, Communication 74/92, at para. 20. Available at: <http://hrlibrary.ngo.ru/africa/comcases/74-92.html>

The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.²⁷⁴

“The last layer of obligation requires the State to *fulfill* the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights.”²⁷⁵

247. In the case of *Association of Victims of Post Electoral Violence & Interights v. Cameroon*, the African Commission further underscored that acceptance and ratification by the States of the provisions contained in the Charter only constituted the beginning of the exercise of promotion and protection of human and peoples’ rights. In this regard, it emphatically stated that:

“Article 1 of the African Charter imposes on the States Parties the obligation of using the necessary diligence to implement the provisions prescribed by the Charter since the said diligence has to be followed by *practical action* on the ground in order to produce *concrete results*.”²⁷⁶

248. By this, the Commission has clarified that “the obligations which ensue from Article 1 impose on the State the need to implement all the measures required to produce the result of protecting the individuals living on its territory”²⁷⁷. It has then drawn on jurisprudence from the International Court of Justice to highlight that the obligation of result that follows from Article 1, “should manifestly be enforced unconditionally”²⁷⁸.

249. Furthermore, the Commission has made expressly clear that “Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. It means that a violation of any provision of the Charter, automatically means a violation of Article 1”²⁷⁹.

250. By ratifying the African Charter, Kenya has recognized the rights provided under this instrument and undertook to guarantee those rights under its jurisdiction. On this basis, Kenya Government is obliged to provide effective nationality to Kenyan Nubians, as well as to uphold their property rights under the Charter. It also means that the rights to participation, education, health, work and the freedom of movement must not only be available to them, but also accessible to them in real terms.

251. The earlier submissions on admissibility filed by the applicants before this Commission described the steps that were made to exhaust domestic remedies.

²⁷⁴ *Ibid.* para. 46 (emphasis added).

²⁷⁵ *Ibid.* para 47.

²⁷⁶ *Association of Victims of Post Electoral Violence & INTERIGHTS v. Cameroon*, African Comm. Decision 11-25 November 2009, Communication No. 272/2003, at para. 110. Available at: http://www.achpr.org/english/activity_reports/27_activity.pdf (emphasis added).

²⁷⁷ *Ibid.* para. 115.

²⁷⁸ *Ibid.* para. 105 & 111.

²⁷⁹ *Dawda Jawara v. The Gambia*, African Comm. Decision of 11 May 2000, Communication Nos. 147/95 and 149/96, at para. 46. Available at: <http://humanrights.law.monash.edu.au/africa/comcases/147-95.html>

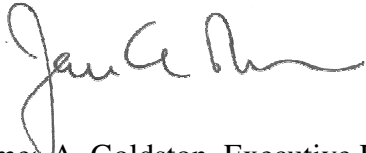
They described how the applicants commenced an action in the High Court of Kenya on 17th March 2003 on behalf of the Nubian community seeking a declaration that the Nubians were Kenyan citizens and that the treatment to which they had been subjected was discriminatory and contrary to the Constitution. However, numerous procedural obstacles were placed in their way. A date for a hearing was eventually fixed for 7th June 2004, but was not heard due to further procedural issues. The Nubian community wrote to the Chief Justice asking him to ensure the case was heard on numerous occasions in 2004 and the last letter was written in January 2005, but no reply was ever received.

252. The plight of the applicants demonstrates very clearly that the Kenyan Government has failed in its duty to meet its obligations under Article 1 of the Charter, thus constituting a violation of this underlying provision of the Charter.

V. CONCLUSION AND REMEDIES

253. The historical injustice by which the colonial authorities refused to grant citizenship to Kenyan Nubians and refused to recognise their property rights in Kibera has been perpetuated by subsequent governments of Kenya. Throughout Kenya, Nubians are still deprived of effective access to their citizenship, forced to go through the vetting process with immense delays and uncertainty as to the eventual outcome, leaving them with a citizenship status that remains tenuous.
254. The Government of Kenya has not only the moral obligation to settle the Nubians that was recognized in 1932, but also the duty under African human rights standards to ensure that the Kenyan Nubians are fully recognized as citizens in the same way as other Kenyans, and granted the property rights and services that should come with full acceptance of their citizenship.
255. The Kenyan Nubians seek the following remedies from the African Commission, to be further developed at the appropriate stage in the proceedings:
- *Firstly*, a finding that their rights have been violated, as explained above.
 - *Secondly*, a public apology from the Kenyan government.
 - *Thirdly*, a clear recognition that Kenyan Nubians are citizens of Kenya, on the same basis as other groups in Kenya.
 - *Fourthly*, the withdrawal of the vetting process, and the promise that Kenyan Nubians will be treated like any other Kenyan citizen in obtaining their ID cards.
 - *Fifthly*, recognition of their individual and collective property rights in Kibera, including restitution of sufficient land to sustain them as a community.

- *Sixthly*, the supply of appropriate utilities including clean water, drainage and electricity, and the provision of appropriate community services such as schools and hospitals on an equal basis with other Kenyans.
- *Seventhly*, compensation for the violation of their rights, sufficient to permit them to re-build their ancestral homeland.



James A. Goldston, Executive Director

Rupert Skilbeck, Litigation Director

Cynthia Morel, Legal Officer

Open Society Justice Initiative

400 West 59th Street

New York, N.Y. 10019



Sheila Keetharuth

Executive Director

The Institute for Human Rights and Development in Africa

No. 949 Brusubi Layout

Coastal Highway

P.O. Box 1896, Banjul

The Gambia



Korir Sing'Oei Abraham

The Center for Minority Rights Development

Dam Estate, Suite 132, Off Langata Road

Box 14692 00100

Nairobi, Kenya

VI. LIST OF DOCUMENTS

Affidavits

Exhibit 1	Affidavit of Abdalla Ali Yusuf
Exhibit 2	Affidavit of Abdallah Sebit
Exhibit 3	Affidavit of Abdi Juma Abdalla
Exhibit 4	Affidavit of Adam Hussein Adam
Exhibit 5	Affidavit of Adam Muhammed
Exhibit 6	Affidavit of Ahmed Adam
Exhibit 7	Affidavit of Ahmed Musa
Exhibit 8	Affidavit of Ali Hussein Mursall
Exhibit 9	Affidavit of Amina Sebit Amina
Exhibit 10	Affidavit of Arafa Ali
Exhibit 11	Affidavit of Athman Said
Exhibit 12	Affidavit of Fatuma Ismail Mahmud
Exhibit 13	Affidavit of Ibrahim Athman Said
Exhibit 14	Affidavit of Ismail Ahmed Babalah
Exhibit 15	Affidavit of Ismail Dafala Salim
Exhibit 16	Affidavit of Ismail Ramadhan
Exhibit 17	Affidavit of Issa Abdulfaraj
Exhibit 18	Affidavit of Jaffar Ahmed Musa
Exhibit 19	Affidavit of Juma Bin Ismail Rubey
Exhibit 20	Affidavit of Kadara Sebit
Exhibit 21	Affidavit of Khaltuma Ismail Omar
Exhibit 22	Affidavit of Mariam Gharib Ahmed
Exhibit 23	Affidavit of Mohammed Gore
Exhibit 24	Affidavit of Mohammed Ramadhan Fadhal
Exhibit 25	Affidavit of Mohammed Ramadhan Faraj
Exhibit 26	Affidavit of Mwajuma Bashir
Exhibit 27	Affidavit of Salama Ibrahim
Exhibit 28	Affidavit of Sekina Asha Mohammed
Exhibit 29	Affidavit of Shafir Ali Hussein

- Exhibit 30 Affidavit of Sheikh Ahmed Ramadhan
- Exhibit 31 Affidavit of Zakia Yusuf
- Exhibit 32 Affidavit of Zena Ahmed
- Exhibit 33 Affidavit of Zubeda Kasim
- Exhibit 34 Affidavit of Zuhura Adam
- Exhibit 35 Affidavit of Zura Abdul Aziz

Exhibits

- Exhibit 36 Letter from the Secretariat Nairobi to the Assistant Commandant of King's African Rifles, 7 June 1919
- Exhibit 37 Letter from District Commissioner of Nairobi to the Provincial Commissioner, 27 April 1931
- Exhibit 38 The Carter Land Commission Report, 1933
- Exhibit 39 Location Survey of Buildings and Shambas at Kibera, District Surveyor, 31 October 1934. It comprises of 397 plots, solely allocated to Kenyan Nubians.
- Exhibit 40 Union of the Sudanese Headquarters Kibera, Letter to the Kenyan Governor petitioning for return to Sudan as speedily as possible in return for past military service (7 August 1939) & Acting Chief Secretary for the Governor of Kenya, Letter to the Union of the Sudanese Headquarters of Kibera indicating that the Kenya Government granted ex-service men holdings at Kibera in lieu of repatriation to Sudan and that repatriation benefits are not planned, 22 August 1939
- Exhibit 41 Letter from Commissioner for Local Government, Lands and Settlement to the Town Clerk, Nairobi, 26 March 1945
- Exhibit 42 Letter addressed to the Honorary Chief Commissioner of Nairobi, 1 September 1950
- Exhibit 43 Letter from the Ministry of Health to the Secretary of the Treasury, the Secretary for African Affairs, and the Secretary of Defense, 13 September 1954
- Exhibit 44 E.D. Fox, Notes on a Preliminary Survey of the Proposal to Reconstitute the Kibera Africa Settlement Area, 18 May 1955
- Exhibit 45 Letter from the Officer in Charge of the Extra Provincial District of Nairobi to Secretary for African Affairs, 11 November 1955

- 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 47 Letter from the Officer in Charge of the Extra Provincial District of Nairobi to Secretary for Local Government, Health and Housing Nairobi, 30 July 1957
- Exhibit 48 Letter from the Officer in Charge of the Extra Provincial District of Nairobi to the Permanent Secretary, Minister of African Affairs Nairobi, 1 August 1958
- Exhibit 49 Letter from the District Commissioner of the Commissioner of the Lands to the Union of the Sudanese Headquarters Kibera, 16 April 1964
- Exhibit 50 Letter from the District Commissioner of Nairobi Area to the Permanent Secretary, Ministry of Health and Housing, 21 April 1964
- Exhibit 51 Picture of the Minister for Lands and Settlement receiving the Memorandum from the Kibera village delegation. African Standard, 5 September 1968
- Exhibit 52 Kenyan Ministry of Education, Letter to Yusuf Ibrahim Diab asking for Confirmation that he is a Kenyan Citizen so that his bursary application may be considered, 23 June 1970
- Exhibit 53 Parliamentary debates. Question 516 on the issuance of the title deeds, Exchange between Mr. Raila, Dr. Otiedo-Kopiyo and Mr. Farah with the Assistant Minister for Lands Mr Keino, pp.1420-1422, 15 July 1993
- Exhibit 54 Letter from District Officer, Kibera Division to the Provincial Commissioner, Nairobi Area, 28 July 1999
- Exhibit 55 Korir A. Singo'ei and Adam H. Adam in conjunction with the Kenyan Nubian Council of Elders, Covert Racism. *The Kibera clashes: An Audit of Political Manipulation of Citizenship in Kenya And 100 years of Nubians' Landlessness*", 2002
- Exhibit 56 Affidavit of Yunis Ali, Civil Suit No. 256, High Court of Kenya at Nairobi, 17 March 2003, at para. 6
- Exhibit 57 The Kenyan Nubian Council of Elders, Letter to the Director of Physical Planning and Ministry of Lands and Settlement, 1 March 2004
- Exhibit 58 Kenya Nubian Council of Elders, Letter re: *Expedited Registry of the Nubian Council Trust Charitable Trust Deed*, 18 November 2007

- Exhibit 59 The Kenyan Nubian Council of Elders, Application for Registration for a Certificate Incorporation to the Kenyan Commissioner of Lands (stamped as received 19 November 2007)
- Letter from the Kenyan Ministry of the Lands to the Kenyan Nubian Council of Elders recalling name and diagrammatic representation requirements of the application and requesting completion, 1 February 2008
- Letter from Kenyan Nubian Council of Elders to the Kenyan Ministry of Lands indicating compliance with criteria recalled in the correspondence of 1 February 2008 (letter of 27 February 2008 – stamped received 4 March 2008)
- Exhibit 60 Letter from the Office of the President to Issa Abdulfaraj (Kenya Nubian Council of Elders) regarding the expedited registration of trust deed in Kibera, 27 May 2008
- Exhibit 61 Letter from Kenyan Nubian Council of Elders to the Prime Minister and Member of Parliament for Langata Constituency Nairobi, 24 August 2009
- Exhibit 62 Newspaper article “DO says demolition of Kibera to go on”
- Exhibit 63 Prime Minister Raila Odinga, “Kibera upgrading project to go on”, Office of Public Communications (Office of Government Spokesperson), 10 September 2009
- Exhibit 64
- Exhibit 65

Newspaper Articles and Academic Articles

- Exhibit 66 J. B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Acts Press, African Centre for Technology Studies, 1990)
- Exhibit 67 African Population and Health Research Centre (APHRC), *Population and Health Dynamics in Nairobi’s Informal Settlements: Report of the Nairobi Cross-sectional Slums Survey (NCSS) 2000* (2002)
- Exhibit 68 John Mbaria, “Meet the Nubians, Kenya’s Fifth Generation Foreigners,” *The East African* (15 July 2002)
- Exhibit 69 Minority Rights Group International/Centre for Minority Rights Development, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity* (2005)
- Exhibit 70 Centre on Housing Rights and Evictions (COHRE), *Listening to the Poor? Housing Rights in Nairobi, Kenya* (2005)

- Exhibit 71 UN-HABITAT/Government of Kenya, *Kibera Social and Economic Mapping: Household Survey Report* (February 2005)
- Exhibit 72 Centre on Housing Rights and Evictions (COHRE), *Listening to the Poor? Housing Rights in Nairobi, Kenya* (2006)
- Exhibit 73 Michael Mugwanga, “Application forms of IDs Run Out”, *Kenya Daily Nation* (21 January 2006)
- Exhibit 74 Gitonka Muriuki, “Demands by Officers to See ID Cards Illegal”, *Kenya Daily Nation* (6 February 2006)
- Exhibit 75 Lucas Barasa, “Row on ID Cards Tender Rages”, *Kenya Daily Nation* (7 February 2006)
- Exhibit 76 Kenya National Commission on Human Rights, *An Identity Crisis: A Study on the Issuance of National Identity Cards* (2007)
- Exhibit 77 Open Society Justice Initiative, “Kenyan Nubians: Without Papers, Who Are You?”, *Report on Developments 2005-2007* (2007)
- Exhibit 78 Annabel S. Erulkar and James K. Matheka, *Adolescence in the Kibera Slums of Nairobi Kenya* (Population Council, 2007)
- Exhibit 79 Centre on Housing Rights and Evictions (COHRE), *Rapid Assessment of the Water and Sanitation Situation within Informal Settlements in Nairobi* (2008)
- Exhibit 80 Douglas H. Johnson, “Tribe or Nationality? The Sudanese Diaspora and the Kenyan Nubis”, 3 *Journal of East African Studies* (2009), at p. 112-131
- Exhibit 81 Bronwen Manby, *Struggles for Citizenship in Africa* (Open Society Institute, 2009)
- Exhibit 82 UNICEF, *Info by Country: Kenya*. Available at: <http://www.unicef.org/infobycountry/kenya.html>.
- Exhibit 83 The Star Newspaper, *Why it is Vital to Register Births and Deaths*, 19 April 2010

Kenyan Laws

- Exhibit 84 Registration of Persons Act, 1973 (Cap 107) as amended by the Registration of Persons (Amendment) Act 1987
- Exhibit 85 Chapter 280 of Kenyan Laws, the Government Lands Act. Part II – Administration, Special Powers of the President, S.3(a)
- Exhibit 86 Children’s Act of 2001, Chapter 586, Laws of Kenya