

Do not forget the Nubians: Kenya's compliance with the decisions of African regional treaty bodies on the plight and rights of Nubians

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SUMMARY

In 2006 and 2009, the African Commission on Human and People's Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) respectively, received communications on behalf of the people of Nubian descent in Kenya. These communications alluded to the government's violation of several provisions of the African Charter on Human and People's Rights (African Charter) and the African Charter on the Rights and Welfare of the Child (African Children's Charter). In 2011 and 2015, both treaty bodies found the government of Kenya in violation of several provisions of the Children's and the African Charters, respectively. As discussed further in this article, the recommendations from both treaty bodies on the Nubian communications have been celebrated as groundbreaking. More than ten years after these recommendations were made, the objective of this article is to reflect and track the level at which the state of Kenya has implemented the recommendations. Using an analytical human rights approach, guided by the facts and recommendations of both communications, this article further seeks to suggest a way forward to Kenya to expedite compliance with the recommendations from the African Children's Committee and the African Commission.

1 Introduction

The Nubian cases represent the first communication brought before the African Commission and the African Children's Committee by the same complainants¹ on behalf of the people and children from the same community.² As stated in the communications, the Nubian community

1 Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI).

2 *The Nubian Community in Kenya v The Republic of Kenya* (Communication 317/2006) ACHPR Merits Decision, 17th Extraordinary Session (2015) (*Nubian Peoples' case*); and *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* (Communication 002/2009) ACERWC (22 March 2011) (*Nubian Children's case*).

is a small community located in central Nairobi.³ They have been in Kenya for over 100 years.⁴ However, because of their ethnic origin, they are forced to go through a lengthy and tedious vetting process to obtain Kenyan citizenship and identity cards.⁵ According to the communications, the Nubian community, including children, is a marginalised community with limited access to basic services such as land, education and health.⁶ Also, in both communications, the complainants linked the plight of the Nubians to their lack of recognition as Kenyan citizens.⁷

Thus, the leading legal issue in both communications was on statelessness and the consequences of being stateless. According to the 1954 United Nations Convention Relating to the Status of Stateless Persons, a "stateless person" means "a person who is not considered as a national by any State under the operation of its law".⁸ Although Kenya is not a signatory to this instrument, there is a legal basis which supports this definition, established for example, in Article 6 of the African Children's Charter, which protects the right of children to a nationality⁹ and further supported by Chapter Four of the 2010 Constitution of Kenya which defines and protects the rights of citizens.¹⁰

According to the facts, after failed attempts from 2002 to 2005 to challenge the stateless status of the Nubians in Kenya, the complainants decided to approach the African Commission in 2006¹¹ and the African Children's Committee in 2009.¹² This is because it was practically impossible to exhaust local remedies within a reasonable time.¹³ After careful examination of the arguments submitted by the complainants to further elucidate the complicated procedural route of exhausting local remedies and the response from the state on the issue of the admissibility of the Communication, in 2006 the African Commission, based on the rationality of Article 56(5) of the African Charter, declared the Communication admissible as it held that "the Complainants in the particular circumstances are unable to utilize local remedies mainly

3 *Nubian Peoples'* case paras 2-5 and *Nubian Children's* case paras 2-5.

4 *Nubian Peoples'* case paras 2-5 and *Nubian Children's* case paras 2-5.

5 *Nubian Peoples'* case paras 2-5 and *Nubian Children's* case paras 2-5.

6 *Nubian Peoples'* case paras 2-5 and *Nubian Children's* case paras 2-5.

7 *Nubian Peoples'* case paras 2-5 and *Nubian Children's* case paras 2-5.

8 Convention Relating to the Status of Stateless Persons, adopted on 28 September 1954 by a Conference of Plenipotentiaries Convened by Economic and Social Council Resolution 526 A (XVII) of 26 April 1954, entered into force in 1960, in accordance with Art 39. It specifically protects the rights of stateless persons. Kenya is not a party to this Convention.

9 Kenya ratified the African Children's Charter on 25 July 2000.

10 The Constitution of Kenya, 2010 was promulgated into law on 27 August 2010.

11 *Nubian Peoples'* case para 52.

12 For details of attempts to exhaust local remedies see *Nubian Peoples'* case paras 27-34. See also Art 56 of the African Charter.

13 *Nubian Peoples'* case paras 27-34 and *Nubian Children's* case paras 15-22.

because of many procedural and administrative bottlenecks put in their path”.¹⁴

In 2009, the African Children’s Committee, based on the strength of Article 56(7) of the African Children’s Charter and the best interests of the child presented in Article 4(1) of the African Children’s Charter, also declared the communication admissible by stating that:

[A]n 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*, 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.¹⁵

Before presenting a profound analyses of the facts of the communications discussed under point 2, and to further analyse the extent to which Kenya has adhered to the recommendations made in both communications discussed under point 3, it is important to note that both treaty bodies, are quasi-judicial bodies established by the African Charter¹⁶ and the African Children’s Charter¹⁷ with a mandate to oversee the proper implementation of their respective Charters.¹⁸ As quasi-judicial bodies, the decisions of both bodies have no binding force.¹⁹ Consequently, it is left to state parties to act in good faith and to undertake all appropriate legislative, administrative, and other measures to comply with the recommendations of both treaty bodies.²⁰

Against this background, the objective of this article is to reflect on and track the level at which the state of Kenya has complied with the recommendations from the African Commission and the African

14 *Nubian Peoples’ case* para 52, see also para 27 where the complainants argued that “real remedies are essentially non-existent in the Republic of Kenya, as every effort has been made to establish the Nubians’ right to Kenyan citizenship by seeking remedies through proper domestic channels”.

15 *Nubian Children’s case* para 32.

16 See part 2 of the African Charter.

17 See part 2 of the African Children’s Charter.

18 Ebobrah ‘Reinforcing the Identity of the African Children’s Rights Committee: A Case for Limiting the Lust for Judicial Powers in African Quasi-Judicial Human Rights Mechanisms’ 2015 *Transnational Human Rights Law Review* 1.

19 Viljoen and Louw “State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights, 1994-2004” 2007 *The American Journal of International Law* 1.

20 The view that the onus rests with states parties to comply in good faith with the recommendations of human rights treaty views has been supported by state representatives. See International Law Association *Final report on the impact of findings of the United Nations treaty bodies* (2004) n 19. The report is available at https://docs.escr-net.org/usr_doc/ILABerlinConference2004Report.pdf (last accessed: 2018-07-11).

Children's Committee in relation to the Nubian cases. The article further aims to remind the government of Kenya, the African Commission and the African Children's Committee not to forget the Nubians. It is imperative to view the rationale and analyses in this article as a reminder of the ground-breaking recommendations made by the African Children's Committee in 2011 and the African Commission in 2015 to the government of Kenya to resolve the plights and protect rights of the Nubians. The article is divided into six sections. These include, the introduction, an analysis of the regional decisions on the rights of Nubians, the status of Kenya's compliance and implementation of the recommendations, the impact of the factors that pressurised the state to comply and to implement the recommendations, a suggestion of the way forward, and the conclusion.

2 Regional decisions on the rights of Nubians

In 2011 and 2015, the African Children's Committee and the African Commission handed down strong recommendations to the government of Kenya in the Nubian communications, respectively. These recommendations as indicated in the introduction and further discussed under point 3, were far-reaching and included consequential violations of human rights provisions protected in the African Charter and African Children's Charter. Before highlighting the recommendations, it is important to briefly discuss the facts of the communications as presented to the African Children's Committee in 2009 and the African Commission in 2006 in order to properly appreciate the recommendations.

2.1 *Nubian Children's case*

On 20 April 2009, the IHRDA and the OSJI approached the African Children's Committee with a communication on behalf of the children of Nubian descent in Kenya.²¹ In this communication, it was alleged that the government of Kenya had violated several provisions of the African Children's Charter.²² The communication also mentioned a list of alleged consequential violations of interrelated provisions of the African Children's Charter, including Article 11(3) (equal access to education) and Article 14 (equal access to healthcare).²³

The central issue of the communication was on the complications faced by the children of the Nubian community to access basic services

21 For a detailed case review of this decision see Fokala and Chenwi 'Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee' 2014 *African Journal of Legal Studies* 371.

22 More specifically, Art 6 (name and nationality), specifically, sub-arts 2 (right to have a birth registration), 3 (right to acquire a nationality at birth) and 4 (State duty to protect and promote the provision of Art 6) and Art 3 (prohibition on unlawful/unfair discrimination) of the African Children's Charter.

23 *Nubian Children's case* paras 58-68.

such as health and education, due to their non-recognition by the state as citizens of Kenya.²⁴ Even though Kenya adopted a ‘new’ Constitution in 2010, which protects, inter alia, a child’s right to a name and nationality at birth under Article 53(1)(a), the government made no effort to recognise children of Nubian descent as Kenyans.²⁵ More so, the Constitution specifically provides under Chapter Three, Section 14(4) that “[a] child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth”.²⁶ This provision is a strong showing of Kenya’s commitment not to leave any child born in Kenya unregistered and stateless. However, the reality of Nubian Children, flags the fact that they are intentionally discriminated against and marginalised by the state.

After examining the merits of the communication, in 2011, the African Children’s Committee found the government of Kenya in violation of the allegations outlined in the communication. As a result, the African Children’s Committee recommended to the Government of Kenya to:²⁷

- a Take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, acquire a Kenyan nationality and the proof of such a nationality at birth;
- b Take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognised are systematically afforded the benefit of those new measures as a matter of priority;
- c Implement its birth registration system in a non-discriminatory manner; and
- d Take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth.

2 2 Nubian Community case

Prior to submitting the communication in respect of the Nubian children to the African Children’s Committee in 2009, the same complainants, had submitted an earlier communication to the African Commission on behalf of the Nubian people against the government of Kenya.²⁸ This communication was brought before the Commission on the grounds that

24 Durojaye and Foley ‘Making a First Impression: An Assessment of the Decision of the Committee of Experts of the African Children’s Charter in the Nubian Children Communication’ 2012 *AHRLJ* 566.

25 It is important to note at this point that even though the communication was brought before the African Children’s Committee in 2009, the Committee finalised the communication and made its recommendations in 2011.

26 This provision of the 2010 Constitution is important to note because, the Nubian problem of statelessness is generational. Therefore, based on this provision, from the date the Constitution was enacted into law, it was immaterial whether parents of children of Nubian descent were recognised as citizens or not – the Constitution, mandated the recognition of every child who was or appeared to be less than eight as citizens.

27 *Nubian Children’s case* para 69(1-5).

28 Communication 317/2006.

the government of Kenya was allegedly in violation of several provisions of the African Charter.²⁹ Akin to the communication submitted before the African Children's Committee, this communication also includes a list of alleged consequential violations of interrelated provisions of the African Charter: Article 12 (denial of freedom of movement); Article 15 (denial of equal access to work); Article 16 (equal access to effective health care); and Article 17 (rights to equal access to education).³⁰

In 2015, the Commission made its decision on the communication in which it declared the government of Kenya to be in violation of several provisions of the African Charter.³¹ In its recommendation, the Commission echoed the recommendations made by the African Children's Committee in 2011 but more so from a broader angle as it called on the government of Kenya to:³²

- a Establish objective, transparent and non-discriminatory criteria and procedures for determining Kenyan citizenship;
- b Recognise Nubian land rights over Kibera by taking measures to grant them security of tenure; and
- c Take measures to ensure that any evictions from Kibera are carried out in accordance with international human rights standards.

3 Status of compliance and implementation

3.1 Nationality and citizenship

Generally, Kenya has a long and established unsettled history relating to citizenship and nationality disputes.³³ To resolve this, the state has amended its laws relating to birth registration, identification and citizenship.³⁴ Currently, the Kenyan legislature is considering a bill on identification and registration of persons including birth and death registration and the access to national identity.³⁵ This bill, once adopted,

29 Specifically, Art 2 (right to freedom from discrimination); Art 3 (right to equality before the law and equal protection of the law); Art 5 (prohibition of torture and cruel, inhuman and degrading treatment) and Art 14 (right to property) of the African Charter.

30 *Nubian Peoples'* case paras 93-110.

31 These included Arts 1, 2, 3, 5, 12, 13, 14, 15, 16, 17(1) and 18 of the African Charter.

32 Para 171(ii)(a)-(c).

33 Ndegwa "The Citizenship and Ethnicity: An Examination of Two Transition Moments in Kenyan politics" 1997 *The American Political Science Review* 599.

34 For recent developments to Kenya's registration of persons processes, see Atellah "Toa Kitambulisho! Evolution of Registration of Persons in Kenya" *The Elephant* (2019-06-14) <https://www.theelephant.info/data-stories/2019/06/14/toa-kitambulisho-evolution-of-registration-of-persons-in-kenya/> (last accessed: 2020-08-06).

35 Registration and Identification of Persons Bill, Kenya Gazette Supplement 153 of 2014; Kenya Human Rights Commission *Memorandum on the Registration and Identification of Persons Bill* (2014).

will repeal the 2011 Citizenship and Immigration Act,³⁶ and the 2015 subsidiary legislation on the Registration of Persons Act which also provides, inter alia, provisions on who qualifies for nationality and citizenship in Kenya.³⁷

These bills guarantee citizenship by registration to two categories of stateless persons in Kenya, namely, those who have lived (including their descendants) in Kenya continuously after Kenya's independence in 1963 and foreigners who arrived after independence, but who have lived legally in Kenya continuously for seven years.³⁸ Therefore, according to Sections 6 to 21 of the Kenya Citizenship and Immigration Act³⁹ the Nubians qualify for Kenyan citizenship because they have been in Kenya since pre-independence in 1963. However, invariably, the lack of political will from the state to properly implement the provisions of, for example, the Kenya Citizenship and Immigration Act, means the Nubians are still stateless in Kenya, a decade after the decision of – specifically – the African Children's Committee.

For the Nubians, it would be a massive relief should the amendments of the bills which are currently being examined in Kenya, result in responding positively to the recommendations from the African Commission and the African Children's Committee which calls on the Kenya to recognise and resolve the issue of statelessness amongst the Nubians in Kenya. According to Manby, this will be a huge legal victory and the real genesis of removing discriminatory practices that have characterised access to identity documentation in Kenya for decades.⁴⁰

3 2 Land rights and security of tenure over land

Similar to the issues discussed under 3.1, the legal and administrative treatment of indigenous tenure of land has been a major subject in Kenya for decades. Legally, and thanks to the jurisprudence of the African Commission, the most prominent illustrative example, which needs to be highlighted to reflect on how far back this issue dates, is *Endorois*.⁴¹ According to the facts, the Endorois community had lived in Kenya (the Lake Bogoria area) for centuries.⁴² Even though the Endorois people have since been recognised as a tribe in Kenya and their land rights and

36 Kenya Citizenship and Immigration Act 12 of 2011.

37 Secs 6-21 of the Kenya Citizenship and Immigration Act.

38 Secs 6-21 of the Kenya Citizenship and Immigration Act.

39 *Nubian Peoples'* case paras 2-5 and *Nubian Children's* case paras 2-5.

40 Manby *Citizenship and statelessness in Africa: The law and politics of belonging* (2015).

41 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (Communication 276/2003) ACHPR.

42 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* para 3.

security of tenure over land safeguarded,⁴³ the fact that the *Nubian* and the *Ogiek*⁴⁴ communications also reflect similar issues as in *Endorois* is concerning. It serves as an indication that Kenya has not properly and proactively complied with the recommendations in *Endorois* which should have resolved and avoided the *Nubian* and *Ogiek* communications in relation to their plight to land rights and security of tenure over land. From a rights perspective, the respect of the right to land and security of tenure over land, has far-reaching effects, with the ability to reinforce or damage, a people's sense of their identity and to limit their access and enjoyment of other rights such as the right to housing.⁴⁵

Another aspect which also indicates that Kenya is not completely and politically interested to resolve its land rights and security of tenure over long-standing land issues, is in the adoption of the 2010 Constitution.⁴⁶ The strength and depth of the Constitution is widely recognised and appreciated.⁴⁷ The 2010 Constitution includes a full chapter on land and environment,⁴⁸ it establishes a National Land Commission⁴⁹ as an independent institution, with the mandate to “advise the national government on a comprehensive programme for the registration of title in land throughout Kenya” and to comprehensively implement the National Land Policy.⁵⁰ The National Land Policy, promises to bring thorough reforms in Kenya's land and security of tenure sector.⁵¹ The Policy recognises the need for security of tenure over land, for all Kenyans. It provides a strategy of achieving and effectively protecting the rights of all Kenyans, the opportunity to access, occupy and use land. It streamlines and merges all legal and institutional frameworks, land and security of tenure rights and obligations in Kenya into four major land laws: The Land Act, 2012; the Land Registration Act, 2012; the National Land Commission Act, 2012; and the Community Land Act, 2016. The merger, is very helpful to communities who are involved in land disputes, and it also facilitates the process of recognising and accurately protecting and implementing land rights in Kenya. On paper, these instruments are enough to resolve Kenya's land rights and security of tenure over land

43 For details, visit, Minority Rights Group “Kenya: Protecting the Endorois' right to land” (2016-11-13) <https://minorityrights.org/law-and-legal-cases/centre-for-minority-rights-development-minority-rights-group-international-and-endorois-welfare-council-on-behalf-of-the-endorois-community-v-kenya-the-endorois-case/> (last accessed: 2021-02-27).

44 *African Commission on Human and Peoples' Rights v Republic of Kenya* (Application 006/2012) ACtHPR (2017).

45 Orondo “Land Rights as an Imperative for Sustainable Land and Natural Resources Management in Kenya 2020 *US-China Law Review* 103.

46 The Constitution includes: Art 40 (right to property); Art 60 (principles of land policy); Art 61 (classification of land); and Art 63 (community land).

47 For a glimpse of the comprehensive nature of the Constitution, see Kibet “The Constitution of Kenya, 2010: An Introductory Commentary, by PLO Lumumba & L Franceschi” 2015 *Strathmore Law Journal* 141.

48 See Chap 5 of the Constitution.

49 Art 67.

50 Art 60(2).

51 Sessional Paper 3 of 2009

issues, that have, as argued above, disadvantaged several communities in Kenya for centuries.

Read together with the constitutional provisions relating to property and land rights and if implemented properly, these additional laws, mentioned earlier, could well be the missing piece of the jigsaw to fix one of Kenya's long-standing land and security of tenure over land challenges. Jointly, they promise a well-functioning land administration and security of tenure delivery process which is what Kenya really needs to comply with the recommendations from the African Commission on land rights and security of tenure over land.⁵² There is hope because, perhaps thanks in part to the existence of these pieces of legislation, in June 2017, for the first time, some members of the Nubian community were granted community land rights in Kenya.⁵³ Particularly, this community land was granted in accordance with Article 4(1) of the Community Land Act which provides that "Community land in Kenya shall vest in the Community", and further in Article 4(2) that "Subject to the provisions of this Act or any other written law, the State may regulate the use of community land in accordance with Article 66 (which protects the regulation of land use and property) of the Constitution". Even though this does not grant individual Nubians land rights in Kenya, their collective enjoyment of community land rights, may, hopefully, mark the beginning of the end of the deep-rooted discrimination and marginalisation of the Nubians.

3.3 Forced evictions

According to the United Nations Committee on Economic Social and Cultural Rights (CESCR), forced eviction is "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".⁵⁴ In other words, forced eviction is not a violation of a right, provided it is based on exceptionally good reasons such as environmental concerns or protection of the ecosystem.⁵⁵ None of these exceptions is applicable to justify the eviction of the Nubians. According to the facts, it was simply an act of extended discrimination against the Nubian people. According to the complainants, the Nubians are only seeking the recognition and protection of their collective property rights in Kibera where they have

52 Land Registration Act of 2012, Arts 6(6) & (7).

53 Open Society Foundation "After Long Struggle, Kenya's Nubian Minority Secures Land Rights" (2017-06-05) <https://www.opensocietyfoundations.org/press-releases/after-long-struggle-kenyas-nubian-minority-secures-land-rights> (last accessed: 2018-05-13).

54 General Comment 7: The right to adequate housing (Art 11.1): forced evictions, CESCR (20 May 1997) UN Doc E/1998/22 (1997).

55 See eg the decision of the Constitutional Court of South African in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 CC para 83.

lived for decades in order “to protect themselves against further forced evictions and encroachments, which threaten their cultural survival”.⁵⁶

To be fair to the government of Kenya, this is one aspect and recommendation from the African Commission that the government has, so far, made an attempt to comply with. First, the fact that the Nubians still reside in Kibera, could be interpreted as Kibera being recognised as their homeland. Secondly, as already indicated, in June 2017, the government issued a community land title to the Nubian community trust for 288 acres of land in the Kibera neighbourhood, thus increasing their land space to 688 acres.⁵⁷ This is a huge victory considering the dire situation which the Nubians are facing and because over the years leading to the submission of the communication, the 4 197 acres originally allocated to the Nubians had been reduced to 400 acres by government sales of land for development.⁵⁸

4 Factors supporting compliance

4.1 Follow-up by treaty bodies

The African Commission and the African Children's Committee have adopted rules of procedure guiding (separately) both treaty bodies to follow-up on the implementation of their recommendations to state parties.⁵⁹ Generally, the rationale for follow-up procedures is not to police state parties to commit to implementing recommendations. But it is meant to ensure that state parties are committed to taking reasonable steps within reasonable time and resources to adhere to the recommendations. The idea is also to persuade state parties to fulfil their African human rights law commitments.

The African Children's Committee's mandate to follow-up on the implementation of its recommendations, decisions and findings is guided by Rule 10(2)(e) which mandates the chairperson of the Committee to specifically “follow up compliance with the decisions, and implementation of the recommendations of the Committee” and where the chairperson or other measures taken by the Committee are unsuccessful, the Committee “may transmit its Concluding Observations

56 *Nubian Community* case para 88.

57 Open Society Foundation (2017).

58 Open Society Foundation (2017) para 90.

59 See generally Rules of Procedure of the African Commission on Human and Peoples' Rights, Rule 112 (Follow-up on the recommendations of the Commission). See also the Revised Guidelines for the Consideration of Communications, Section XXI (Implementation of Decisions of the Committee on Communications) and also Rules 10(e) (Duties of the chairperson) and 82(6) (Relations with African Union Organs, Institutions and Programs) of the Revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child.

or recommendations arising from its decision on communications to the Pan African Parliament for follow-up”.⁶⁰ As discussed under 4.1.1, the Chairperson of the Committee has been to Kenya to check the status of Kenya’s compliance with its Nubian recommendations. So far, as noted further in this article, Kenya has not complied with the recommendations from the Committee and Rule 82(6) of the Committee’s rule of procedure has not yet been implemented.

Section XXI (1) of the Revised Guidelines for the Consideration of Communications of the Committee, mentions timeframes within which a state should report back to the Committee on progress made to comply with its decision. Under this subsection, a state party has 180 days to report back. If it fails to do so, the timeframe will be extended for 90 days. If the state still fails to meet the extended timeframe to report to the Committee, the matter will be referred to the Assembly of the African Union for appropriate intervention on the matter. It is unclear whether the Committee has to report to the Pan African Parliament first before these next steps are considered. Notwithstanding, what is clear, in the case of the Nubians in Kenya, is that the state has failed to meet all these deadlines and only reported back during the 29th Session of the Committee – three years after the decision was made.⁶¹

Generally, some of the challenges faced by the Committee in following-up on its recommendations can be attributed to the fact that the Rules of Procedure do not contain a proper follow-up mechanism which directs the Committee’s follow-up strategy with realistic targeted phases in the follow up process. Targeted phases are critical to ascertain levels of compliance. This could also account for the reason why it took the Chair of the Committee three years to report back to the Committee’s Session on the visit to Kenya as discussed under 4.1.1.

On the other hand, the African Commission’s follow-up strategy and mandate is governed by its Rules of Procedure of 2010. Under Rule 82 (a-d), state parties are called to do everything within their means to provide, assist and cooperate with any mission that might be appointed to gather information relating to a particular communication. Under Rule 112 (which is similar to Section XXI (1) of the African Children’s Committee’s Revised Guidelines) state parties of the African Charter are accorded similar time limits to report back on the implementation of a recommendation. Further, the African Commission’s Rules of Procedure provide that where a state fails to report back to the Commission on measures adopted to comply with the recommendations of the African Commission, the Commission “shall draw the attention of the Sub-Committee of the Permanent Representatives Committee and the

60 Rule 82(6) of the Committee’s Rules of Procedure.

61 The state report is unpublished. But is reflected here based on the notes taken by the author in attendance during the 29th Session of the African Children’s Committee during which the state submitted its report on measures adopted to comply with the decision of the Committee in relation to the plight of Nubian Children.

Executive Council on the Implementation of the Decisions of the African Union, to any situations of non-compliance with the Commission's decisions".

It is interesting that even though the African Commission and the African Children's Committee are quasi-judicial bodies of the African Union, with striking similarity in terms of their mandates, they are different at the point of making the referral of non-compliance with their recommendations. In case of non-compliance, the African Children's Committee refers the matter to the Pan African Parliament while the African Commission refers the matter to a Sub-Committee of the Permanent Representatives and the Executive Council on the Implementation of the Decisions of the African Union, as indicated above. Practically, this could be one of the underlying reasons why African states have such poor compliance track records. To resolve this referral issue, it is suggested that the AU should harmonise its referral procedure under these quasi-organs. A harmonised referral strategy will fortify the AU's management and assessment of state party compliance with the decisions of its leading organs.

It is important to understand the preceding section as a backdrop to the issues discussed under section 4.1.1, which discusses the measures taken by the African Children's Committee and the African Commission to follow-up on Kenya's compliance with its Nubian recommendations. A proper implementation of the recommendations of these treaty bodies, in relation to the Nubians, will go a long way to restore the dignity of this Community located in the Kibera area in Nairobi, Kenya.

4 1 1 The African Children's Committee visit to Kenya

Pursuant to Rule 10(e) of the Revised Rules of Procedure of the African Children's Committee, the chairperson of the Committee acted on its mandate to follow up on the compliance of the Committee's recommendations in the *Nubian Children's* case. The chairperson of the Committee visited Kenya in 2013 a couple of months after the decision was made and reported on its visit in 2017 during the 29th Session of the Committee. Unfortunately, the reasons why it took the Chair three years to report back to the Committee are not provided. It is the opinion of the author that the slow pace at which the Committee has implemented its Rules of Procedure could have demotivated the state of Kenya to take its recommendations seriously. Generally, considering the urgency required to act swiftly and timely in the protection of children in Africa,⁶² this delay is unacceptable, especially considering the deplorable and humiliating situation of Nubian children and Kenya's poor record of implementing its national laws protecting children.⁶³

62 See eg *Nubian Children's* case para 31.

63 Odongo 'Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms' 2012 *AHRLJ* 135.

In the Chairperson's report it is noted that the government of Kenya has indeed made an attempt to comply with the recommendations from the Committee, as the government has and is currently reviewing its legislature around citizenship and registration of persons, discussed under 3.1. This effort is commended, but the sluggish pace at which the government of Kenya is considering the decision of the African Children's Committee is disappointing. It is critical that the state moves fast to finalise this process and to recognise children of Nubian descent as Kenyans without them undergoing any arduous vetting process. The prolonged approach of the state is anti-protective and anti-progressive to a group of children who desperately need protection to develop properly and to transcend from childhood to adulthood with confidence.

4 1 2 Kenya's report to the African Children's Committee⁶⁴

Kenya reported to the African Children's Committee during its 29th Session, on the measures it has taken to implement its recommendations in the *Nubian Children's* case. The state's report was presented to members of the African Children's Committee, the complainants and representatives of the Nubian community and civil society organisations attending the 29th Session of the Committee. In its report, the state alluded to adopting a comprehensive approach in implementing the recommendations of the Committee, such that the measures taken absolve current and future challenges in Kenya related to the issues raised in the *Nubian Children's* case. This is a plausible approach as most of the issues raised in the decision and recommendation as indicated under point 2.1, are multi-generational in nature. These measures, the state alludes to, include legislative, administrative and other measures required to comply with the recommendations. Some of these measures as indicated by the state, include the adoption of the 2010 Constitution, which as discussed under point 3.1 includes provisions on birth registration, nationality and citizenship.⁶⁵

Further, the state also indicated that it has opened an 8-year window of registration of children up to 29 August 2019 and has put in place a monitoring plan in health facilities to ensure that every birth is registered at any maternal health outlet. The state stated that it has also started conducting accelerated mobile registration, establishment of a guideline on orphan and vulnerable children, re-engineering the education management information system, sensitisation of religious leaders on birth registration, distribution of registration guidelines to registration agents, ensuring that government registers all birth as soon as they occur irrespective of any circumstance, subsidising secondary school education, capitation increase in the 2014/2015 academic year,

64 The author was in attendance and took notes which are reflected in this section of the paper. Please note that this is a summary of the key points made in the state's report.

65 See for example, Art 14 on citizenship by birth; Art 15 on citizenship by registration; and Art 27 that protects every Kenyan's right to equality and freedom from discrimination.

including fruits and vegetables in school feeding programmes, health facilities development, commencing free child delivery services, including HIV/AIDS education in the school curriculum and making the principle of non-discrimination central to issues of health and education. The delegation proceeded to add that the government of Kenya has put in place a long-term vision up to 2030 that will address similar issues in various vulnerable groups within its social pillar.

It is unfortunate to note that in 2021, the state has failed to keep its promise in relation to the 'birth registration window' which expired in 2019. Also, the plan to address – broadly – the plights of vulnerable groups in Kenya by 2030, does not inspire any hope given Kenya's record to address similar issues in the past. Specifically relating to the Nubians, in 2020, Kimani reported that the state "has only given them false hopes by issuing waiting cards which have stayed close to a year without any signs of getting the actual IDs".⁶⁶

4 1 3 Concluding Observations and General Comments

Akin to General Comments, Concluding Observations, is a strategic document under international law used by human rights monitoring bodies to make tangible recommendations to state parties.⁶⁷ However, as seen below, both measures are different in context and intention. Contrary to General Comments, a Concluding Observation is country-specific and is the result of, for example, the African Children's Committee examination of a particular state party report. So far, the Committee has published 40 Concluding Observations of which four are on Kenya's initial and first periodic state reports.⁶⁸ In both Concluding Observations, the African Children's Committee makes specific recommendations to Kenya on how to improve its implementation of the African Children's Charter. Of specific interest to this article, is the Committee's second Concluding Observation on Kenya, which specifically includes its observation on the state's compliance with its decision in the *Nubian Children's* case. In it, the African Children's Committee takes:

[N]ote of the decisions rendered by the Committee, and the African Commission on Human and Peoples' Rights, the Committee regrets that there is a huge gap in the implementation of decisions concerning the Nubian children and their access to birth registration and the necessary documentation. The Committee rendered a decision in 2011, but the State has not implemented the decision fully and the situation remains to be the

66 Kimani "Nubian's demand IDs, recognition as one of Kenya's ethnic groups" *The Star* (2020-10-02) <https://www.the-star.co.ke/news/2020-10-02-nubians-demand-ids-recognition-as-one-of-kenyas-ethnic-groups/> (last accessed: 2021-07-15)

67 O'Flaherty "The Concluding Observations of United Nations Human Rights Treaty Bodies" 2006 *Human Rights Law Review* 27 at 33-35.

68 See generally the African Children's Committee 'Concluding Observations Table' <https://www.acerwc.africa/concluding-observations/> (last accessed: 2018-04-16).

same for unregistered children. The Committee urges the State Party to urgently take measures to comply with the decision of the Committee as well as that of the Commission.⁶⁹

As gathered from the excerpt, the African Children's Committee is worried about Kenya's lethargic pace to comply with its recommendations in the *Nubian Children's* case. Currently, the Nubians are still facing the same issues that motivated the communications and one wonders if Kenya takes the African Children's Committee' Concluding Observations seriously. As noticed, the Committee's position in its Concluding Observation to Kenya, contradicts the appreciative position of the Chairperson's and Kenya's Report to the African Children's Committee discussed under 4.1.1 and 4.1.2.

4 1 4 The African Commission's silence

The African Commission's silence to follow-up on its recommendations in the Nubian communication is too loud to be ignored. Currently, there is no evidence of any effort made by the African Commission to follow-up on the implementation of its recommendations in the Nubian communication. Also, unlike the African Children's Committee, the African Commission did not make a remark on this issue in its Concluding Observations on Kenya in 2016.⁷⁰ Notwithstanding, on a general note, in paragraph 60 of its Concluding Observation on Kenya, the Commission called on the government of Kenya "to take urgent measures to address indigenous peoples' specific needs in relation to land, education, health, employment and access to justice, and further ensure that affirmative action policies and measures adopted in this respect effectively and adequately benefit them". Broadly, and based on the fact that the Nubians are still facing similar challenges, albeit based on the origin, this also includes the Nubians. But, a specific reference to the plight of the Nubians, would have sent a stronger message to Kenya to comply with its recommendations.

5 A proposed way forward

Kenya's citizenship legal framework and the procedure required to attain citizenship is uncertain and complicated especially for people from minority communities like the Nubians. The procedure in Kenya embodies characteristics and challenges that are entrenched in a legacy of discrimination. This legacy has greatly impacted on a comprehensive protection of a child's right to nationality in Kenya. If the state honestly plans to comply with the decision of the African Children's Committee

69 Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Kenya 1st Periodic Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child para 12. See also, para 23.

70 Concluding Observations and Recommendations on the 8th to 11th Periodic Report of the Republic of Kenya, AU adopted at 19th Extraordinary Session, 16-25 February 2016, Banjul, Gambia.

and the African Commission, it would need to, as a matter of urgency, radically improve its administrative and technical capacity for civil registration by repealing all bottlenecks that continue to hinder the recognition of children and members from minority communities. This will be key to ensure that the state also meets its commitment to the African Children's Committee and to ensure that it follows and keeps to the timelines set in Agenda 2063 and particularly, Agenda 2040, which is Africa's agenda for Children.⁷¹ Specifically, the state would have to do the following.

The first urgent indicator that Kenya needs to flag as a strong intention to comply with the decision of the African Children's Committee and the African Commission would be to outlaw its vetting process.⁷² The vetting procedure implemented in Kenya is demeaning, corrupt, embarrassing and a central contributor to Kenya's failure to uphold its commitment under the African Children's Charter and the African Charter. Indeed, in 2015, the Commission on Administrative Justice in Kenya reported that there is widespread distrust and uncertainty even in the government's confidence of its administrative proficiency in the vetting process and the issuance of registration and documentation due to persistent corruption.⁷³ The vetting process affects children more than adults because childhood statelessness has far reaching consequences that threaten a child's access to education, healthcare, standard of living and related developing entitlements.⁷⁴

The Second indicator would be for the state to establish a legal balance between security and rights in the case of children. This article argues that the state should adopt a rights-based approach rather than a security-based approach in granting Nubian children Kenyan citizenship.⁷⁵ A rights-based approach will not only enable the state to meet its commitment under its constitutional principles, it will also enable the state to meet its promise in its Children's Act of 2001 and importantly, comply with the recommendations in the Nubian cases. Largely, it will also facilitate a justified respect for children's right to a nationality protected under Article 6 of the African Children's Charter.

71 Available at https://au.int/sites/default/files/newsevents/agendas/africas_agenda_for_children-english.pdf (last accessed: 2021-07-15).

72 Vetting is a process by which certain individuals are brought before a committee charged with determining whether the person is Kenyan or not. A vetting committee member in Nairobi explained the process to the Justice Initiative, see Kohn "Out in the Cold: Vetting for Nationality in Kenya" Justice Initiative (2011-02-28) <https://www.justiceinitiative.org/voices/out-cold-vetting-nationality-kenya> (last accessed: 2021-07-09).

73 Commission on Administrative Justice "Stateless in Kenya: An investigative report on the crisis of acquiring Identification documents in Kenya" (2015).

74 Aragón "Statelessness and the right to nationality" 2012-2013 *Southwestern Journal of International* 341.

75 See for example, Khawaja "Kenya's Identity Crisis" *Journal of International Affairs* (2018-06-08) <https://jia.sipa.columbia.edu/online-articles/kenyas-identity-crisis> (last accessed: 2021-07-15).

6 Conclusion

Possibly, the main deterring factor and perhaps a stronger signal that Kenya will not fully comply with the recommendations from the African Commission and the African Children's Committee is the rigorous and lengthy vetting process required for obtaining nationality still extant in Kenya. Prior to the Committee's decision in 2011 and the Commission's decision in 2015, the vetting process had no tangible legal basis. Even though they were justified through the expansive interpretation of the provision of Section 8 of the Registration and Persons Act,⁷⁶ which permits registration authorities to request additional information to justify one's nationality it was only in 2014 – before the African Commission's decision – that the state, based on security concerns amended its security law to firmly consolidate vetting within the security framework without any clear safeguards to guide registration authorities.

It is worth noting that all three major aspects in the Nubian cases – nationality and citizenship, land rights and security of tenure, and forced evictions – are interlinked. As noted by the African Children's Committee in the *Nubian Children's* case, access to a nationality or citizenship has critical and tangible implications to access other rights such as basic public services and to enjoy other economic opportunities. Simply put, having a nationality or citizenship is parallel to having the right to have and enjoy rights. What is worrying in the case of Kenya is the reluctant approach that the state has adopted in addressing the recommendations from the regional bodies. The recent granting of citizenship to the members of the Shona Community and further recognition of the Shona as the 44th tribe in Kenya should be celebrated as a sign that the state is indeed working on its outdated, discriminatory laws.⁷⁷ However, this is not good news to the Nubians as the fact they are still not recognised as Kenyans could mean that the state has forgotten about their plight. Kenya, must take the recommendations from the African Commission and the African Children's Committee seriously to show good faith in its commitment to the African Charter and African Children's Charter.

76 See generally the Registration of Persons Act of 1973 (amended by the Registration of Persons Act of 1987) available at www.kenyalaw.org (last accessed: 2018-05-17).

77 Mulinya "Shona Celebrate Kenyan Citizenship as Decades of Closed Legal Doors Open" *VOA News* (2020-12-31) <https://www.voanews.com/africa/shona-celebrate-kenyan-citizenship-decades-closed-legal-doors-open> (last accessed: 2021-02-28).