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**THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS  
AND WELFARE OF THE CHILD (ACERWC)**

**DECISION ON THE COMMUNICATION SUBMITTED BY THE INSTITUTE FOR  
HUMAN RIGHTS AND DEVELOPMENT IN AFRICA AND THE OPEN SOCIETY  
JUSTICE INITIATIVE (ON BEHALF OF CHILDREN OF NUBIAN DESCENT IN  
KENYA) AGAINST THE GOVERNMENT OF KENYA**

**AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD**

**INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT IN AFRICA (IHRDA) AND OPEN  
SOCIETY JUSTICE INITIATIVE ON BEHALF OF CHILDREN OF NUBIAN  
DESCENT IN KENYA**

**v.**

**THE GOVERNMENT OF KENYA**

**DECISION: No 002/Com/002/2009**

**Summary of Alleged Facts**

1. On 20 April 2009, the Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (African Committee) received a Communication brought by the Institute for Human Rights and Development in Africa based in the Gambia (and organization with an observer status before the African Committee) and the Open Society Initiative based in New York (the Complainants) on behalf of children of Nubian descent in Kenya.
2. The Complainants allege that the Nubians in Kenya descended from the Nuba mountains found in what is current day central Sudan and were forcibly conscripted into the colonial British army in the early 1900s when Sudan was under British rule. Upon demobilisation, allegedly, although they requested to be returned to Sudan, the colonial government at the time refused and forced them to remain in Kenya.
3. The Complainants allege that the British colonial authorities allocated land for the Nubians, including in the settlement known as *Kibera*, but did not grant them British citizenship. At Kenyan independence (1963), the Complainants argue, the citizenship<sup>1</sup> status of the Nubians was not directly addressed, and for a long period of time they were consistently treated by the government of Kenya as “aliens” since they, according to the Government, did not have any ancestral homeland within Kenya, and as a result could not be granted Kenyan nationality. The Complainants allege that the refusal by the Kenyan Government to recognise the Nubians’ claim to land is closely linked with the Government’s denial of Nubians to Kenyan citizenship.
4. A major difficulty in making the right to nationality effective for Nubian children is the fact that many Nubian descents in Kenya who are parents have difficulty in registering the birth of their children. For instance, the fact that many of these parents lack valid identity documents further complicates their efforts to register their children’s births. It is further alleged birth registration certificate in Kenya explicitly indicates that it is not proof of citizenship, thereby leaving registered children in an ambiguous situation contrary to Article 6 of the African Children’s Charter.

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<sup>1</sup> Although technically speaking “nationality” and “citizenship” do not mean the same thing, the African Committee uses the two notions interchangeably in this decision as they are used in such a manner in the Communication itself.

5. In connection to this, the Communication further alleges that while children in Kenya have no proof of their nationality, they have legitimate expectation that they will be recognised as nationals when they reach the age of 18. However, for children of Nubian descent in Kenya, since many persons of Nubian descent are not granted the ID cards that are essential to prove nationality, or only get them after a long delay, this uncertainty means that the future prospects of children of Nubian descent are severely limited and often leaves them stateless. The Complainants further allege that a vetting process that is applicable to children of Nubian descent is extremely arduous, unreasonable, and de facto discriminatory.

6. The Complainants allege and attempt to substantiate that the facts submitted by them are supported by reports from the United Nations bodies, non-governmental organizations, independent researchers, academicians, and adults and children of Nubian descent living in Kenya.

## **The Complaint**

7. The Complainants allege violation of mainly Article 6, in particular sub-articles (2), (3) and (4) (the right to have a birth registration, and to acquire a nationality at birth), Article 3 (prohibition on unlawful/unfair discrimination) and as a result of these two alleged violations, a list of “consequential violations” including Article 11(3) (equal access to education) and Article 14 (equal access to health care).

## **Procedure**

8. The Communication was received by the Secretariat of the African Committee on 20 April 2009. After some effort to follow up with the Complainants, and the Respondent State, during its 15<sup>th</sup> session, the Committee declared the Communication admissible as per Decision number 01/Com/002/2009 dated March 16, 2010.

9. A note verbal (reference DSA/ACE/64/1000.10 dated 13 July 2010) was addressed to the Respondent State to present its written argument on the merits of the Communication to allow the Committee consider the Communication, but no response was received.

10. The Committee deferred the consideration of the Communication for its next ordinary session.

11. Another note verbal (reference DSA/ACE/64/256.11 dated 22 February 2011) was again sent again to invite the Respondent State to come and present its argument during the African Committee’s 17<sup>th</sup> ordinary session, but again no response was received.

12. At its 17<sup>th</sup> Ordinary Session held in March 2011, the African Committee reasoned that children’s best interests demanded that it consider the Communication, and decided to be seized thereof and consider the Communication on its merits. As a result, it heard oral arguments by the Complainants, and scrutinized the validity, legality, and relevance of such arguments through a series of questions.

14. Unfortunately, despite continued efforts by the Secretariat of the African Committee, this Communication does not benefit from a response by the Respondent State. This has inevitably forced the African Committee to rely on other information sources in determining

and ascertaining questions of fact and law, that could possibly have been provided, raised, and/or invoked by the Respondent State. It is important to mention at the outset that the Guidelines for the Consideration of Communications explicitly provide that the absence of a party shall not necessarily hinder the consideration of a communication.

## **Admissibility**

### ***Complainants' submission on admissibility***

15. The current communication is submitted pursuant to Article 44 of the African Charter on the Rights and Welfare of the Child which allows the African Committee to receive and consider communications from "any person, group or nongovernmental organization..." The Guidelines for the Consideration of Communications provides, under Chapter II Article 1, that the admissibility of a communication submitted pursuant to Article 44 is subject to around seven conditions relating to form and content.

16. The Complainants submitted, in a submission dated 6<sup>th</sup> November 2009, that the authors of the Communication have been identified and relevant details of the Communication have been provided to the Committee, it is written and it is against a State Party to the African Children's Charter. The Complainants submitted that the Communication is compatible with the provisions of the Constitutive Act of the African Union as well as with the African Children's Charter, that the Communication is not exclusively based on information circulated by the media, and that the same issue has not been considered according to another international procedure. In addition, the Complainants submitted that the Communication is submitted within a reasonable period of time and that the Communication is not written in an offensive language.

17. A more detailed explanation is provided by the Complainants in relation to the requirement to "...exhaust all appeal channels at the national level..." In this regard, the Complainants submitted that they have undertaken a number of efforts to exhaust local remedies for a period of seven years in order to resolve the issue of lack of citizenship of the Nubian community.

18. The Complainants submit that in 2002 the Nubian community, through the Kenyan Nubian Council of Elders, instructed the Centre for Minority Rights Development (CEMIRIDE) to institute legal proceedings against the Kenyan Government. On 17<sup>th</sup> March 2003 an action was commenced in the High Court of Kenya by way of an urgent application that led to a leave to file a class action suit on behalf of the Nubian community.

19. However, the Complainants indicate that, even though CEMIRIDE filed the substantial constitutional application the same day in the High Court in Nairobi, numerous procedural obstacles have since been raised which have stalled the case. These obstacles reportedly include how on 8 July 2003 a certain Justice of the High Court declined to transmit the file to the Chief Justice on the ground that it was necessary to ascertain the identity of the 100,000 applicants; how another Justice of the High Court subsequently agreed that such a process to ascertain was unreasonable and fixed a date for a hearing of the merits of the case for the 7<sup>th</sup> of June 2004; but later on how, on the 7<sup>th</sup> of June 2004, again another Justice declined to hear the application and referred it back to the duty judge for directions on grounds that there were contradictory orders in the file.

20. Frustrated with the process, especially with the fact that within fifteen months of filing, the case had been brought before five different judges none of whom had proceeded with it, the Complainants indicate that a letter was sent to the Chief Justice of Kenya stating that there appeared to be a deliberate placement of administrative and procedural obstacles in the path of the determination of the application brought on behalf of the Nubian community. In this regard, the Complainants indicate that no response to this letter, and other letters sent on 24 July 2004, 24 September 2004, and 24 January 2005 was received.

21. As a result, the Complainants submitted that, more than six years after the CEMIRIDE instituted proceedings on behalf of the Nubian community, no bench has been constituted and no date has been fixed for a substantive hearing on the case. By invoking jurisprudence from the African Commission, and highlighting the provisions of the African Children's Charter and its Guidelines on the Consideration of Communications, the Complainants submit that such a delay is excessive, and should be seen as an exception to the exhaustion of local remedies rule.

22. The Complainants are of the view that the pursuit of local remedies by the Nubian community has been fraught with such impediments that it offers no prospect of success and children of Nubian descent living in Kenya cannot be reasonably expected to benefit from these local remedies. As a result of the above, the Complainants argue that the Communication should be declared admissible as it complies with all the requirements of the Guidelines for the Consideration of Communications.

### ***The African Committee's analysis and decision on admissibility***

23. The African Committee, after a detailed consideration of the Communication, agrees with the submission of the Complainants that the form of the Communication is in compliance with the Guidelines of the African Committee- i.e. it is not anonymous, it is written, and concerns a State Party to the African Children's Charter. It also decides, after a thorough look at the Communication, that the Communication is compatible with the Constitutive Act of the African Union and with the African Children's Charter. The Communication is presented in a professional, polite and respectful language, and is based on information provided, inter alia, by the alleged victims and on court documents, and not solely based on media reports. The Secretariat of the African Committee has also undertaken efforts to confirm that the same issue provided for in the present Communication has not been considered according to another international procedure.

24. However, to decide on the less straightforward and important issue whether local remedies have been exhausted (and in connection to that, whether the present Communication has been brought within a reasonable period of time), which is an issue that probably would have been challenged by the Government of Kenya, the African Committee has scrutinised the written and oral submissions by the Complainants in detail, and would offer below a more elaborate explanation.

25. At the outset, it should be mentioned that the African Children's Charter explicitly mandates the African Committee, in Article 46 of the Charter, to:

...draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organization of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

It is based on this explicit legislative mandate that the African Committee makes reference to laws, and jurisprudence from other countries or treaty bodies in Africa and elsewhere.

26. This as a backdrop, a local remedy has been defined as "any domestic legal action that may lead to the resolution of the complaint at the local or national level."<sup>2</sup> One of the main purposes of exhaustion of local remedies, which is also linked to the notion of state sovereignty, is to allow the Respondent State be the first port of call to address alleged violations at the domestic level. In the words of the African Commission, exhaustion of local remedies is intended "to give domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgments of law at national and international levels".<sup>3</sup> Furthermore, the primacy and greater immediacy of the domestic level is reinforced by the fact that local remedies are "normally quicker, cheaper, and more effective"<sup>4</sup> and allow for better fact finding of alleged violations too. The African Committee understands and unreservedly supports these roles that the rule on the exhaustion of local remedies is supposed to play.

27. The lack of awareness of an alleged violation by the State deprives it the opportunity to address such a violation. However, in the context of the present Communication, it would not be reasonably defensible to argue that the authorities in Kenya did not know about this ongoing allegation of violations of human rights in the presence of a number of related reports (including by the Human Rights Commission of Kenya) and more so, in the face of the pending case law before the High Court in Nairobi for such a long period of time.

28. This said, it is a well established rule under international human rights law procedures that "only domestic remedies that are available, effective, and adequate (sufficient) that need to be exhausted".<sup>5</sup> In Communication Nos. 147/95 and 149/96, the African Commission held that a remedy is considered available if the Complainant can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the complaint.<sup>6</sup> In other words, in terms of jurisprudence from the African Commission, and by interpreting the African Committee Guidelines for the Consideration of Communications, it follows therefore that the local remedies rule is not rigid.

29. In a clear distinction from other cases declared inadmissible by the African Commission,<sup>7</sup> the Complainants did not operate on the basis of anticipating the effectiveness or otherwise of local remedies in theory and argued an exception to the rule. Rather, they in fact engaged the judicial system in Kenya, but with no success so far to have the case heard on its merits. Furthermore, there are unconfirmed indications that the case in the High Court is still pending as a result of some procedural technicalities that may need to be fulfilled under Kenyan law. Even then, it cannot be in these children's best interests (a principle domesticated by the Children's Act of 2001) to leave them in a legal limbo for such a long period of time in order to fulfil formalistic legal procedures. As an upper guardian of children, the State and its institutions should have proactively taken the necessary

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<sup>2</sup> See *Constitutional Rights Project [CRP] v. Nigeria*, Communication No. 60/91.

<sup>3</sup> *SERAC v. Nigeria*, Communication No. 155/96, para 37.

<sup>4</sup> F Viljoen *International human rights law in Africa*, (2007), 336.

<sup>5</sup> As above. See too citations there in pertaining to the jurisprudence of the African Commission in this regard and *Dawda Jawara v. The Gambia*, Communication Nos. 147/95 and 149/96, para.32.

<sup>6</sup> Paras 31 and 32.

<sup>7</sup> See, for instance, *Anuak Justice Council v Ethiopia*, Communication 299/2005, para 48

legislative, administrative and other appropriate measures in order to bring to an end the current situation children of Nubian descent in Kenya find themselves in.

30. Furthermore, with some stretch of imagination, it could also be argued that the Complainants should have exhausted extra-judicial remedies such as administrative procedures within the relevant government offices or by lodging an official claim at the Kenya National Commission on Human Rights. However, what is envisaged under the Guidelines for the Consideration of Communications, and also supported by the jurisprudence from the African Commission, is that extraordinary remedies of a non-judicial nature do not fall within the notion of “local remedies” and need not necessarily be exhausted for a communication to be declared admissible.

31. The African Committee is of the view that the Complainants can be exempted from exhausting local remedies if such an attempt would be or is unduly prolonged, which is an explicitly mentioned exception under Article 56(7) of the African Charter on Human and Peoples’ Rights.

32. In fact, an unduly prolonged domestic remedy cannot be considered to fall within the ambit of “available, effective, and sufficient” local remedy. Therefore, while the African Committee notes that in *Civil Liberties Organization v. Nigeria*,<sup>8</sup> the African Commission declined to consider a Communication with respect to which a claim had been filed but not yet settled by the courts of the Respondent State, it is our view that the unduly prolonged court process in the present Communication is not in the best interests of the child principle (Article 4 of the Charter), and warrants an exception to the rule on exhaustion of local remedies.

33. To conclude, a year in the life of a child is almost six percent of his or her childhood. It is in the spirit and purpose of the African Children’s Charter, the Africa Call for Accelerated Action (Cairo Plus 5), the Millennium Development Goals and other similar commitments, that States need to adopt a “children first” approach with some sense of urgency. This is one of the messages that the drafters of the African Children’s Charter wanted to communicate in its Preamble when they recognized that “the child occupies a unique and privileged position in the African society”. The implementation and realization of children’s rights in Africa is not a matter to be relegated for tomorrow, but an issue that is in need of proactive immediate attention and action.

34. As a result of the above, the African Committee decides that the six years that lapsed without a consideration of the merits of the case before the High Court in Nairobi is unduly and unreasonably prolonged, and qualifies for an exception to the requirement imposed on Complainants to exhaust local remedies. In connection to this, the Committee is also of the view that this Communication is brought within a reasonable period of time, after waiting for a sufficient period of time attempting to see if local remedies would offer any prospect of success and adequate remedies.

35. In view of the preceding reasoning, the Communication is declared admissible.

### **Consideration of the Merits**

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<sup>8</sup> Communication No. 45/90.

36. The Communication alleges that the Respondent State violated Articles 6, in particular sub-articles (2), (3) and (4), Article 3, and as a result of these two alleged violations, a list of “consequential violations” including Article 11(3) and Article 14.

### **Decision on the merits**

#### ***Alleged Violation of Article 6***

37. Article 6 of the African Children’s Charter, titled “Name and Nationality”, provides in full that:

1. Every child shall have the right from his birth to a name
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. States Parties to the present Charter shall undertake 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.

38. It is rightly said that birth registration is the State’s first official acknowledgment of a child’s existence, and a child who is not registered at birth is in danger of being shut out of society – denied the right to an official identity, a recognized name and a nationality.<sup>9</sup>The Complainants allege that the treatment of children of Nubian descent violates their right to be registered at the time of their birth, because some parents have difficulty having their children registered especially since many public hospital officials refuse to issue birth certificates to children of Nubian descent. Such a limitation is confirmed by the Kenya National Commission on Human Rights (KNHCR) that identified and recorded practices indicating discrimination against certain population groups, including persons of Nubian descent, in the grant of birth registration and identity documents.<sup>10</sup>

40. Both the African Committee (2009) and the CRC Committee (2007) have already recommended through their concluding observations to the Government of Kenya that there is some gap in the State Party’s birth registration practice, partly reflected in the number and categories (such as children born out of wedlock, children of minority groups, and children of refugee, asylum-seeking or migrant families) of births that go unregistered. Unregistered children are not issued birth certificates and thus rendered stateless, as they cannot prove their nationality, where they were born, or to whom. The African Committee is of the view that the obligation of the State Party under the African Children’s Charter in relation to making sure that all children are registered immediately after birth is not only limited to passing laws (and policies),<sup>11</sup> but also extends to addressing all de facto limitations and obstacles to birth registration.<sup>12</sup>

41. The Complainants have further alleged that even when birth certificates are issued,

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<sup>9</sup> See UNICEF “Birth registration: Right from the start” (March 2002) *Innocenti Digest No 9*, 1.

<sup>10</sup> See generally, KNCHR, “An Identity Crisis? Study on the issuance of national identity cards in Kenya” (2007).

<sup>11</sup> It remains to be seen in practice the extent to which the guarantee in the 2010 Constitution, particularly in Article 12(1)(b) which states that “[e]very citizen is entitled to a Kenyan passport and to any document of registration and identification issued by the State to citizens” will improve this situation.

<sup>12</sup> This can sometimes be achieved through a universal, well-managed registration that is based on the principle of non-discrimination and accessible to all (using e.g. mobile registration units for children living in remote areas) and free of charge. See J.E. Doek “The CRC and the right to acquire and to preserve a nationality” (2006) 25(3) *Refugee Survey Quarterly* 26.



they do not confer a nationality. They allege that children of Nubian descent are often left to wait until they turn 18 to apply to acquire a nationality.

42. In this respect, the African Committee is of the view that there is a strong and direct link between birth registration and nationality. This link is further reinforced by the fact that both rights are provided for in the same Article under the African Children's Charter (as well as the UN Convention on the Rights of the Child). The African Committee notes that Article 6(3) does not explicitly read, unlike the right to a name in Article 6(1), that "every child has the right *from his birth* to acquire a nationality". It only says that "every child has the right to acquire a nationality". Nonetheless, a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth. This interpretation is also in tandem with Article 4 of the African Children's Charter that requires that "in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration". Moreover, this interpretation is further supported by the UN Human Rights Committee that indicated: "States are required to adopt every appropriate measure, both internally and in cooperation with other States, *to ensure that every child has a nationality when he is born*" (African Committee's emphasis).<sup>13</sup> Moreover, by definition, a child is a person *below* the age of 18 (Article 2 of the African Children's Charter), and the practice of making children wait until they turn 18 years of age to apply to acquire a nationality cannot be seen as an effort on the part of the State Party to comply with its children's rights obligations. Therefore, the seemingly routine practice (which is applied more of as rule than in highly exceptional instances) of the State Party that leaves children of Nubian descent without acquiring a nationality for a very long period of 18 years is neither in line with the spirit and purpose of Article 6, nor promotes children's best interests, and therefore constitutes a violation of the African Children's Charter.

43. The Complainants allege that birth registration certificate in Kenya explicitly indicates that it is not proof of nationality thereby leaving even registered children stateless. Furthermore, the Communication further alleges that while children in Kenya have no proof of their nationality, they have legitimate expectation that they will be recognised as nationals when they reach the age of 18. However, for children of Nubian descent in Kenya, since many persons of Nubian descent are not granted the ID cards that are essential to prove nationality, or only get them after a long delay, this uncertainty means that the future prospects of children of Nubian descent are severely limited, and often leaves them stateless. The Complainants further allege that a vetting process that is applicable to children of Nubian descent is extremely arduous, unreasonable, and *de facto* discriminatory.

44. Therefore, central to the present Communication is the issue of statelessness. One of the main purposes of Article 6, in particular Article 6(4) of the African Children's Charter, is to prevent and/or reduce statelessness. A "stateless person", according to the 1954 UN Convention relating to the Status of Stateless Persons, means "a person who is not considered as a national by any State under the operation of its law". There is evidence that this universal definition of a "stateless person" is accepted as part of customary international law. Therefore, a "stateless child" is a child who is not considered as a national by any State under the operation of its laws.

45. While complex issues of parentage, race, ethnicity, place of birth, and politics all play a

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<sup>13</sup> Human Rights Committee, General Comment No. 17, "Article 24: Rights of the Child", (1989), para. 8.

role in determining an individual's nationality, the root causes of statelessness are complex and multifaceted including state succession, decolonization, conflicting laws between States, domestic changes to nationality laws, and discrimination.<sup>14</sup>

46. Whatever the root cause(s), the African Committee cannot overemphasise the overall negative impact of statelessness on children. While it is always no fault of their own, stateless children often inherit an uncertain future. For instance, they might fail to benefit from protections and constitutional rights granted by the State. These include difficulty to travel freely, difficulty in accessing justice procedures when necessary, as well as the challenge of finding oneself in a legal limbo vulnerable to expulsion from their home country. Statelessness is particularly devastating to children in the realisation of their socio-economic rights such as access to health care, and access to education. In sum, being stateless as a child is generally antithesis to the best interests of children.

47. At the global level, a range of instruments recognise the right to acquire a nationality, albeit with varying formulations.<sup>15</sup> Here, it is worth mentioning that, as Doek rightly explains, international human rights law has shifted from the position that “the child shall be entitled from his birth (...) to a nationality”,<sup>16</sup> to one mandating that the child “shall acquire a nationality” (Article 7(1) of CRC, Article 24(3) of ICCPR).<sup>17</sup> The same wording and position is transparent under Article 6 of the African Children’s Charter. The reason for such a shift is because it is felt that “a State could not accept an unqualified obligation to accord its nationality to every child born on its territory regardless the circumstances”.<sup>18</sup>

48. Therefore, under general international law, States set the rules for acquisition, change and loss of nationality as part of their sovereign power. However, although states maintain the sovereign right to regulate nationality, in the African Committee’s view, state discretion must be and is indeed limited by international human rights standards, in this particular case the African Children’s Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness.<sup>19</sup>

49. This as a backdrop, the Government of Kenya has adopted its rules that provide for conditions by which a person can become a Kenyan citizen. Pursuant to Chapter IV of the former Constitution of Kenya and the Kenya Citizenship Act, Cap 170 of the Laws of Kenya, the four ways through which a person may acquire Kenyan citizenship are birth, descent,

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<sup>14</sup> See S Kosinski “ State of uncertainty: Citizenship, statelessness, and discrimination in the Dominican Republic” (2009) 32 *Boston College International and Comparative Law Review* 377.

<sup>15</sup> These instruments include the Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); and the Convention on the Rights of Persons with Disabilities (CRPD).

<sup>16</sup> Principle 3 of the UN Declaration on the Rights of the Child of 1959.

<sup>17</sup> Doek (note 12 above).

<sup>18</sup> As above.

<sup>19</sup> In this regard, the African Committee is of the view that African States, including Kenya, need to be encouraged and supported to ratify and implement fully the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

registration, and naturalisation. The African Committee has found sufficient evidence that indeed some persons (including children) of Nubian descent in Kenya have acquired Kenyan nationality through one of these four ways. Therefore, neither the Communication alleges nor the African Committee believes that *all* children of Nubian descent in Kenya have been left stateless. However, the crux and truth of the matter is that, even with the application of these (fairly restrictive) four ways through which a person can become a Kenyan national, a significant number of children of Nubian descent in Kenya have been left stateless.

50. As a result, the duty in Article 6(4) of the African Children's Charter to ensure that a child "...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" is squarely applicable to the present Communication as an obligation of the Government of Kenya. This, by no means, is an attempt by the African Committee to be prescriptive about the choice States make in providing for laws pertaining to the acquisition of nationality. Therefore, while the African Committee is not suggesting that States Parties to the Charter should introduce the *jus soli* approach, in line with the best interests of the child principle, it is explaining the intent of Article 6(4) of the African Children's Charter that if a child is born on the territory of a State Party and is not granted nationality by another State, the State in whose territory the child is born, in this particular case Kenya, should allow the child to acquire its nationality.

51. It may have been further argued (by the Government of Kenya), perhaps rather loosely, that the children of Nubian descent in Kenya may be entitled to the nationality of the Sudan, and, as a result, the Government does not have to provide them with Kenyan nationality. However, such a line of argument would be remiss of the fact that, implied in Article 6(4) is the obligation to implement the provision proactively in cooperation with other States, particularly when the child may be entitled to the nationality of another State. In the Communication at hand, nothing has transpired that indicates that the Government, if it holds such view, has undertaken any meaningful efforts to ensure that these children acquire the nationality of any other state.

52. In this regard, it is apposite to further highlight the nature of the State Party obligation that Article 6(4) of the Charter provides, which is - "undertake to ensure". As such, the obligation that States Parties including Kenya have under Article 6(4) of the Charter is not an obligation of conduct but an obligation of result. States Parties need to make sure that all necessary measures are taken to prevent the child from having no nationality.

53. The African Committee notes and commends the new Constitutional dispensation introduced in 2010 in Kenya which ushers a number of advancements in promoting and protecting children's rights, including their right to acquire a nationality. In particular, Article 14(4) of the 2010 Constitution entrenches that a child less than eight years of age whose parents are not known is presumed to be a citizen by birth. While the African Committee lauds the effort of the State Party in providing for this provision in its Constitution, it would like to draw the attention of the State Party that this provision is still not a sufficient guarantee against statelessness, let alone address the crux of the present Communication- namely, children born in Kenya of stateless parent(s) or who would otherwise be stateless, to acquire a nationality by birth.

54. As a result of the above, the African Committee finds violations of Articles 6(2), 6(3) and 6(4) of the African Children's Charter by the Government of Kenya.

### ***Alleged Violation of Article 3***

55. The Complainants allege that children of Nubian descent in Kenya are treated differently from other children in Kenya, for which there is no legitimate justification, amounting to unlawful discrimination and a violation of Article 3 of the African Children's Charter. They further allege that the fact that children of Nubian descent are expected to go through a lengthy and arduous process of vetting (including requiring them to demonstrate the nationality of their grandparents, as well as the need to seek and gain the approval of Nubian elders and governmental officials, etc.) is discriminatory, and depriving them of any legitimate expectation of nationality, and leaving them effectively stateless.

56. Racial and ethnic discrimination are prohibited as binding *jus cogens* norm of international law. The African Children's Charter is no exception. Article 3 provides in full that:

[e]very child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

The current facts in relation to children of Nubian descent in Kenya indicate a *prima facie* case of discrimination and violation of Article 3 of the Charter. As a result, the burden shifts to the state to justify the difference in treatment indicating how such a treatment falls within the notion of fair discrimination. The failure of the State to be present for a consideration of this Communication makes such an engagement impossible. However, the African Committee weighed whether the treatment of the children of Nubian descent in Kenya can be considered to be a fair discrimination, but found otherwise. For instance, in a very similar case involving children of Haitian descent in Dominican Republic, it was held that the refusal and placing of unfair obstacles by local officials to deny birth certificate and recognition of the nationality of Dominicans of Haitian descent as part of a deliberate policy which effectively made the children stateless constituted racial discrimination.<sup>20</sup> Moreover, after a thorough investigation of the situation of children of Nubian descent in Kenya, the Kenya National Commission on Human Rights has 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".<sup>21</sup>

57. The current practice applied to children of Nubian descent in Kenya, and in particular its subsequent effects, is a violation of the recognition of the children's juridical personality, and is an affront to their dignity and best interests. For a discriminatory treatment to be justified, the African Commission has rightly warned that "the reasons for possible limitations must be founded in a legitimate state interest and ... limitations of rights must be strictly proportionate (sic) with and absolutely necessary for the advantages which are to be obtained".<sup>22</sup> The African Committee is not convinced, especially in relation to a practice that has led children to be stateless for such a long period of time, that the current discriminatory treatment of the Government of Kenya in relation to children of Nubian

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<sup>20</sup> See, generally, *Yean and Bosico v. Dominican Republic*, I-ACtHR Judgment of 8 September 2005.

<sup>21</sup> KNCHR, (note 10 above), vi.

<sup>22</sup> *Legal resources Foundation v. Zambia*, Communication No. 211/98, para 67

descent is “strictly proportional with” and equally importantly “absolutely necessary” for the legitimate state interest to be obtained. The Committee is of the view that measures should be taken to facilitate procedures for the acquisition of a nationality for children who would otherwise be stateless, and not the other way round. As a result of all the above, the African Committee finds a violation of Article 3 of the African Children’s Charter.

### ***Consequential violations***

58. The indivisibility of rights in the African Children’s Charter is underscored by the consequential impact of the denial of nationality to children of Nubian descent by the Government of Kenya. All Charter rights generate obligations to respect, protect, promote and fulfil. This is no less so in respect of the rights implicated when nationality and identity rights are violated. The complaint in the instant Communication has primarily resulted in an infringement of Article 3 which fundamentally proscribes discrimination against the child so as to limit the enjoyment by the child of the rights and freedoms recognised and guaranteed in the Charter. In the instant case, the discriminatory treatment of the children affected by the conduct of the Government of Kenya based on their and their parents’ and legal guardians’ social origin has had long standing and far reaching effects on the enjoyment of other Charter rights. And, as the African Commission on Human and Peoples’ rights has confirmed, in the African context, collective rights and economic and social rights are essential elements of human rights in Africa.<sup>23</sup>

### ***Alleged Violation of Article 14***

59. In the first place, a case had been made out that the affected children have suffered denial and unwarranted limitation of their rights to health. The Charter provides in Article 14 for the children to enjoy the right to the highest attainable standard of health. Minimal access to health facilities, a lower level of contact with health promoting measures and medical assistance, and a lack of provision of primary and therapeutic health resources and programmes is inconsistent with respect for the child’s right to the highest attainable standard of health. African jurisprudence places a premium on both the right to health care and the right to the underlying conditions of health. In the *Purohit* case, the African Commission held that the right to health in the African Charter on Human and Peoples’ Rights includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.<sup>24</sup> It has been confirmed that the underlying conditions for achieving a healthy life are protected by the right to health. Thus lack of electricity, drinking water and medicines amount to a violation of the right to health. The *Zaire* case,<sup>25</sup> concerning Article 16 of the African Charter on Human and Peoples’ Rights, confirmed that the failure of the government of Zaire to provide the mentioned basic services amounted to an infringement of the right to health.

60. In the Communication regarding the children affected by the denial of their nationality and Kenyan identity, a case was made out that the State Party had violated in particular the right enshrined in Article 14(2) (b) (the duty to ensure the provision of necessary medical assistance and health care to all children with the emphasis on the development of primary health care) and article 14(2)(c) (the duty to ensure the provision of adequate nutrition and safe drinking water). These provisions being similar in content to

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<sup>23</sup> *SERAC v. Federal Republic of Nigeria*, Communication No. 155/96, para 68.

<sup>24</sup> *Purohit and Moore v. The Gambia*, Communication 241/2001, para 80.

<sup>25</sup> *Free Legal Assistance Group and Others v Zaire*, Communications No 25/89, 47/90, 56/91, 100/93

the equivalent provisions in the African Charter on Human and Peoples' Rights, it can be deduced that the findings of the African Commission bear significant relevance.

61. It is incumbent upon States Parties to the African Children's Charter to ensure that Article 14(2)(g) is given full implementation, within available resources. Integrated health service programmes must be fully incorporated national development programmes, including those pertaining to the most vulnerable who lived in overcrowded and underserved slum areas or camps. Where the underlying conditions, such as conditions in informal settlement and slum areas, present a heightened risk to the child's enjoyment of her right to health, the duty bearer must accept that there is a correspondingly more urgent responsibility to plan and provide for basic health service programmes under Article 14(2)(g)). The States Parties to the African Children's Charter are encouraged in giving effect to their Article 14(2)(g) obligations, to ensure that national development plans reflect the need to prioritise health services and to intensify such planning for services to otherwise disadvantaged communities where child beneficiaries live.

62. The affected children had less access to health services than comparable communities who were not comprised of children of Nubian descent. There is de facto inequality in their access to available health care resources, and this can be attributed in practice to their lack of confirmed status as nationals of the Republic of Kenya. Their communities have been provided with fewer facilities and a disproportionately lower share of available resources as their claims to permanence in the country have resulted in health care services in the communities in which they live being systematically overlooked over an extended period of time.<sup>26</sup> Their health needs have not been effectively recognised and adequately provided for, even in the context of the resources available for the fulfilment of this right.

### ***Alleged Violation of Article 11(3)***

63. The Committee notes that the violation includes an infringement of the rights enshrined especially in Article 11(3) of the African Children's Charter, which provides for the right to education. Ratifying States Parties undertake to take all appropriate measures, with a view to achieving full realisation of this right. Article 11(3) (a) requires in particular the provision of free and compulsory basic education, which necessitate the provision of schools, qualified teachers, equipment and the well recognised corollaries of the fulfilment of this right.

64. The African Commission on Human and Peoples' Rights has emphasised that the failure to provide access to institutions of learning would amount to a violation of the right to education under the African Charter on Human and Peoples' Rights.<sup>27</sup>

65. The affected children had less access to educational facilities for the fulfilment of their right to free and compulsory primary education than comparable communities who were not comprised of children of Nubian descent. There is de facto inequality in their access to available educational services and resources, and this can be attributed in practice to their lack of confirmed status as nationals of the Republic of Kenya. Their communities

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<sup>26</sup> This can also be said to affect their right to development under the African Charter on Humans and Peoples' Rights, to which the Republic of Kenya is also a States Party. See, too the right to survival and development provided for on Article 6 of the UN Convention on the Rights of the Child, as well as Article 24 dealing with the right to health.

<sup>27</sup> *Free Legal Assistance Group and Others v Zaire*, Communications No 25/89, 47/90, 56/91, 100/93, para 11.

have been provided with fewer schools and a disproportionately lower share of available resources in the sphere of education, as the de facto discriminatory system of resource distribution in education has resulted in their educational needs being systematically overlooked over an extended period of time.<sup>28</sup> Their right to education has not been effectively recognised and adequately provided for, even in the context of the resources available for this fulfilment of this right.

66. At this juncture, while not directly in contention in this Communication, the African Committee would also like to highlight the relevance of Article 31 of the African Children's Charter to the issues at hand. Article 31 of the African Children's Charter requires that every child shall have responsibilities towards the family, society and the state, as well as other legally recognised communities, subject to his age and ability and to other limitations as may be contained in the Charter. Children of Nubian descent who have been born in Kenya are subject to the requirement of their serving their national community by placing their physical and intellectual abilities at the service of the nation, as well as preserving and strengthening social and national solidarity and the independence and integrity of his country. Although it cannot be suggested that the fulfilment of these duties is contingent upon the of their status as nationals and their identity as children of Kenya, the fulfilment of Article 31 responsibilities highlights the reciprocal nature of rights and responsibilities, which reciprocity is not fulfilled when Article 6 rights are not respected by the State concerned. The Committee wishes to emphasise that national solidarity and African unity are best achieved in an environment which eschews discrimination and denial of rights.

67. The African Committee regards the violations discussed in the preceding paragraphs as emblematic of the difficulties occasioned by the non-recognition of Kenyan nationality of children of Nubian descent in the instant case. Other Charter rights which, seen together, serve the child's best interests can be adduced on which the present violation have a bearing. The African Committee does not need to investigate these in further detail in the light of the findings above.

68. The Committee does not wish to fault governments that are labouring under difficult circumstance to improve the lives of their people. The Government of Kenya has ratified the African Children's Charter earlier than many countries on the continent (25 July 2000), and more importantly, has made a number of significant progresses in implementing the provisions of the Charter. However, it is worthy of note that the violation complained of has persisted unchecked for more than half a century, thereby prejudicing not just the children in respect of whom the complaint has been brought under this African Children's Charter, but indeed generations preceding them. The implications of the multi-generational impact of the denial of right of nationality are manifest and of far wider effect than may at first blush appear in the case. Systemic under-development of an entire community has been alleged to be the result. Therefore, in addressing the consequences of the non-recognition of the nationality of children of Nubian descent, actions which address the long-term effects of the past practice must be formulated. As is clearly stated in the African Children's Charter (see Article 11(2)(h); Article 14(2)(h); Article 20(2)), such measures must be formulated with the participation of the impacted community.

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<sup>28</sup> This can also be said to affect their right to development under the African Charter on Human's and Peoples' rights, to which the republic of Kenya is also a states party. See, too the right to survival and development provided for on article 6 of the UN Convention on the Rights and Welfare of the Child, as well as article 24 dealing with the right to health.

## **Decision of the African Committee**

69. For the reasons given above, the African Committee finds multiple violations of Articles 6(2), (3) and (4); Article 3; Article 14(2) (b), (c) and (g); and Article 11(3) of the African Children's Charter by the Government of Kenya, and:

1. Recommends that the Government of Kenya should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth.
2. Recommends that the Government of Kenya should take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognised are systematically afforded the benefit of these new measures as a matter of priority.
3. Recommends that the Government of Kenya should implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth.
4. Recommends that the Government of Kenya to adopt a short term, medium term and long term plan, including legislative, administrative, and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities.
5. Recommends to the Government of Kenya to report on the implementation of these recommendations within six months from the date of notification of this decision. In accordance with its Rules of Procedure, the Committee will appoint one of its members to follow up on the implementation of this decision.

**Done in Addis Ababa, Ethiopia,**

**22 March 2011**

**The Chairperson of The Committee**