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Rights of Minorities: A Case Study of Nubians in Kenya

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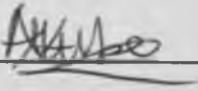
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Declaration

This project is my original work and has not been presented for a degree in any other University.

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This project has been submitted for examination with my approval as University Supervisor;

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Dedication

To my Grandfather, the Late Ali Murbe

Abstract

The focus on the study of minorities has not only attracted international and national desire to create peace and stability but the notion has brought about the need to address the moral concerns and rights governing the Nubian minority group. The current problem being faced is on how best to define minorities and extend protection towards this group at both national law level and international laws perspective. There is a need to safeguard the rights of minorities by ensuring that discrimination and violations of their basic human rights are prevented by putting measures in place that will protect and extend to the group fundamental equal rights. The problem at hand is on implementation of laws on protection of minorities in national laws especially in the Constitution of Kenya. There is a need to understand the grievances facing Nubians as a minority group and see whether there are any laws in motion that would address the plight of Nubians in Kenya.

The Government of Kenya has actively ignored the plight of Nubians in Kenya. One of the biggest causes of structural violence among this minority group comes from the failure of the government to give Nubians citizenship and ownership of Kibera in the form of a title deed. The ongoing structural violence being orchestrated on Nubians has taken over four decades and yet the government has shown reluctance to address their concerns. The legal system in Kenya has failed to address minority rights concerns however there are international legal frameworks which have been effective in providing a voice for minority groups. International laws and declarations on minority protection have therefore become important.

The research deployed inductive method to collect data. Survey research method of data collection was used. Data collection was done in the form of interviews and content analysis on the Nubian situation in Kenya. The research relied on both primary and secondary sources of data collection. Secondary sources were collected from publications and journals which highlighted the key issues facing Nubians in Kenya. Secondary sources of data collection acted as a support for the primary data which was collected in the form of structured focused interviews with the Nubian community. This method was preferred as it gave the respondents liberty to express their own definition of the situation in question.

From the findings of the Nubian history and situation in Kenya, the Government of Kenya is seen to play a big role in the current Nubian situation. Nubians are not being regarded as Kenyan citizens. They are being regarded as de facto stateless people. The Government of Kenya has failed to give them access to freedoms and basic human rights as stipulated in the Kenyan constitution. Nubians believe they are as much citizens of Kenya as the rest of the population is and they believe they have a right to the land in Kibera which they regard as their ancestral home. In terms of their recognition as a minority group, the government has failed to recognize them as citizens.

The desire for peace on both the national and international level will need to take into account the need to extend protection to minorities. The Nubian community have faced over four decades of structural violence. Structural violence has proved to not only be the theoretical underpinning of Nubians but this violence can trigger violent action if not addressed on time. The community has failed to be recognized as a Kenyan community. There is need for Kenyan national laws that would provide legal protection for not only Nubians but minorities as a whole in Kenya. On an international law perspective, proper measures need to be taken to promote states to safeguard and promote the protection of national minorities.

Abbreviations

ECHR:	European Convention on Human rights
EU:	European Union
ICCPR:	International Covenant on Civil and Political rights
ID:	Identification cards
KAR:	King's African Rifles
PCIJ:	Permanent Court of International Justice
UN:	United Nations
UDHR:	United Declaration of Human Rights
USSR:	Union of Soviet Socialist Republics

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CHAPTER ONE

1.0 INTRODUCTION

1.1 Background of the Research Problem

Violent conflicts, inequality, oppression and human rights violations are just some of the areas that have been making headline across the world. The international system has begun to pay a lot of attention to these issues with particular emphasis on how minority groups are behaving towards such threats. There has been a rise in minority awareness in various parts of the world. For example, in Palestine, Philippines, Australia and Ireland; these governments have seen a need to address the concerns and need for protection of minority groups in their respective states. According to Jenne, over the last two decades, “only 8 out of the 110 armed conflicts were fought between states, the rest were all waged between minorities and their Government.” The most prominent being the Tamil tigers against Sri Lankan Government and Chechen separatist against Russia.¹ The focus on the study of minorities has not only attracted international and national desire to create peace and stability however the notion has brought about the need to address the moral concerns and rights governing minorities. The time has come for the world to no longer ignore the suffering there is a need to address these issues especially in reference to human rights and international law.

The issues of minority rights entered into the international arena during the First World War with the emergence of new states of Central and East Europe. To avoid tension between the dominant ethnic communities and rest of the ethnic communities, the League of Nations agreed to comply with the notion of self-determination and protection of minorities.² According to

¹ Jenne. E., 'A bargaining theory of Minority demands: explaining the dog that did not bite in 1990s Yugoslavia,' *International Studies Quarterly*, Vol 48, No. 4, pp. 728-729

² Verkuylev. M., Yildiz A.A., 'The endorsement of Minority Rights: The Role of Group Position, National Context, and Ideological Beliefs,' *Political Psychology*, Vol. 27, No. 4 (Aug. 2006), pp. 528

Dyke, the subject of minorities and their relations to self-determination and human rights are closely linked together.³ According to 'Minorities at Risk' data, in the 1990s minorities were subject to one or more kinds of discrimination: "direct discrimination, economic disadvantage, political exclusion, and cultural restrictions, religious practice, cultural traditions, and the formation of cultural organizations."⁴

For the purposes of this research, it will be important to appreciate the need to address equal rights of minorities across the world. According to Baldwin, Chapman and Gray, "when minority rights are enshrined in constitutions, and implemented through electoral, justice and education systems before a conflict has a chance to fester, there is a chance that conflict might not occur at all."⁵ Human rights envisage the need to address the individual protection of minorities rather than look at the collective aspect. Minority rights can no longer be ignored in society. Thus it is recommended that in order to grant minorities equality and preserve their diversity and correct the wrong doings, it is important for minorities to be accommodated into society and given equal rights.

Kenya as a country is known for its ethnic diversity. Although its 42 ethnic communities comprise of bigger ethnic communities like Kikuyu, Kalenjin, Luo and Kamba, there are also smaller ones such as the Dorobo, Rabai, Elmolo, Malakote, Boran and Ogiek. Despite the absence of a majority ethnic group, some ethnic groups have defined themselves as minority groups. According to Makaloo, the feeling of being a minority group in Kenya can be

³ Verkuylev. M., Yildiz A.A., 'The endorsement of Minority Rights: The Role of Group Position, National Context, and Ideological Beliefs,' *Political Psychology*, Vol. 27, No. 4 (Aug. 2006), pp. 528

⁴ Ibid

⁵ Baldwin C., Chapman. C. and Gray Z., 'Minority Rights: The key to Conflict Prevention', *Minority Rights Group International Report*, 2007, pp. 2

characterized not only by the political affiliations of the ethnic community but it can be defined along the lines of religion, social and economic organizations.⁶

Other groups within the smaller ethnic communities include the Somali, Arabs, and the Nubians. These smaller groups form what can be called minorities. The problem they are facing is that such groups do not have proper social structures, documentation, land ownership titles and even citizenship or access to education and health care. The extent to which these injustices continue can predict the outcome of conflictual behaviour.

When grievances of minorities are not recognized, from past experiences they have been seen to lead to more aggressive methods to fight oppression. One such case is the Palestinian situation with Israel. Nubians as a minority group in Kenya have a history with the Kenyan Government. Nubians since independence and release from duty by the then British colonial Government have experienced challenges in their social and economic recognition by the Kenyan Government.⁷ A case in point is the official government documents of the last colonial census where Nubians were classified as 'others'.⁸

According to one definition of statelessness, the term 'stateless' by itself can be a trigger for violent eruptions. Statelessness is grounded on the principle of sovereignty and this can arise out of the conflict of nationality law.⁹ Statelessness of the Nubians does take on an international perspective. According to the United Nations Declaration on Human Rights, article 15(1): "(n) o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

⁶ Makaloo, M.O & Ghai, Y., 'Kenya: Minorities, Indigenous Peoples and Ethnic Diversity' *Minority Rights Group International and Centre for Minority Rights Development* (2005), pp. 4

⁷ Adam, H. A., 'The Nubians and Statelessness: History in Defining Modern Lives,' pp. 1-4

⁸ Ibid., pp. 16

⁹ Walker, J. D., 'Statelessness: Violation or Conduit for Violation of Human Rights?' *Human Rights Quarterly*, Vol 3, No. 1, (1981) pp. 107

¹⁰It further stipulates in Article 15(2)), “Nationality is a basic human right that should be accepted by all.”¹¹ Statelessness involves the Governments of the host country-Kenya, the Government of the country of origin-Sudan and the international community as a whole who by the standards set by the United Nations Declaration on Human rights should hold Kenya accountable for the malpractice and discrimination against minorities.

1.2 Statement of the Research Problem

Minority rights grievances have taken centre stage in the growing number of conflicts in society. Minorities do have influence over society in as much as the majority population does thus it is with that appreciation that it is important to address their grievances before this escalates into fully fledged conflicts. Under Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws allows “each state to determine under its own law who are its nationals.”¹² Nubians as a minority in Kenya face challenges in terms of their access to basic fundamental social amenities enjoyed by fellow Kenyans. The aim of this study is to research on their situation, understand the history of Nubians and relationship with the Government of Kenya and highlight the need for Kenya to set laws in motion that would address the plight of not only Nubians but minority groups as whole. Does human rights and international law play a big role in accommodating minorities? On the national level, what is the Government of Kenya doing to address minority rights grievances? This research will aim to address the call for protection tools in national laws that will accommodate and protect minorities.

¹⁰ Walker, J. D . ‘Statelessness: Violation or Conduit for Violation of Human Rights?’ *Human Rights Quarterly*, Vol 3, No. 1, (1981) pp. 106

¹¹ Ibid

¹² Samore. W., ‘Statelessness as a Consequence of the Conflict of Nationality Laws’, *The American Journal of International Law*, Vol. 45, No. 3 (Jul., 1951), pp. 476-494

1.3 Objectives of the Research

1. Highlight the protection of minorities in the international regime.
2. Examine the legal regime in Kenya touching on minorities.
3. Review the social issues facing Nubians in Kenya.
4. Analyze the progress made by Nubians towards redress of their plight.

1.4 Literature Review

International Laws on Minorities will be important in understanding the history of minority rights protection laws and appreciating the present situation of which laws are in motion to safeguard the protection of minorities.

The international perspective on minority will analyze the situation, definition and understanding of minorities from an international systems perspective by looking at key examples that international law regimes have used. This will be important as this perspective acts as a foundation for national perspective on minority rights.

The national perspective on minorities will look at the legal system in Kenya and how this has either benefitted or disadvantaged the protection of minorities. Understanding the Constitution of Kenya and the legal implication it has on protection of national minorities in Kenya will be important in the appreciation of the legal framework in Kenya.

Analysing the history of Nubians in Kenya will be important in appreciation of the ethnic community by understanding their history in Kenya and some of the grievances they have faced as a small ethnic community.

1.4. 1 International Laws on Minorities

Minorities have a long history of European international law. Their protection and definition of their rights has in many ways been shaped by the East and Central European states.¹³ During the 20th century, international law protected the rights of minorities in East and Central Europe. The system described minorities but states were not allowed to define them. This was limited in the Permanent Court of International Justice's observation on Greco-Bulgarian Convention of 1919 that: "The existence of communities is a question of fact; it is not a question of law..."¹⁴ This means that minorities carry an autonomous position and that states will be judged based on the international standard.

When the League of Nations was formed and the emergence of new states came into force after the World War I, minorities received minimal recognition in the treaties signed by states.¹⁵ The minority system of the League of Nations was designed mainly to safeguard the national rights of minorities living in East and South East European countries. The aim was to try and protect not only the individual rights of members of minorities but also their group rights to culture, religion and linguistic entities.¹⁶ The League of Nations was given the authority to oversee violations of minorities' treaties. The minority regime collapsed with the end of the League of Nations.

Under the new world system, Universal Declaration of Human rights (UDHR), the focus shifted from the rights of minorities to the individual rights with key focus on non-discrimination

¹³ Thornberry .P., "An Unfinished Story of Minority Rights." In Anna Maria Biro and Petra Kovacs (eds). *Diversity in Action. Local Public Management of Multiethnic Communities in Central and Eastern Europe*. (Budapest: LGI, 2001), pp. 48

¹⁴ Ibid

¹⁵ Krippendorff. E., 'Minorities, Violence, and Peace Research', *Journal of Peace Research*, Vol. 16, No. 1 (1979), pp. 28

¹⁶ Schechtman. J.B., 'Decline of international Protection of Minority Rights', *The Western Quarterly*, Vol. 4. No. 1 (Mar., 1951), pp. 2

aspect.¹⁷ In Europe on the other hand, bilateral and domestic law provided a guide to minorities.

European Convention on Human rights (ECHR) included 'association with a national minority.'

¹⁸International organizations on the other hand carried out basic principles of minority rights. Till to date, the UN Article 27 of the International Covenant on Civil and Political rights (ICCPR) continues to function as the minimum global treaty standard. ¹⁹ Minority rights are not mentioned as part of the declaration of human rights. The only tangible achievement made was on the adoption of Article 27 on ICCPR which stipulates, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in the community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."²⁰

Minority rights issues vary in their capacity and intensity in each country. A minority issue in one country cannot be used as comparison to another issue in another country, however with the United Nations adoption of Article 27 and even more recently the UN General Assembly law that was passed, gives minorities a framework for their grievances to be addressed from an international perspective. On the national level, the challenge is that minorities through their social and cultural aspect can challenge the laws of the land, resources of the state, claim participation in decision-making yet there are no national laws that have been put in place that can appreciate the ethnic dimensions shared by minorities. For example, In the European Union (EU) laws, they did not have an instrument for accommodating minority rights but instead

¹⁷ Thornberry .P., "An Unfinished Story of Minority Rights." In Anna Maria Biro and Petra Kovacs (eds). *Diversity in Action. Local Public Management of Multiethnic Communities in Central and Eastern Europe*. (Budapest: LGI, 2001). pp. 48

¹⁸ Ibid

¹⁹ ICCPR was passed by the General Assembly under General Assembly Resolution 47/135, 18 December 1992. This was a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

²⁰ Mullerson.R., 'Minorities in Eastern Europe and the former USSR: Problems, tendencies and protection,' *The Modern Law Review*, Vol 56, No. 6 (Nov., 1993), pp. 795

covered the cultural and educational aspect which is reflected in Article 22 of the European Charter on the Fundamental Freedoms agreed at the European Union Summit at Nice.²¹

According to Thornberry, “most important non-treaty text specifically devoted to minority rights is the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities²² which was adopted in 1992, which includes recommendations on how to resolve minority issues.²³ The UN Declaration on minorities addresses both the collective and the individual rights of minorities. It is seen as a more grounded non-treaty in that in the preamble, it inspires nations to actively preserve equal rights and minority culture and inspires new awareness of minority rights in international arena. Additionally, the Declaration is seen as a more improved articulation of the rights to be granted to minorities. This is because the majority of the rights enshrined are individual rights held by members of minority groups by virtue of their membership whereas the supreme right to exist as a minority group is seen as a collective right.²⁴

1.4.2 International perspectives on Minority rights

According to Thornberry, “ethnicity and perception of ‘otherness’ are distinctive bases of oppression and underprivileged.²⁵ Poverty can be seen to result from cultural disintegration.” Minority rights awareness will need to take into account both the collective and individual aspects of minority rights participation. The challenge in appreciating the international laws and

²¹ Thornberry .P.. “An Unfinished Story of Minority Rights.” In Anna Maria Biro and Petra Kovacs (eds). *Diversity in Action. Local Public Management of Multiethnic Communities in Central and Eastern Europe*. (Budapest: LGI, 2001), pp. 51

²² Ibid. pp. 50

²³ Mullerson.R.. ‘Minorities in Eastern Europe and the former USSR: Problems, tendencies and protection.’ *The Modern Law Review*, Vol 56, No. 6 (Nov., 1993), pp. 804

²⁴ Ibid

²⁵ Thornberry .P.. “An Unfinished Story of Minority Rights.” In Anna Maria Biro and Petra Kovacs (eds). *Diversity in Action. Local Public Management of Multiethnic Communities in Central and Eastern Europe*. (Budapest: LGI, 2001), pp. 51

treaties that have been passed is that there is a need for creation of a balance between collective and individual cultural and social rights.

According to the African Charter on Human and Peoples Rights, Kenya became party to the ratification of the Charter on 23 January 1992. This Charter has been an important international law that safeguards the protection of minorities in Africa. The African Charter prohibits discrimination in the following terms in Article (2) and (3), "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."²⁶ Every individual shall be equal before the law; every individual shall be entitled to equal protection of the law.²⁷ Article 19 further stipulates that, "all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another. International Covenant on the Elimination of All Forms of Racial Discrimination (1965)"²⁸

This Charter has been effective in the protection of minorities who through the national laws of their countries were unable to seek protection and recognition. The African Charter supersedes the national laws of African states as this is a more superior and authoritative body that has the power to address issues to do with human rights and minority rights concerns from an international law perspective.²⁹ For example, the Ogiek community was granted their recognition, protection and ownership of ancestral land in Baringo as part of the international

²⁶ African Charter on Human and Peoples Rights (1981), Article 2

²⁷ Ibid, Article 3

²⁸ Ibid, Article 19

²⁹ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 22-23

law verdict that recognized the community as a minority group in Kenya. Kenya being party to its ratification has to abide by the ruling offered by the African Charter.

Furthermore under Article 5(d) (iii) of African Charter Covenant, ratified by Kenya on 13 September 2001, it states that, "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: The right to equal treatment before the tribunals and all other organs administering justice; The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service; Other civil rights, in particular: The right to freedom of movement and residence within the border of the State; The right to nationality; The right to own property alone as well as in association with others: The right to inherit; Economic, social and cultural rights, in particular: the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; The right to form and join trade unions; The right to housing; The right to public health, medical care, social security; The right to public health, medical care, social security and social services and the right to education and training."¹⁰ Based on these rights as stipulated in the African Charter, it puts forward a clearly defined case of fundamental freedoms and rights which should be accorded to

¹⁰ African Charter on Human and Peoples Rights (1981)

law verdict that recognized the community as a minority group in Kenya. Kenya being party to its ratification has to abide by the ruling offered by the African Charter.

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³⁰ African Charter on Human and Peoples Rights (1981)

all citizens of a country. These basic rights defined by the African Charter forms an important platform by which international law standards governing human rights protection in Africa can be used to supersede national laws of states which disregarded fundamental human rights as stated in the Charter.

Looking at other international law set standards on minorities, as much as there is no one particular definition of minorities, one can define minorities in the context of Article 27 of the International Covenant on Civil and Political rights (ICCPR). According to the 1966 United Nations Special Rapporteur, Francesco Caportorti he proposed a definition of minorities in the context.³¹ "A group numerically inferior to the rest of the population of a state, and in a non-dominant position, whose members being nationals of the state-possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religions and language."³²

According to the above ICCPR Article 27, UN could not remain indifferent to the rights of minorities. The challenge in this Article is that it does not specify the action that should be taken by states in the eventuality that minorities are not recognized. Under the provisions of human rights treaties, "all persons subject to or under the jurisdiction of a State are to have their rights protected."³³ According to the commentary to the UN Minorities Declaration of the Working Group on Minorities, "any action for the protection of minorities should focus primarily

³¹ Makaloo, M. O, 'Kenya: Minorities, Indigenous Peoples and Ethnic Diversity' *Minority Rights Group International and Centre fir Minority Rights Development* (2005) pp. 7

³² Capotorti,F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic minorities*, (New York: United Nations, 1991) para. 568

³³ Office of the United Nations High Commissioner for Human Rights, '*Towards Developing Country engagement strategies on minorities*,' An information note for OHCHR Staff and other Practitioners, pp. 2

on protection of the physical existence of persons belonging to minorities which include protection from genocide and crimes against minorities".³⁴

The end of the First World War and the formation of the League of Nations thereafter and creation of the United Nations after the Second World War marked the beginning of the protection of minority rights. The protection of minorities came into play particularly during the signing of the peace treaties between Eastern Europe and the Balkan States after the First World War. The League of Nations was instrumental in the protection of minorities. The formation of the Permanent Court of International Justice (PCIJ) which made sure racial, religious and linguistic minorities were granted the same rights and treatment and also decided on the issues of discrimination against minority groups played an effective role. With the creation of the United Nations in 1945 which brought about the Universal Declaration of Human Rights (UDHR) in 1948, minority rights protection became a paramount part of the laws governing states.³⁵ UDHR became the global non-treaty text that sort to protect minorities as stipulated in the Declaration.

1.4.3 National perspectives on Minority rights

On the national level, a minority according to the Kenya draft constitution of 2004, Article 306 can be defined as a 'marginalized group or community'. They must be disadvantaged under the constitution; feel discriminated because of their small population size and area. Therefore, they do not have access to vital resources; they can be nomadic or by their presence in an area experience very little social and political integration in their region.³⁶ Minorities can be

³⁴ Office of the United Nations High Commissioner for Human Rights, 'Towards Developing Country engagement strategies on minorities,' An information note for OHCHR Staff and other Practitioners, pp. 2

³⁵ Thornberry .P., "An Unfinished Story of Minority Rights." In Anna Maria Biro and Petra Kovacs (eds). *Diversity in Action. Local Public Management of Multiethnic Communities in Central and Eastern Europe.* (Budapest: LGI, 2001), pp. 53

³⁶ Makaloo, M. O, 'Kenya: Minorities, Indigenous Peoples and Ethnic Diversity' *Minority Rights Group International and Centre fir Minority Rights Development* (2005) pp. 8

defined according to their ethnic, cultural and religious backgrounds. For a community to be considered a minority, it is important to note that the culture of the host community has to be diffused out into the peripheral community. This is characterized by exploitation of the peripheral community.

With the emergence of civil wars, international conflicts, terrorism and new world order in the international system, there was a need to address the rights of minorities. The case of Palestine fighting against Israel is one such case of a minority problem that has escalated and arisen from the issues facing the modern state today. The escalated growth of internal conflicts with roots on minority rights, witnessed a growing need to address the minority debate with key reference on the nation state. According to Krippendorff, the "nation state has given rise to so much ideological confusion and aberration, most notably in the form of modern nationalism." The modern state is seen in terms of the structure and the social stratification, the state of class society.³⁷ Nation state has been seen to give rise to "the politically most explosive and far-reaching slogans of national self-determination with all its conflict-generating consequences."³⁸ This has been seen as the leading cause to minority conflicts. Nationalism can be seen to give rise to forms of ethnic cleansing and discrimination on minorities. This is seen through exclusion on the political and social life for example, enjoyment of basic citizenship rights, rights to vote. For example, in Sri Lanka, the Tamil Tigers who had been living in the country for many years were denied citizenship by the new Sri Lankan Government when Sri Lanka became

³⁷ Krippendorff, E., 'Minorities, Violence, and Peace Research', *Journal of Peace Research*, Vol. 16, No. 1 (1979), pp. 33

³⁸ Ibid

independent. This denial of basic right. led to the tensions and eventually ethnic conflict between the Tamil Tigers and the Sri Lanka Government.³⁹

Nationalism is a phenomenon that can also be used to explain how states view minorities. According to one scholar, nationalism can be found in most countries where different ethnicities live together. According to Jenne, the primordialist can be used to explain how groups with a distinctive national identity will seek independence on the perceived right to national self-determination. Groups who are small in size will not have privileges to be ethnically rescued and are unlikely to pursue secessionism.⁴⁰ Groups of this size can therefore be categorized as minorities.

A special feature of nationalism is their attitude towards other neighbours and nationalities.⁴¹ Nationalism can be used as an instrument of conflict between majority and minority groups. When a minority struggles for autonomy, it is the nationality that will push the majority to use its autonomy and power against the minority group. Nationality can be seen as a simple and emotional connection that is used as a tool for furthering state autonomies especially in communist states.⁴² It creates a feeling of discontent among minority groups. In Union of Soviet Socialist Republics (USSR) for example, it was used to explain the onset of nationalism in the context to how minorities were treated in the country.

On the other hand, the issue of self-determination is a paramount issue in the study of minorities. This is because for one to be considered a minority there needs to be distinction made between minorities and the people. When a minority is discriminated against, it is important to

³⁹ Mullerson.R., 'Minorities in Eastern Europe and the former USSR: Problems, tendencies and protection,' *The Modern Law Review*, Vol 56, No. 6 (Nov., 1993), pp. 802

⁴⁰ Jenne. E., 'A bargaining theory of Minority demands: explaining the dog that did not bite in 1990s Yugoslavia,' *International Studies Quarterly*, Vol 48, No. 4, pp. 730

⁴¹ Mullerson.R., 'Minorities in Eastern Europe and the former USSR: Problems, tendencies and protection,' *The Modern Law Review*, Vol 56, No. 6 (Nov., 1993), pp. 800-802

⁴² *Ibid.* pp. 800

make that distinction that will differentiate them from the cultural or ethnic norms set in place. Self-determination is therefore very relevant to minorities in such that this gives them a distinction to which they can be viewed.⁴³

1.4.4 Literature review on Nubians

Kenyan Nubians are descendants of ex-Sudanese from the Nuba mountain area of central Sudan. The Nubians were forced to serve the British army in the early 1900s and after the war, instead of being repatriated back to Sudan, many of them resettled in Kenya with the decree passed by the then British colonial masters.

The Nubians served in the King's African Rifles (KAR), a British colonial army set up to govern and secure their colonies. Many of the Nubians had been sent to Kenya to guard the Kenya-Uganda railway line which was being constructed at the time. During the colonial period, the Nubians were assigned land in Kibera.⁴⁴ The first Sudanese veterans settled on the land in 1911.⁴⁵ By the time Kenya reached independence under the new Government of Kenya, the Nubian population in Kibera felt they did not have assurance on the land they lived on in Kibera. Instead the Nubians were given housing concessions by the Government and most of the land was partitioned out to other ethnic communities that were growing in the area.⁴⁶

Kenya has approximately 100,000 Nubians living in many parts of the country.⁴⁷ Despite the big margin coming from Kibera (Nairobi town) many of the marginalized groups can be seen

⁴³ Mullerson.R., 'Minorities in Eastern Europe and the former USSR: Problems, tendencies and protection,' *The Modern Law Review*, Vol 56, No. 6 (Nov., 1993), pp. 800

⁴⁴ Kibera is a word that originates from Sudanese Arabic language meaning *forest*.

⁴⁵ Parsons, T, 'Kibra is our blood: The Sudanese military legacy in Nairobi's Kibera location, 1902-1968', *The International Journal of African Historical Studies*, Vol 30, No 1, (1997) pp. 88

⁴⁶ Makaloo, M. O, 'Kenya: Minorities, Indigenous Peoples and Ethnic Diversity' *Minority Rights Group International and Centre fir Minority Rights Development* (2005) pp. 17

⁴⁷ This number is not the official population count of Nubians. There are no exact records on their numbers. Estimate as given by Adam. H. A., 'The Nubians and Statelessness: History in Defining Modern Lives,' pp. 19

in areas of Bondo, Mombasa, Eldama Ravine, Kisumu, Mumias, Meru, Isiolo, Kaloleni, Nanyuki, Kakamega and Kisii.⁴⁸

Kenyan Nubians since independence and release from duty by the then British colonial Government have received both discriminatory and arbitrary treatment although the Nubians in 1939 requested the British colonial government to repatriate them back to Sudan; their plea was denied in the aftermath of World War II.⁴⁹

The discriminatory treatment can be seen in the failure to allow Nubians the right to own land and instead the land they built their property is considered state property.⁵⁰ Over the last four decades, the Kenyan Government has not addressed the Nubian situation; a case in point is the official government documents of the last colonial census where Nubians were classified as 'others'.⁵¹

The Nubian community is neither accepted by the Kenyan Government as Kenyan citizens nor are they recognized by their country of origin, Sudan. In this regard Nubians are regarded as *de facto* stateless people.⁵² This means they have no access to identification cards, passports, death and birth certificate provisions like other Kenyans. Additionally, the Nubians are denied basic human right needs such as freedom of movement and freedom of speech which all other Kenyans enjoy.

The Nubian plight can be seen to have escalated from the land ownership issue in Kibera however there are other factors that need to be considered when analysing the Nubians situation in Kenya. Nubians at present are seen to still face some extent of discrimination from the

⁴⁸ These are just some of the towns where Nubians have settled in for more detailed please refer to: '*Briefing on the Nubian community of Kenya*' CEMIRIDE (Nairobi), 15 June 2004, pp. 3

⁴⁹ Adam. H. A., '*The Nubians and Statelessness: History in Defining Modern Lives*,' pp. 1-4

⁵⁰ Makaloo. M. O. '*Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*' *Minority Rights Group International and Centre fir Minority Rights Development* (2005) pp. 17

⁵¹ *Ibid.*, pp. 16

⁵² Adam. H. A., '*The Nubians and Statelessness: History in Defining Modern Lives*,' pp. 6

society, many Kenyans at present still feel that this marginalized groups do not belong here and should be returned back to Sudan where they originate from.⁵³

Galtung defined violence as 'the cause of difference between the potential and the actual'.⁵⁴ Up until December 2001 when the clashes between Nubians and other tribes in Kibera broke out into violence and killings of 12 victims, Kenya was made aware of the dire need to address the Nubian statelessness debate. Nubians do feel alienated and it does not help that they are no longer welcomed in their country of origin, Sudan nor are they being considered citizens of Kenya. This group has in essence been transformed by the Kenyan society as a polarized ethnic group. Any spark of intimidation or threat on their basic needs can somehow lead to violence.

The conflict faced by Nubians can be viewed more as a struggle for basic human needs and for the society as a whole to recognize them as citizens of Kenya. Nubians are politicized ethnic groups. In the early 1990s and more recently, in the 2007, Nubian communities were used as weapons of political transformation in elections. Politicians used their weakness due to the fact that Nubians felt inferior to other tribes as a tool to progress their political motives. The state of Kenya can be defined as a Weberian state that governs its citizens through rational and legal codes which govern the democratic rights of citizens. In the case of the Nubians, the lack of efforts by the Government to address their grievances has seen the community being used a tool for ethnic grievance and political motives.

According to Burton, it is this very nature of cultural and societal grievances that frustrate people and make violence possible.⁵⁵ Discrimination against the Nubians has been recognized as

⁵³ Mbaria, J. 'Meet the Nubians, Kenya's Fifth-Generation "foreigners"' *The East Africa*, (Nairobi) 15 July 2002

⁵⁴ Galtung, J., 'Violence, peace and peace research', *Journal of Peace Research*, Vol 26, No. 3, (1969), pp. 167-191

⁵⁵ Burton, J.W., *Conflict: Human needs theory*, (New York: ST.Marturis,1990), pp. 3

‘both a cause and consequence of statelessness.’⁵⁶ Land ownership has been a common cause of discrimination against the Nubians. The 2001 violence that broke out in Kibera was as a consequence of President Moi’s visit to Kibera and his statement on illegal informal settlements in Kibera and that landlords had no right to demand rent from tenants. This official statement from the President led to a break out in conflict with about twelve people dead, many injured and the Nubian community fearing for their life and seeking refuge in religious institutions.⁵⁷

According to Lemarchand, it is important to identify the ethnic groups and identity as this will prevent conflict and inspire collective action by the group to pursue conflict interests and privilege.⁵⁸ Nubians have continued to seek justice from the High court in recognition of their Kenyan citizenship. This has however been turned down on several occasions by the High court on grounds that the Government feels this case should have been brought in front of the British colonialists and not the Kenya Government.⁵⁹ The lack of acceptance by the Government and the continued denial by the society of their existence does pose a security risk. Statelessness and discrimination of their human rights can act as a trigger to eruption of conflict.

At the time of independence, Nubians were not given recognition or identification by the Government. This led the way for decades of protest and lobbying by Nubians to be recognized by the Kenyan Government. Nubians have faced a number of issues in the quest for receiving recognition from the Kenyan Government. Under the Kenyan constitution chapter VI Section 90, it states that a person born outside Kenya after 11th December 1963 shall become a citizen if his

⁵⁶ Open Society Institute, OSI Forum: *in Transit to Nowhere-personal accounts of statelessness in the 21st Century*, viewed at: www.soros.org/resources/events/intransit_20060510

⁵⁷ The scholar who wrote this is a Nubian and Project Coordinator on the Citizenship and statelessness Project in Africa through the *Open Society Initiative for East Africa (OSIEA) and Open Society Justice Initiative (OSJI)*; Adam. H. Adam. ‘Covert racism’, (unpublished), pp. 9

⁵⁸ Lemarchand. R. *Burundi: Ethnocide as discourse and practice*. (New York: Cambridge University Press, 1994) pp. 5

⁵⁹ Makaloo. M. O. ‘Kenya: Minorities, Indigenous Peoples and Ethnic Diversity’ *Minority Rights Group International and Centre for Minority Rights Development* (2005) pp. 17

or her parents are Kenyan citizens at that time.⁶⁰ This worked against the Nubians as many of them were unable to produce their parents' birth certificates thus many failed to receive citizenship status. Up to date, Nubians are still subjected to vetting procedures conducted by government officials.

It is important to understand the perspectives of the conflict faced by Nubians. Looking at it from this angle would help guide and identify the origins of both the violence and caring needs.⁶¹ The case of the Nubians and their plight is an example that can be borrowed from the structural violence approach. According to Galtung, this approach can be defined as "existing in those conditions in which human beings are influenced so that their actual somatic and mental realizations are below their potential realizations."⁶² Nubians have lacked political identity and have become victims of humanitarian assistance as the international community tries to recognize their issues to do with statelessness. Without recognition as citizens of Kenya, Nubians lack direct representation in government and recognition as citizen which is important in addressing their grievances before the government.

Nubians are driven by the need for equitable resources, if compared to Burton's human needs approach, it is important then to identify the weaknesses which hamper their basic social habitat. All in all, it is important to highlight the needs for citizenship of the Nubians and identify the theoretical background that can explain the conflictual situation. The essence of a human being is to feel a sense of belonging to a community without this, there is little that can be done to assist the minority group to overcome their present situations.

⁶⁰ UNHCR. *Statelessness in Kenya: Nubians*, (unpublished), 2007

⁶¹ Burton. J. W., *Conflict: Human needs theory*, (New York: ST.Marturis, 1990) pp. 3

⁶² Galtung, J., 'Twenty-five Years of Peace Research: Ten Challenges and Some Responses' *Journal of Peace Research*, Vol 22, No. 2 (1985), PP. 141-158

In reference to Kofi Annan's report, human security implies protecting the basic fundamental freedoms, protecting people from critical and persistent threats and it also means strengthening their will power by creating systems that will give them a proper survival livelihood and dignity as a people belonging to a community.⁶³ This is the essence that should form the livelihood and acknowledgement of Nubians by the Kenyan Government.

1.5 Theoretical Framework

According to Galtung, structural violence can be defined as absence of overt violence in which structural violence have control over behaviour as the use of force.⁶⁴ This violence is built into the structures of society. Nubians have for the longest time experienced this violence which has been propagated from successive governments' failure to recognize them as a Kenyan people. Nubians have been constrained by the society from receiving equal rights to social amenities, political representation, national recognition and documentation and more recently the land ownership debate has taken the centre stage.

The cycle of this structural violence is constant and it has continued. Galtung has been instrumental in the introduction of the two actors: 'top dogs' and 'under dogs'. The under dogs are the victims of the failing structures whereas the top dogs are the main beneficiaries in the control of power and structures.⁶⁵ Nubians in this case can be viewed as the underdogs who experience dynamic problems in land ownership and citizenship being constant in the life cycle of the conflict.⁶⁶

⁶³ Report of the Commission of Human Security, presented to the UN Secretary General Kofi Annan, 1 May 2003.

⁶⁴ Groom, J.A., 'Paradigms in Conflict: The Strategist, the Conflict researcher and the Peace Researcher', *International Studies*, Vol. 14, No. 2, (1988), pp 111

⁶⁵ Galtung, J., 'Twenty-five Years of Peace Research: Ten Challenges and Some Responses' *Journal of Peace Research*, Vol 22, No. 2 (1985), PP. 141-158

⁶⁶ Mwangi, M., *Peace and Conflict Management in Kenya* (Nairobi: Centre for Conflict Research and Catholic Peace and Justice Commission, 2003), pp. 55-64

According to Galtung, "violence is present when human beings are being influenced so that their actual somatic and mental realizations are below their potential realizations."⁶⁷ The basis of minority group grievances and the aggression towards the majority population can form a problem in the creation of social balance and resource distribution. This has the potential to escalate into violence which in many ways can be tied into the lack of recognition by the majority population.

On psychological and physical violence, it is right to say that the lack of proper recognition of minorities can play a big role into their psychological and physical interaction with the majority population. As Galtung rightly put it, "violence works on the body, and violence works on the soul".⁶⁸ Threats of violence can also be considered violent. He identified four types of needs which are paramount to a collective community: survival needs, wellbeing needs, identity needs and freedom needs.⁶⁹ When there is structural violence these needs are seen to manifest within restrained environments of exploitation by the majority population. In a scenario facing minority populations, there has to be a feeling of aggression and manifestation. Nubians in Kenya are facing problems of access to proper social structures, documentation, land ownership titles and even citizenship or access to education and health care. The extent to which these injustices continue can predict the outcome of conflictual behaviour.

According to Galtung, violence can be seen to either manifest as direct violence which is seen as an event: structural violence which is seen as a process with ups and downs; or it could lead to cultural violence which is considered an invariant. Or it could lead to a violence

⁶⁷ Galtung, J., 'Violence, Peace, and Peace Research', *Journal of Peace Research*, Vol. 6, No. 3 (1969), pp. 168

⁶⁸ *ibid* pp. 169

⁶⁹ Galtung, J., 'Culture of Violence', *Journal of Peace Research*, Vol. 27, No. 3 (1990), pp. 292

manifestation of all three, in this case being seen as a violent triangle, with structural violence and direct violence seeking their nutrients from cultural violence.⁷⁰

The three types of violence: structural, direct violence and cultural violence can be used to explain the vicious cycle of minority issues that peg on especially the more volatile minority groups. Group dynamics and the relationships between the underdogs and the top dogs are paramount to how the minority views themselves against the rest of the population. Exploitation, fragmentation and marginalization as propagated by Galtung are useful in explaining the group dynamics of minorities. Minorities in this case can be seen as the underdogs who under the exploitation of the top dogs experience various forms of need deprivation to the point they experience needs-deficit.⁷¹ These forms of deprivation can take the form of exploitation of their resources, lack of access to fundamental needs given to all citizens, lack of freedom of speech, discrimination in the participation in Government.

Using a case study in Kenya as an example, Nubians are currently experience the needs-deficit. Their form of violence is escalating as structural violence. The problem they are facing is that Nubians do not have proper social structures. The Government of Kenya is failing to recognize them as citizens despite their history with the British Colonial Government in Kenya. Furthermore, the lack of access to basic fundamental rights as citizen has restricted their access to national documentation, land ownership titles and even citizenship or access to education and health care. The structural violence is pegging on their survival, wellbeing, identity and freedom needs as highlighted by Galtung. The lack of access to these needs is leading to a strained environment between the Nubians and their relationship with the Government of Kenya.

⁷⁰ Galtung, J., 'Culture of Violence', *Journal of Peace Research*, Vol. 27, No. 3 (1990), pp.294

⁷¹ Ibid

According to Galtung, when there is needs-deficit within a collective group this can lead to collective group trauma that “can sediment into the subconscious and become raw material for major historical processes and events.” A case study here is the historical conflict that has been waging between Palestine and Israel. Palestine in this case is the underdog who has been experiencing different forms of violations and exploitations by Israel. For example, one trigger was when the Gaza strip home area was rightfully taken from them and the mistreatment of their citizens by Israeli border patrol. With the decades of on going violations, this type of cultural and structural violence eventually led to an outburst of violence and is still one of the most volatile conflicts the world has ever witnessed.

As Galtung rightfully put it “violence breeds violence.”⁷² Minorities have both the collective and individual dynamics when dealing with issues of exploitation, discrimination and oppression. The lack of group effort mobilization among the Nubian population does not mean that the group is disregarded. Thus there is a need to appreciate the questions of group survival against individual choices. In Kenya, Nubians as a collective group facing structural grievances have formed a basis to manifest or be latent violence.⁷³ The Nubian community’s survival and their wellbeing needs are under threat due to lack of action by the majority population. The land debate over Kibera and the issue over citizenship and statelessness will require the Government’s action before the potentiality of the violence turns into actual violence. These two issues in particular have a basis of forming a trigger for any conflict to occur amongst ethnic communities living with the Nubians.

Minorities living among a ruling majority population have a potential to face exploitation and manifestations of violence in various forms in cases where their needs are not met. In the

⁷² Galtung, J., ‘Culture of Violence’, *Journal of Peace Research*, Vol. 27, No. 3 (1990), pp. 295

⁷³ Galtung, J., ‘Violence, Peace, and Peace Research’, *Journal of Peace Research*, Vol. 6, No. 3 (1969), pp.172

case of Nubians, by the status of them being regarded as stateless, the group can feel disjointed from society. Therefore to fully understand the aspects facing minority groups, it is crucial to understand the group dynamics and the relationships between the underdogs and the top dogs. This relationship is paramount to how the perception change will occur and the degree to which rights of minorities will need to be respected, accommodated and protected. Understanding the needs of the minority group and engaging the top dogs in prevention of structural violence will form a solid basis for the protection and accommodation of minority rights of Nubians in Kenya.

1.6 Justification of the Research

This study will shed new light on the need for the Kenyan Government and key policy makers to consider laws and policies that will address the plight of minorities and especially groups that are considered de facto statelessness in Kenya. It is important for these minority groups to be recognized by the people of Kenya and Government as a whole.

On the international level, it will be crucial to understand and gain new insight into human rights policies in regard to minorities. This will cover the aspect of statelessness and discrimination of minorities which can pose a security risk to not only the country but the region as a whole.

As a Nubian, I believe this study will form the platform for future research in conflict prevention studies among minority groups. In addition the study can be used in the pool of academic articles and journals on the history and analysis of minorities in Kenya in particular the Nubian community and the source of their conflicts.

This study will be important in the understanding of the need for collective and individual laws at both the national and international level that will address the new trends facing minorities

at risk. Furthermore, it will add new knowledge to the field of international conflict management in particular: minority rights studies and national law and conflict prevention among minorities at risk. A lot of academic journals may have been written on minority rights around the world however, there is very little literature which focuses on Nubian minority case study in Kenya.

1.7 Methodology of the Research

1.7.1 Research instrument

The research is qualitative in nature. It will employ inductive methods to collect data. This method was preferred as it allowed broad and diverse reasoning in my research. This method was preferred because the study will use qualitative research as its basis and to establish an understanding of rights of minorities with key focus on formulating a hypothesis on the case study of Nubians in Kenya. This method will help come up with a discrete observation on the findings as well as provide a more descriptive detail of the research.

1.7.2 Population sample

A section of the Nubian population was interviewed to gather sufficient data on their history and experience living in Kenya. The interviews were conducted as structured open ended interviews. This gave the interviewer a wider margin to collect sufficient data on their history and grievances. The population sample of Nubians interviewed was: a) Elderly Nubians: this sample was picked because they have a better historical recount of their history and origin. b) Former chief of Kibera: he holds a pool of knowledge on the history of Nubians living in Kibera as well as he represents the Nubian population in question. c) Nubian Council of Elders: they represent the collective interest of the Nubian community in legal, cultural and social affairs. d)

Middle aged Nubian population: they represent the middle ground population of Nubians e)
Representation from the youth: they represent the future generation of Nubians who will have the responsibility of carrying on the Nubian history and legacy.

1.7.3 Data collection

Survey research method of data collection was used. This allowed the interviewer to ask respondents questions and seek information which was important in the research.⁷⁴ Survey research method employed both focused personal interviews and open-ended questionnaire guide as methods of collecting data.

The research relied on both primary and secondary sources of data collection. Primary data collection was collected as structured focused interviews with representatives from the Nubian community and Nubian Council of elders. Whereas secondary data was collected from the library sources such Private sector reports on Nubians in Kenya, JSTOR. University of Nairobi library sources, newspaper and internet as: articles, journals and books.

Focused interview was the preferred mode of interviews for collecting data on Nubians. The respondents were given the liberty to express their own definition of the situations faced. Also the questioning process and control of the interviews was managed as it allowed free flow of information by the respondents. By carrying out these interviews, I was able to establish a diverse setting on the background of my study as well as the content of knowledge of Nubians. This method was effective because it captured different views from sample populations of Nubian as well as dug into the root of the statement of the research.

⁷⁴ Nachmias. C. F & Nachmias. D., *Research methods in the social sciences* (London: St Martin's Press, 1996) , pp. 232

Secondary data was obtained through content analysis of published private sector journals which captured the Nubian issue in Kenya. Academic journals and articles were used which focused on international laws governing minority rights protection, national laws and constitutional references on protection of minorities as well as case studies of other minority groups as well as the Nubians in Kenya. Content analysis was effective in developing rich, contextual intellectual information that was easily disseminated and applied to my research on Nubians as a minority group.

1.7.4 Research procedure

Primary data was obtained through structured focused interviews with a sample population from the Nubian community and representation from the Nubian Council of elders. Primary data collection: carried out with: elderly Nubians, Nubians representation in the Nubian Council of elders, middle aged Nubians and Nubians who represented the youth population. Limitations faced when interviewing this diverse sample population of Nubians was that interviews were limited to sample populations living in Kibera, Nairobi which was the biggest ancestral home of Nubians in Kenya. In total, 15 respondents were interviewed who represented a portion of the Nubian community in Kenya and representation from the Nubian Council of elders.

The method employed to collect the data was a face-to-face interpersonal role situation which allowed respondents to give answers based on their experiences. Focused interviews were effective as it allowed probing while the interviews were being conducted. The respondents were also at liberty in expressing their definitions and understanding of Nubian history and issues. Open-ended interview question guide was used as a guide to the structure of questions to ask

respondents. This was effective in allowing free flow of information and expression from the respondents without limiting their set of answers. The questions asked were not restricted to the questionnaire guide that was designed. The advantage with this method was that it allowed respondents to express their thoughts and perceptions in their own words and feeling without limiting them.

1.7.5 Data analysis

The data analysis technique will be case study approach based on the content analysis from academic journals, articles, books and findings from the interviews conducted on Nubians. The basis of using this method is that there already exists data on minority rights issues written by scholars across the world. This method is preferred as it will provide a comparison of the data collected in my literature review with the data to be collected during my interviews with the Nubian population. This will act as basis to understanding my statement of the problem and assist in formulation of a hypothesis.

1.8 Scope and Limitations of the research

Data collection techniques of content analysis and open-ended interviews had time constraints and cost implication on my research. The challenge faced with the interviews was that the intended numbers of interviews scheduled were not all conducted as some of the respondents were not available. Also, the interviews were limited to Nairobi with key focus on Kibera which hubs the largest population of Nubians. This was limited due to time and costs constraints.

Another challenge witnessed during the interviews was that not all respondents were comfortable giving their personal views in relation to their plight in Kenya. In addition, most of the respondents preferred their names and details remain anonymous for their own protection.

On secondary data collection, content analysis required I perform a lot of research and readings on materials before getting the relevant information needed for application on my research. As the number of interviews conducted was minimal in comparison the interviews that were to be conducted, content analysis from private sector publications were effective in supporting the interviews conducted.

1.9 Hypotheses

1. Legal system in Kenya does not address the minority rights protection issues.
2. The Kenyan Government has been responsible for the inherited Nubian problem.
3. The Kenyan Government has outwardly expressed her reluctance to settle minority concerns of Nubians in Kenya.
4. Nubians as a minority group in Kenya have been used by the Kenyan Government to drive political agenda in Kibera.

1.10 Chapter outline

Chapter one which focused on the introduction and background introduced the plight of minorities from both an international and local perspective. The chapter gave a background on the problems facing minorities with key focus on international case studies and international laws regarding protection of minorities. It further identified the statement of the research problem. This was further justified by the literature review content on international laws

protecting minorities, international perspective on minorities and the history of Nubians in Kenya.

Chapter two focused on the historical overview of minority protection. This chapter took special references to the international laws, national laws and other bodies that were instrumental in the protection minorities. The chapter also gave an overview of the challenges faced in passing international laws and declarations for the protection of minorities.

Chapter three highlighted the case study of Nubians in Kenya. This chapter collected data on Nubians. This chapter was important in highlighting the history and grievances of Nubians during colonialism, post-independent Kenya and the current situation in Kenya.

Chapter four captures the understanding and analysis of the data collected on Nubians. The hypotheses were also tested based on the analysis of the data collected. Findings from the data collection were able to identifying the key variables as well as the social issues facing Nubians.

Chapter five leads to the final conclusion of the research based on the findings and hypotheses testing. This chapter gave recommendations for addressing minority rights with key emphasis on the Nubian issue in Kenya.

CHAPTER TWO

2.0 HISTORICAL OVERVIEW OF MINORITY PROTECTION

2.1 Introduction

Minority protection encompasses both the individual and collective protection aspects. Historical perspectives of minorities have shown that minority rights definition has evolved over time. Dating as far back as the 19th century, minorities in those times were defined according to states and ethnicity, a more collective aspect.⁷⁵ Minority protection then was focused on how the small ethnic states can be protected from the larger ethnic states. With time, we have come to appreciate the different roles that the state and the international system have played in the protection and definition of minorities in our history. Minorities appreciation and protection both the collective and individual rights are important in not only keeping peace whether on the national or global context but they are important in preventing conflict. Special protection and empowerment of minorities is therefore considered very important in the protection of minority groups from violations of their dignity. Minorities encompass a different population from the rest of the populations. However how history has defined the group is what has varied.

Minorities are important as they affect our society and how society itself will associate with them. According to Thornberry, "Minority rights raise issues about the kind of society we have and want, the principles which do or should animate it, and the means by which we should achieve it, keeping in mind that means cannot always be detached from ends."⁷⁶ Keeping this mind, this chapter will look at the historical aspects of minority protection and how it has

⁷⁵ Schechtman. J.B., 'Decline of international Protection of Minority Rights', *The Western Quarterly*, Vol. 4, No. 1 (Mar., 1951), pp. 2

⁷⁶ Thornberry .P., "An Unfinished Story of Minority Rights." In Anna Maria Biro and Petra Kovacs (eds). *Diversity in Action. Local Public Management of Multiethnic Communities in Central and Eastern Europe.* (Budapest: LGI, 2001), pp. 48

evolved from the international to national level. This historical perspective will be important in the understanding of the various stages the protection of minorities has taken.

2.2 Historical overview: Issues of minorities and international law

Minority rights protection dates as far back as the 17th century with bilateral treaties signed for the protection of religious minorities in Europe.⁷⁷ Minority rights protection during this time was focused on the protection of religious minorities who were facing opposition from the majority population. Among such treaties that were signed by minorities included, the Treaty of Westphalia (1648) between France and the Holy Roman Empire and the Treaty of Vienna (1606) between Hungary and Transylvania.⁷⁸ These treaties focused on the protection of religious minorities in Europe who were facing opposition from the general population that was in power. The focus of the treaties was to provide protection of religious minorities by ensuring that a peace agreement between the state and the religious group would give amnesty to the religious group and allow their protection by preventing opposition from the majority populations. The Treaty of Westphalia for example, was seen to end the 30 years' war (1618-1648) in the Holy Roman Empire and the eighty years of war (1568-1648) between Spain the Dutch Republic.⁷⁹ This agreement was instrumental in the appreciation of states which led to an important period when state sovereignty became an important part in the prevention of conflict between two states. The treaty agreement was bilateral between the Holy Roman Empire and France.

⁷⁷ Thornberry .P.. "An Unfinished Story of Minority Rights." In Anna Maria Biro and Petra Kovacs (eds). Diversity in Action. Local Public Management of Multiethnic Communities in Central and Eastern Europe. (Budapest: LGI, 2001), pp. 48

⁷⁸ Ibid

⁷⁹ Schiller Institute, Treaty of Westphalia, <http://www.schillerinstitute.org>. 11 August 2011

On the other hand, the Treaty of Vienna which was also a bilateral treaty granted all constitutional and religious rights to Hungarians in both Hungary and Transylvania.⁸⁰ This agreement was instrumental as it recognized the autocracy of Hungarian Lutherans in Transylvania. The minorities were given protection from the state and were assured religious tolerance against the general religious populations. The two treaties; Treaty of Westphalia and Treaty of Vienna were instrumental in providing protection to religious minorities. Looking at the history for example, of the Holy Roman Empire, the church's former glory was a very powerful empire that had control over most if not all states in Europe. The divisions in the empire started when the empire divided its state powers and territories across the different states and regions it had control over. Soon the Holy Roman Empire had moved from being the sole controller of power in states to being the minority religious group that was facing opposition from the general mass population and territories that it used to control. By the time the Treaty of Westphalia came into effect, the protection of the minority group was governed when the religious group gave power to the state. These treaties formed a backbone for what is to date the protection of sovereignty of states and bilateral agreement.⁸¹ The treaties were instrumental in that states were able to protect their sovereignty by signing agreements with the religious groups who during the time were considered very powerful in the matters to do with the state.

Minorities in the 17th centuries were viewed from a religious group struggle perspective. During the time of which, religious groups who had previously held the power to states, were facing a lot of opposition from rising majority populations over matters of concerns to the state. They were considered minorities based on their collective concerns for protection as opposed to individual concerns. Thus the protection of their sovereignty as a religious group was more

⁸⁰ Kissinger, H. 'The Congress of Vienna: A Reappraisal,' *World Politics*, Vol. 8, No. 2 (Jan., 1956), pp. 264-269

⁸¹ Schroeder D.W. 'Did the Vienna Settlement rest on a Balance of power?' *The American Historical review*, Vol. 97, No. 3 (Jun., 1992), pp. 705

paramount than individual concerns. Even as the treaties came into effect and the religious groups lost power over the states, the treaties ensured that the religious groups received certain amnesty and protection in a period when states were coming to terms with their sovereignty in Europe.

However, it was not until the 19th Century that substantive concerns for minorities were witnessed. In Europe, there rose a concern about protection of states and issues arising from nationalism and ethnic discrimination of minorities. During the World War, Europe was divided among those states which had more ethnic power and the states which had lesser power. The Allies were seen as United Kingdom, France, Russia, Italy whereas the central powers were seen as Germany, Austro-Hungarian Empire, the Ottoman Empire and the Kingdom of Bulgaria. The First World War was a crucial point at which European states felt the wrath of ethnic divide in Europe. Even as the Second World War was fought in Europe, the First World War was the breaking point at which weaker ethnic European states felt they needed protection from the more stronger and dominant states which had strong alliances.⁸² League of Nations was used as a tool to safeguard the protection of minorities.⁸³ The tensions between the two factions and the contribution by the United States as a neutral party led to the First World War between 1914 and 1918. The First World War and the aftermaths of it, led to high tension among European states with many fearing domination by superior ethnic states.⁸⁴ This period of tension marked the beginning of minority rights protection becoming an issue of most if not all European states.

The understanding of minorities in the period leading to First World War was different in comparison to the understanding of minorities in the 17th century. In the period leading to First

⁸² Thornberry .P., "An Unfinished Story of Minority Rights." In Anna Maria Biro and Petra Kovacs (eds). Diversity in Action. Local Public Management of Multiethnic Communities in Central and Eastern Europe. (Budapest: LGI, 2001). pp. 48-52

⁸³ Jabareen. T. Y., 'Towards Participatory Equality', *Israel Law Review*, Vol. 41, No. 3, 2008, pp. 646

⁸⁴ Ibid

World War, minorities were viewed from a perspective of ethnic states that had inferior ethnic power in comparison to states which had superior power. In the 17th century period, minorities were viewed from a religious perspective and not ethnic perspective. Concerns then arose from the power given to religious bodies vis-a-vis power given to the states. The religious groups then were considered minorities in that they faced a lot of opposition from the rising majority power system which had focused on taking the power from the religious arm and giving it to the state.

During the First World War period, powerful ethnic states came together to unite and safeguard their national interests by using fear and ethnicity as a tool to gain power over minority states. This period led to the vulnerability of minority ethnic states.⁸⁵ After the First World War, the need to address the concerns of inferior ethnic states arose. Eastern European states together with the United States of America met to try and address the concerns of minority states. From this conference of states is where the League of Nations was born.⁸⁶

An analysis of the 19th century definition of minorities was that these groups of minorities were defined based on the ethnic background and superiority of states. A more recent definition of minorities focuses on the protection of both individuals and collective group of people who face discrimination in their political, religious and ethnic association. The difference in the definition of minorities in the 19th century was that minorities were defined according to the state power and ethnicity of states. During this time, states were scrambling for recognition and domination amongst other European states powers. Even as the central powers and allies fought against each other during the First World War, the minority groups found themselves at the centre of discrimination and opposition by the major state powers at play. The 19th century was a period which witnessed a change in power and especially a change in the way international

⁸⁵ Jabareen, T. Y., 'Towards Participatory Equality', *Israel Law Review*, Vol. 41, No. 3, 2008, pp. 646

⁸⁶ Biro, A. M & Kovacs, P. (eds), *Diversity in Action: Local Public Management of Multiethnic Communities in Central and Eastern Europe*, (Budapest: LGI, 2001), pp. 48-52

affairs affecting other states were dealt with. During this time, even as minority groups emerged and states witnessed a need for their protection. There was a need for states to understand and address the change in hegemony that was witnessed in the period before and after both World Wars.

The period after the First World War, the League of Nations was formed with key emphasis to protect certain groups of people in Europe, particularly, states in Eastern and Central Europe and even Iraq. Certain treaties and declarations made by the League Council looked at the protection of 'racial, linguistic and religious' minorities.⁸⁷ However, the challenge in the treaties was that they did not specify the minorities who would be offered protection as well as specify the kind of protection to be offered. This eventually led to the failure of the League of Nations when European states were divided among ethnic grounds leading to World War II and the separation of European states with power and those without power.

The view of minorities during the 19th century was a collective, state view whereas more recently minority protection encompasses both the collective and especially the individual perspectives. This understanding is important because it helps understand, define and raise concerns facing minorities today.

According to Thornberry,⁸⁸ the League of Nations collapse marked the end to the minority regime. The new world order set in when the United Nations was formed in the period after the World War II. States came together to form a union that would provide protection to war torn nations, raise concerns that are of international concern and address some of the failures of the League of Nations. The League of Nations had failed to provide a more unifying and structured way of dealing with minorities. By the time, the United Nations (UN) was being

⁸⁷ Jabareen, T. Y., 'Towards Participatory Equality', *Israel Law Review*, Vol. 41, No. 3, 2008, pp. 646-650

⁸⁸ Biro, A. M & Kovacs, P. (eds), *Diversity in Action: Local Public Management of Multiethnic Communities in Central and Eastern Europe*, (Budapest: LGI, 2001), pp. 48

formed in 1945, states had seen the need to come together to address ways in which conflicts can be prevented and new measures can be put in place to address warfare.⁸⁹ The two World Wars acted as a testament to the need for states to form a unifying body that would prevent conflicts and repair damages made to war torn European states. The UN brought in better structures for peaceful existence of people and equal rights of human beings compared to what the League of Nations had codified.⁹⁰ Whereas the League of Nations had highlighted the special protection of some groups of minorities in Europe, the mode of protection of these minorities had never been specified. The UN came in to repair to the damages caused by the two World Wars fought in Europe.

Particular emphasis was given to the need to develop a Declaration that was to address the global concerns of minorities and not only the concerns of minorities in Europe. The UN in line with addressing some of the concerns raised from the World War period aftermath formed the Universal Declaration of Human Rights (UDHR) on the protection of minorities in 1948.⁹¹ The Universal Declaration of Human Rights (UDHR) thus reaffirmed the faith of states in appreciation of the respect in fundamental human rights, dignity and worth of all people in the world. UDHR was the first global expression of rights to which all human being are entitled to. The declaration differed from the one the League of Nations stipulated.⁹² UDHR focused on the protection of universal human rights and development of friendly relations on states.⁹³ The declaration also focused on the principle of non-discrimination which captures aspects of minority protection. The UDHR redefined minorities from the previous definition given by the

⁸⁹ Jabareen. T. Y., 'Towards Participatory Equality', *Israel Law Review*, Vol. 41, No. 3, 2008, pp. 647

⁹⁰ Ibid

⁹¹ Ibid, pp. 646-650

⁹² United Nations, Universal Declaration on Human Rights, <http://www.ohchr.org>, 5 September 2011

⁹³ Ibid

League of Nations. Whereas minorities during the World Wars were defined along European ethnic lines, the UDHR redefined minorities from a more global perspective.

UDHR stipulated that all human beings deserve equal human rights and freedom as set forth in the Declaration.⁹⁴ This global definition of human rights was important because it was during this time that witnessed a change in how minority groups would be defined. Minorities based on the Declaration stipulated in the UDHR were now going to be defined based on the global perspective and need to respect and protect all human beings from discrimination.⁹⁵ This global perspective of human rights was important in how minorities in the long run would be defined as a collective group of people who needed protection from not only ethnic lines but religious, cultural, political and social grounds. The challenge faced with the UDHR was that individual rights of minorities were not captured.⁹⁶ It instead focused on the global human rights perspective which forms the core to the understanding and more in-depth coverage of different kinds of minorities in the world. UDHR failed to directly address the issue of minorities instead it focused on the universal human rights concerns which all member states needed to abide by. Also in as much as the all UN member states were party to the UDHR, a number of the member states failed to abide by the Declaration and respect the worth and rights of their people. However UDHR can be seen as an important stepping stone in the way the United Nations and its member states appreciated and defined minorities according to the new set standards on protection and respect of human rights.⁹⁷

⁹⁴ Humphrey J. P., 'Universal Declaration on Human Rights', *International Journal*, Vol 4. No. 4 (Autumn, 1949), pp. 351

⁹⁵ Schwelb.E., 'The influence of the Universal Declaration of Human Rights on International and national law', Proceedings of the American Society of International law at its Annual Meeting (1921-1969), Vol. 53, *Diverse Systems of World Public Order Today*, pp. 217-223

⁹⁶ Ibid

⁹⁷ Humphrey J. P., 'Universal Declaration on Human Rights', *International Journal*, Vol 4. No. 4 (Autumn, 1949), pp. 352-355

The issues of minorities re-emerged when the United Nations set up UN sub-commission on the Prevention of Discrimination and the Protection of Minorities in the 1940s which is currently being referred to as the Sub-Commission on the Promotion and Protection of Human Rights.⁹⁸ The drafting of Article 27 of the Covenant on Civil and Political Rights (ICCPR),⁹⁹ created a more formal agenda and forum for minority rights issues to be raised in the international system.

The UN came into play in international law by introducing global human rights laws that would govern and aim to protect minorities. By member states abiding and agreeing to the legal formation of the United Nations, this allowed matters of international concerns to be raised at the level of the General Assembly and Security Council level. The resolutions that were passed by the UN General Assembly significantly changed the international laws and also affected the national laws of member countries. Member states who were signatories to the treaties, declarations, covenants and bills passed were to respect and live by the fundamental principles of the laws passed. This changed how states addressed their relations with other states and how the national law principles were governed to fit their people. UDHR and ICCPR for example, were significant in changing the paradigm of international laws governing universal human rights protection and the principle of non-discrimination and equal rights for all.¹⁰⁰

The change in international law principles allowed minority definition to be raised by the United Nations in as early as when the organization was formed. For instance, UN brought about the principle of equal rights for all without discrimination. This gave room for minorities to be defined among the groups of people that face discrimination in not only their racial, linguistic

⁹⁸ Biro, A. M & Kovacs, P. (eds), *Diversity in Action: Local Public Management of Multiethnic Communities in Central and Eastern Europe*, (Budapest: LGI, 2001), pp. 49-50

⁹⁹ Ibid

¹⁰⁰ Ibid

and religious beliefs but in cultural and social aspects of their associations.¹⁰¹ To date, Article 27 of ICCPR acts as the minimum global treaty standard for the protection of minorities. ICCPR legally binds the largest number of states parties of any treaty containing minority rights.¹⁰² For over two decades, the fate of minorities were guided by Article 27 of ICCPR, however most recently there emerged the adoption of the most important non-treaty text that is devoted to the protection of minorities:¹⁰³ the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.¹⁰⁴ This declaration is non-binding but has been significant in addressing and guiding the developments of new minorities. This declaration was inspired by the provisions of Article 27 of the International Covenant on Civil and Political Rights (ICCPR) concerning the rights of persons belonging to ethnic, religious and linguistic minorities.

The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities was the first declaration to address the minority rights directly. The concerns rose from the need to implement identifiable measures to the protection of minorities and human rights concerns facing minorities as based on Article 27 of ICCPR. In as much as ICCPR had tried to address the concerns of minorities from a human rights perspective, the need arose out of the need to put up a United Nations bill that will define minorities according to national laws and allows laws of states to apply the principles as

¹⁰¹ General Assembly Resolution 47/135, 18 December 1992. This was a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

¹⁰² Currently 160 states are part of the Covenant

¹⁰³ Biro, A. M & Kovacs, P. (eds), *Diversity in Action: Local Public Management of Multiethnic Communities in Central and Eastern Europe*, (Budapest: LGI, 2001), pp. 49-50

¹⁰⁴ ICCPR was passed by the General Assembly under General Assembly Resolution 47/135, 18 December 1992. This was a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

governed in the Declarations. Thus, this Declaration was formed with a key emphasis to defining and addressing the concerns of minorities on national levels.

The UN identified the need for all states to abide by the non-binding treaty law in the protection of minorities. This Declaration became the first universal standard and a body of globally accepted minority rights. For instance, in Article 1, stipulates, “(1) States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. (2) States shall adopt appropriate legislative and other measures to achieve those ends.”¹⁰⁵

This Declaration has been able to address both the collective and individual aspects of national minority rights. One of the declarations of minorities is witnessed in the preamble which states “to inspire nations to actively strive to preserve minority cultures and equal rights.”¹⁰⁶ This Declaration also emphasizes the need for minority rights as a prerequisite of creation of civil society operating under the rule of law.¹⁰⁷ This meant that not only collective minority rights were protected but individual minority rights within a collective group were also addressed. Furthermore, a United Nations body was formed in 1994 to ensure these expectations were met.

¹⁰⁸A Working Group which met in 2000 for the sixth time was granted the mandate to ensure the realization of minority rights as the advisory and monitoring body. This Working Group on minorities has been crucial in the implementation of the Declaration and ensuring measures are

¹⁰⁵ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, <http://www2.ohchr.org/english/law/minorities.htm>

¹⁰⁶ General Assembly Resolution 47/135, 18 December 1992. This was a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

¹⁰⁷ Biro. A. M & Kovacs. P. (eds), *Diversity in Action: Local Public Management of Multiethnic Communities in Central and Eastern Europe*, (Budapest: LGI, 2001), pp. 48-50

¹⁰⁸ *ibid*

taken on the protection of minorities. The Working Group acted as the monitoring body for ensuring states abided by the laws governed in the Declaration.¹⁰⁹

The challenge with the application of the role to be played by the Working Group was that there is only so much the Working Group can monitor in the implementation of this treaty into state national laws.¹¹⁰ In past cases, the Working Group has been ineffective in pushing states to apply and respect the principles of minority protection in the national laws. For example, in the case of South Africa during the apartheid regime, the then white dominated government had felt a lot of opposition from the minority population of indigenous South Africans who felt that the government had discriminated against their population directly even in the face of the international community. Black South Africans were not given access to their basic human rights. Social amenities including health care, education and employment were segregated against them openly by the then white dominated government.¹¹¹

South Africa was divided among white and black South Africans with all of the privileges being given to the white population which made up a small portion of South Africa in comparison to the rest.¹¹² In this situation, minority rights were not discriminated based on the population size instead the human rights violations against minorities happened because the white dominated government had taken up authority in favour of their population. The apartheid regime on its own illustrated the capacity to which a minority population can live up to the oppression and human rights violations. During the apartheid regime, the minority population

¹⁰⁹ Biro. A. M & Kovacs. P. (eds), '*Diversity in Action: Local Public Management of Multiethnic Communities in Central and Eastern Europe*', (Budapest: LGI, 2001), pp. 49-50

¹¹⁰ Ibid

¹¹¹ Bickford-Smith. V., 'South African Urban History, Racial Segregation and the Unique Case of Cape Town?' *Journal on South African Studies*, Vol. 21, No. 1 (Mar. 1995), pp. 64

¹¹² Ibid

acted directly in opposition to the government laws that had been laid out against the indigenous South Africans.¹¹³ The international community and the United Nations in response did little to address the concerns of the minorities. Trade embargoes had been implemented in South Africa however in particular reference to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, this failed to protect minorities in South Africa during the apartheid regime. Tensions among minority populations in South Africa eventually escalated to a period of violence and conflict in the country until the South African white dominated Government eventually gave into the demands of the minority population, leading to their independence in 1994 and the election of the first black president in South Africa, Nelson Mandela.

In the European context, minority protection under the Central European Initiative produced a valuable tool in 1994 that can be used in the protection of minorities. According to the Initiative, “issues concerning...minorities are a matter of legitimate international concern and do not constitute exclusively an internal affair of the respective States.”¹¹⁴ However a more binding tool for the protection of minority rights was done through the bilateral treaties and domestic laws. For example, the European Convention on Human Rights (ECHR) included ‘association with a national minority’ as ground for discrimination.¹¹⁵ The ECHR was formed as a European Framework Convention for the Protection of National Minorities. This was formed as a legally binding treaty among European States. This framework was formed to specifically preserve minority rights and establish a special measure that will “promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and

¹¹³ Bickford-Smith. V., ‘South African Urban History, Racial Segregation and the Unique Case of Cape Town?’ *Journal on South African Studies*, Vol. 21, No. 1 (Mar. 1995), pp. 63-78

¹¹⁴ Jabareen. T. Y., ‘Towards Participatory Equality’, *Israel Law Review*, Vol. 41, No. 3, 2008, pp. 649-653

¹¹⁵ Thornberry .P., “*An Unfinished Story of Minority Rights.*” (Budapest: LGI, 2001), pp. 49

to preserve the essential elements of their identity, namely religion, language, traditions and cultural heritage.”¹¹⁶

The European Framework Convention has been effective among European Union states in that it has acted as a domestic framework that ensures the protection of minority rights is respected. However based on past experiences, this framework has also failed in its protection of minorities in Europe.¹¹⁷ For example, many of the Eastern European countries during the cold war and aftermath of the cold war faced levels of minorities' grievances arising from the national laws of their states. A good example of this is the Yugoslavia wars, these conflicts escalated between 1991 and 1995.¹¹⁸ The conflicts escalated out of the concerns raised by minority populations. The war was fought on ethnic grounds among the people of former Yugoslavia: mainly between Serbs, Bosnians and Croats. The minority groups in this case were seen as the Bosnians and Croats who faced a lot of opposition from the then Serbian dominated government of Slobodan Milosevic.

These series of conflicts has been considered as one of the worst since the World War II with former Yugoslavian countries fighting against each other. This war was ostracized for the use of ethnic cleansing and genocide as a tool to get rid of minority populations. The war was one of the worst the world has ever witnessed and in principle, the European Convention on Human Rights which was put together to govern the protection of minorities in Europe did nothing to ensure minority rights and human rights were protected. The Yugoslavian conflicts were the worst conflicts the world has witnessed. Even in the aftermath of the international

¹¹⁶ The European Framework Convention for the Protection of National Minorities, Feb. 1995, It entered into force Jan. 2, 1998

¹¹⁷ Thornberry .P., “*An Unfinished Story of Minority Rights.*” (Budapest: LGI, 2001), pp. 49-50

¹¹⁸ Mullerson.R., ‘Minorities in Eastern Europe and the former USSR: Problems, tendencies and protection,’ *The Modern Law Review*, Vol 56, No. 6 (Nov., 1993), pp. 807

community recovering from the mistakes made during the conflict; the international laws for protection of minorities has failed in addressing means by which national minorities can be protected.¹¹⁹

2.3 National laws on protection of minorities

In principle the international laws passed through the declarations to protect minorities were seen as effective according to the capacity of organizations that formed them i.e. the United Nations. However the challenge then and even now is on how to apply these principles effectively in the national laws of countries so as to ensure that protection of minorities is carried out effectively. From past experiences of how these treaties have failed in protecting minorities, for example, the case of Rwanda and Yugoslavia's genocide,¹²⁰ there is a need to provide proper frameworks not only on the international level but most importantly on the national levels of application of laws governing minorities. Understanding national minorities is therefore of great concern to the appreciation of how these minorities are defined and protected by individual states. As earlier indicated there is no general definition of minorities on the national level but it is important for a state to define minorities according to their capacity and understanding by ensuring that their concerns are addressed effectively on a national level.

Based on the principles governed on the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,¹²¹ it was important for states to apply these principles in their national laws. In reference to Article 1, "(1) States

¹¹⁹ Mullerson.R., 'Minorities in Eastern Europe and the former USSR: Problems, tendencies and protection,' *The Modern Law Review*, Vol 56, No. 6 (Nov., 1993), pp. 808

¹²⁰ Staub. E., 'Genocide and Mass Killing: Origins, Prevention, Healing and Reconciliation', *Political Psychology*, Vol. 21, No. 2 (Jun. 2000), pp 367

¹²¹ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, <http://www2.ohchr.org/english/law/minorities.htm>

shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. (2) States shall adopt appropriate legislative and other measures to achieve those ends.”¹²² The Declaration is a non-binding treaty; however it is important that states aim to abide by these principles in their respect of national minorities and the need to address their concerns. The challenge facing this particular reference of Article 1 is that, the article declares the capacity of states to define and respect minorities however there are no indications on the measures to be taken on the implementation of minority protection laws. National laws are very important for the understanding of minorities. National laws allow one to able to fully appreciate the capacity to which a state is taking towards a redress to the concerns of minorities.

According to International law, minorities are seen to carry an autonomous meaning. Thus for a state to be seen to have minorities, this will need to be judged according to the international standards set.¹²³ However the challenge here remains on whether the international standards set are effective enough for states to apply the same principles on their national laws.

Member states of the United Nations have played a key role in the appreciation of the principles of the protection of minorities. Their membership in the organization has acted as a basis to monitor how the principles will be translated into their national laws and carried out effectively in the protection of minorities. The challenge with the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic was that in as much as a Working Group was appointed to monitor the implementation of this Declaration into national laws of countries; many countries have not played their part and if anything have failed

¹²² Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, <http://www2.ohchr.org/english/law/minorities.htm>

¹²³ Biro. A. M & Kovacs. P. (eds), *Diversity in Action: Local Public Management of Multiethnic Communities in Central and Eastern Europe*, (Budapest: LGI, 2001), pp. 48

address the protection of their national minorities. The international standards set on the variation are what can judge whether a state has implemented the protection of minorities or –however there is a need for more stringent measures to counter national laws of states which do not abide by the international principles of minority protection.¹²⁴

Based on the earlier definition of minorities, according to linguistic, religious, cultural or ethnic association, there is no universal definition of who a minority should be.¹²⁵ For example, in France, the Muslim population consider themselves minorities in comparison to the enormous French population. Recently, the French government passed a bill that banned the wearing of religious dress in schools. This created an outrage amongst Muslim population as they felt that their cultural and religious beliefs were being discriminated against with disregard to their basic rights as citizens.

The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities set the standards for states to apply the principles of minority protection on their national law.¹²⁶ Looking at the Kenyan national law, it is thus important to identify how Kenya has been able to apply the Declaration's minority protection principles to fit her national laws and how this has been effective in the protection of national minorities living in Kenya.

With this in mind, looking at Kenya's first constitution which came into force after independence, the rights and protection of individuals are stipulated under Article 70 states; that every person in Kenya is entitled to the fundamental rights and freedoms of the

124. A. M & Kovacs. P. (eds), *Diversity in Action: Local Public Management of Multiethnic Communities in Central and Eastern Europe*, (Budapest: LGI, 2001), pp. 52

125. Humphrey J. P., 'Universal Declaration on Human Rights', *International Journal*, Vol 4. No. 4 (Autumn, 1949), pp. 355

126. A. M & Kovacs. P. (eds), *Diversity in Action: Local Public Management of Multiethnic Communities in Central and Eastern Europe*, (Budapest: LGI, 2001), pp. 52

individual, that is to say, the right, whatever his race, tribe, place or origin, residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following. Namely Life, liberty, security of the person and the protection of the law; Freedom of conscience, of expression, and of assembly and association; and...”¹²⁷

Furthermore, under Article 74 (1) it further stipulates that, “No person shall be subject to torture or inhuman or degrading punishment or other treatment.”¹²⁸ The challenge that faced the first constitution of Kenya was that the rights of minorities were not clearly spelt out in the national law. The first constitution defines the general rights of citizens however it failed to directly address the concerns of minorities and their protection. The first constitution not only meant that minorities were not regarded as different from the rest of the citizens but it meant that there were no human rights protection laws against discrimination of minorities. The first constitution did not look at the individual nor collective rights of minorities; instead it addresses the rights of all citizens. Minorities are not mentioned anywhere in the constitution but instead the constitution refers to the non-discriminatory and equal rights of all individuals in Kenya. The challenge with the first constitution was that, minorities would not have been able to challenge the law in favour of their protection.

In comparison to the new constitution that was passed last year, the new constitution seems to have defined specific human rights aspects that need to be respected and which can be used as a general framework for the protection of minorities. It is important to note that human rights definition forms the backbone for protection of minorities. By defining the areas to which a human being deserves equal human rights this also defines the areas a minority group or

¹²⁷ The Constitution of Kenya, 1963 (repealed), (the National Council for Law Reporting: Nairobi) Revised Edition 2009 (2008)

¹²⁸ *ibid*

individual requires protection from. The Universal Declaration of Human rights in this case formed the backbone for the appreciation of the universal framework for minority rights grievances to be addressed.¹²⁹

In the new and current constitution of Kenya, under chapter 4, Bill of Rights, Article 19 (2) it states, "The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of potential of all human beings."¹³⁰ An in depth definition that addresses human rights is covered under Article 27 which stipulates, "Every person is equal before the law and has the right to equal protection and equal benefit of the law." (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.... (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."¹³¹ this constitution defines the human rights aspects that need to be respected. However, it still fails to address certain details that would form a background for minority protection. For instance, it does not define who a minority is nor does it directly talk about how minorities should be protected.

The new constitution of Kenya does not cover the specific protection of minorities. However, it does refer to the fair and equal rights as well as the need to respect human rights of all individuals.¹³² This is important in not only respecting the aspect of human rights which forms the core in the protection of minorities but under the Bill of rights, the Kenyan law has been seen to given precedence to the need for protection against discrimination and human rights

¹²⁹ Humphrey J. P., 'Universal Declaration on Human Rights', *International Journal*, Vol 4. No. 4 (Autumn, 1949), pp. 352

¹³⁰ The Constitution of Kenya, 2010, (the National Council for Law Reporting: Nairobi), 2010

¹³¹ Ibid

¹³² Ibid

violations of all forms. For minorities living in Kenya, the “freedom of citizens to exercise their political rights”¹³³ can be used to their advantage especially in fighting for equal representation and equal rights in political activities including the right to vote, right to citizenship and the right to political freedom. In comparison to the old constitution, the new constitution can be seen to be more tolerant to the representation of minorities under the freedom of expression, and representation. Though the constitution may not have defined minorities and the methods to which their protection is safeguarded, the national law gives room for the growth and precise definition of minorities. It is worth noting that from the articles that specifically talk about the bill of rights this gives room to address minorities concerns in Kenya.

On the national perspective of Kenya, the current constitution provides a basis to address minorities. Minorities may not have been defined directly but in principle human rights sections on the constitution allow for all Kenyan citizens to receive equal and fair treatment on the bill of rights.¹³⁴ On the international level, Kenya is in a non-binding treaty with the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and to that capacity Kenya should have applied some of the principles stipulated on the Declaration on its constitution. This may not be the case on the current constitution however the challenge on both national and international laws on protection of minorities is that which law should be given precedence over the other when dealing with matters of minorities especially if a state is signatory to both international laws and national laws governing minority rights protection.

¹³³ The Constitution of Kenya, 2010, Article 81 (a), (the National Council for Law Reporting: Nairobi), 2010

¹³⁴ Ibid

2.4 Other related bodies of minority rights

According to Jabareen, "...positive guarantees are needed in order to preserve the collective rights of minority groups, particularly their identities and the special characteristics of their culture. Therefore, additional legal protections creating positive obligations on states are required to fully realize minority rights and substantial, meaningful equality."¹³⁵ Some states have taken the liberty of enshrining the special protection of minority rights in their national laws. This has enabled the preservation and protection of minority rights. For example, these include South Africa, Northern Ireland, and Canada.¹³⁶ The initiative by states among others has played a role in lending support to the inclusion of separate laws that govern the protection of minorities' rights. This has also ensured that special measures are taken by states in their legal foundations and protection of minority rights.¹³⁷ Leading by the examples set by these states; this can form as a good alternative in the inclusion of minority protection laws in the Kenyan constitution. As the constitution already refers to the protection of human rights in general, it is not prudent for the Kenyan Government to include a separate law that will specifically protect national minorities.

In conclusion, the need for national laws to respect and provide protection mechanisms for minority groups in their countries is important. Learning from the frameworks and international law standards set, it is important for states to find means by which these international laws can be set in motion within their national laws. A few examples as mentioned above have set the platform for other states to formulate laws that can fall under the current constitution or can be regarded as separate laws that specifically address minority rights

¹³⁵ Jabareen. T. Y., 'Towards Participatory Equality', *Israel Law Review*, Vol. 41, No. 3, 2008, pp. 649

¹³⁶ The South African Constitution, under Article 31 on Cultural, religious and linguistic communities; the Northern Ireland "Good Friday" or "Belfast" Agreement of 1998; and several Canadian laws protecting the rights of the French-speaking minority passed over the last few decades.

¹³⁷ Jabareen. T. Y., 'Towards Participatory Equality', *Israel Law Review*, Vol. 41, No. 3, 2008, pp. 649-653

protection.¹³⁸ However the biggest challenge here lies with how states perceive of minorities or if at all they recognize the presence of minorities in their territory. The first step in addressing minority concerns in for the state itself to recognize this body of people whether on a collective or individual level. Minorities have formed an important body of people who states can no longer ignore. Based on the international laws set in motion, these bodies of people can no longer be ignored by society.¹³⁹ They are in our society and they form a very important pillar of society even as they struggle to have their needs and issued addressed from a cultural, religious, ethnic and political perspective. Minorities have become a very vocal part group in society. It has now more than ever become important for each state that respects fundamental human rights, to seek ways and means by which protection and equal rights can be shared with them.

¹³⁸ Jabareen. T. Y., 'Towards Participatory Equality', *Israel Law Review*, Vol. 41, No. 3, 2008, pp. 649-653

¹³⁹ Humphrey J. P., 'Universal Declaration on Human Rights', *International Journal*, Vol 4. No. 4 (Autumn, 1949), pp. 352

CHAPTER THREE

3.0 CASE STUDY: NUBIAN MINORITY GROUP IN KENYA

3.1 Introduction

This chapter will focus on the Nubians in Kenya. The particular emphasis is on this ethnic community as their history in Kenya dates back to the British colonial period. To date a lot of their grievances as a minority ethnic community has not been addressed. This chapter will focus on the understanding and appreciation of the Nubian ethnic community as a minority group. It will look at their history dating back to during the pre-colonial era, colonial era, and post-independence era till to date. Their history will be important in the understanding of the Nubian community grievances as a minority group. This history will be able to shade new light on their grievances and especially on the actors involved.

3.2. Nubians during the pre-colonial era in Kenya

Nubians have had a long history dating as far back as when they fought as soldiers in the British military during the British colonial rule in Eastern African in 1900s.¹⁴⁰ The Kenyan Nubians are descendants of ex-Sudanese from the Nuba mountain area of central Sudan.¹⁴¹ The Nubians were forced to serve in the British army; the King's Rifles Army (KRA) in the early 1900s and before the First World War, instead of being repatriated back to Sudan, many of them resettled in Kenya with the decree passed by the then British colonial masters.¹⁴² Unlike their Indian counterparts who were granted British citizenship after serving in the construction of the railway line across East Africa, Nubians were not extended this privilege by the British even as

¹⁴⁰ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 11

¹⁴¹ Parsons, T, 'Kibra is our blood: The Sudanese military legacy in Nairobi's Kibera location, 1902-1968', *The International Journal of African Historical Studies*, Vol 30, No 1, (1997) pp. 88

¹⁴² Ibid

they loyally served them in colonial duties in East Africa.¹⁴³ In reference to the law that was passed granting British citizenship, under the British Nationality Act of 1949, a British is defined as “a person who, being a British subject, had a close relationship either through birth or descent with the UK and its remaining colonies.”¹⁴⁴

Nubians not only played a role serving in the King’s Rifle Army (KRA) but they also served in the British colony in Kenya and other parts of Africa. Nubians served as porters, drivers and servants even as the mission of KRA came to an end.¹⁴⁵ According to one Nubian’s recall, “Nubians continued to serve the British until their release from duty in 1904 when they were assigned Kibera to serve as their home.”¹⁴⁶ “As many Nubians had been assimilated into Eastern African societies, a lot of the families felt that they would not fit in back to their society in Sudan. The challenge faced then was that Nubians would neither be recognized by North Sudan as they were blacks and neither would they be recognized by South Sudan which was mainly Christian dominated.”¹⁴⁷ Being a community which practiced Islam and lived on the Central part of Sudan, Nubians felt that they would face difficulties settling back in Sudan. According to another elderly witness recollection, “Nubians had served the British colony for a long time, their families were no longer in Sudan and thus they felt that repatriation back to Sudan will not work for them.”¹⁴⁸ As a solution to this issue of repatriation, the British colony

¹⁴³ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 11

¹⁴⁴ Ibid. Also refer to J. B. Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (Acts Press, African Centre for Technology Studies, 1990), pp. 66.

¹⁴⁵ Interview conducted with Haji Yusuf Abdalla Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

¹⁴⁶ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 6

¹⁴⁷ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

¹⁴⁸ Interview conducted with Amani Salim, September 2011, Kibera.

settled the Nubians in Kibera which in Nubian dialect *Kibra* means *Forest*.¹⁴⁹ This area of Kibera was once a military reserve for the British thus even as the Nubians settled in Kibera, the British gave the Nubians permits to settle in Kibera in the form of allotment numbers but there were no title deeds which indicated the land belonged to them¹⁵⁰. As Nubians were a small ethnic community with origins in Sudan, the British did not grant Nubians any legal claim to land in Kibera instead their tenure in Kibera was based on their status as former servants of the British Crown.¹⁵¹

The area that was allocated to Nubians was 4,197 acres. Nubians were given individual permits to live and build their houses but they could not build permanent houses for example, for their children as this was restricted.¹⁵² According to the Open Society Justice Initiative paper, it states that according to “the Location survey of buildings and Shambas at Kibera’ prepared by the District Surveyor in 1934, it indicates that Kibera was divided into 397 plots, each of which were individually allocated to named Nubians.”¹⁵³

According to a Nubian elder, “the problems with Nubians and the issues facing Kibera started when the administration Government forcefully grabbed land from the 4,197 acres that was allocated to them.”¹⁵⁴ In reference to the 1933 Carter Land Report Commission, this Commission gave recommendations based on the survey done in Kibera. They recommended that Kibera is reserved for Nubians as this was the designated home of Sudanese ex-soldiers. The

¹⁴⁹ Parsons, T, ‘Kibra is our blood: The Sudanese military legacy in Nairobi’s Kibera location, 1902-1968’, *The International Journal of African Historical Studies*, Vol 30, No 1, (1997) pp. 88

¹⁵⁰ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

¹⁵¹ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 6

¹⁵² Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 6

¹⁵³ *ibid*

¹⁵⁴ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera

Commission stated, "While we are fully satisfied of the necessity for moving the unauthorized residents of Kibera, we are not convinced of the necessity for moving the Sudanese. Their past services to the Government entitle them to sympathetic consideration, and it is certain they would prefer to stay where they are. We shall presently show grounds for thinking that it would be to the advantage both of themselves and of government that they should be allowed to do so."¹⁵⁵ The Commission's findings further reiterated that "The legal position of the occupants of Kibera appears to be that they are tenants at will of the Crown and the tenancy is liable to termination by the Commissioner of Lands. On the other hand we cannot agree that they have no rights in equity. We consider that Government had a clear duty to these ex-askaris either to repatriate them or to find accommodation for them... In our judgment they ought not to be removed without receiving suitable land elsewhere and compensation for disturbance, and we consider that a similar obligation exists in respect of their widows, sons who are already householders at Kibera."¹⁵⁶

From the finding given by the Carter Commission, it is therefore not prudent for Nubians to feel that this land rightfully belonged to them and should therefore be recognized as their ancestral land.¹⁵⁷ The land tenure was never given to them but as former servants of the British and holders of Kibera, the land rightfully belongs to them.

Although Kibera represents only a fraction of the population of Nubians in Kenya, Nubians refer to Kibera as their ancestral land in Kenya as this is where the former British colony permitted them to live.¹⁵⁸ Without separating the Nubians in Kibera from the rest of the

¹⁵⁵ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 7

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Parsons, T, 'Kibera is our blood: The Sudanese military legacy in Nairobi's Kibera location, 1902-1968', *The International Journal of African Historical Studies*, Vol 30, No 1, (1997) pp. 88

population in Kenya, Nubians can be seen to live as far as Mazeras in Mombasa and Bondo. Although the exact numbers of Nubians is not known, Nubians who settled across the various areas in Kenya have been known to inter-marry with other ethnic communities. However, the Nubian culture and Islamic faith being the dominant one, most of the other ethnic communities who have inter-married with the Nubians have been indoctrinated into Nubian culture, dress and religious belief.¹⁵⁹ in Kenya is not known due to the fact that there was never a census¹⁶⁰ which counted Nubians as part of the ethnic communities in Kenya, Nubians can be seen to live as far as Eldama Ravine, Nyanza, Kisumu, Western Province, Meru, Isiolo, Busia since their arrival in Kenya in the early 1900s.¹⁶¹ During the first census in 1969 after Kenya received independence from the British, Nubians were not regarded as a tribe in Kenya. Instead they were classified under "others" which included Indians and Somalis. Thus even as the Nubian grievances started to emerge when the new Kenyan Government of Jomo Kenyatta was in power, there was a unifying factor between all the Nubians in Kenya; Kenyan Nubians wanted to be recognized as a 3rd ethnic community in Kenya and they wanted title deeds to Kibera. Nubians felt that they had fought for the independence of Kenya by giving refuge to the Mau Mau fighters who at some point received refuge in the vast forest of Kibera.¹⁶²

3.3 Nubians in the post-independence Kenya

Kenya received its independence in 1963 which marked the emergence of a new indigenous government of Jomo Kenyatta. Nubians during and after independence were

¹⁵⁹ Interview conducted with Hussein Ali, September 2011, Kibera.

¹⁶⁰ During the first census of 1969, Nubians were grouped under "others". Nubians have not been fully recognized and gazetted as part of the 43 tribes in Kenya. For as long as they are not being recognized as Kenyan citizens, the census body cannot record their population numbers.

¹⁶¹ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06. 17 May 2010, pp. 5

¹⁶² Interview conducted with Haji Yusuf Abdalla. Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

addressed by the government as “aliens” who did not belong in Kenya.¹⁶³ The government strongly felt that Kibera was not their ancestral homeland and that they were squatters on government land.¹⁶⁴ According to one witness recount, when the British were handing over power to the Kenyan Government, they made it clear that the plight of Nubians would be addressed by the new Government of Jomo Kenyatta.¹⁶⁵ As seen, this was not the case instead the government used propaganda, malice and in some instances violence to forcibly take Nubian property in Kibera and ensure that Nubians were not considered Kenyan citizens.¹⁶⁶

Looking at the period before independence, when the Kenyan representatives including Tom Mboya, Martin Shikuku, Ronald Ngala and Jomo Kenyatta had gone to Lancaster House in the United Kingdom to draft the new constitution of Kenya, representatives from the Nubian community had pursued the politicians to help address their citizenship and land rights to Kibera in the new constitution.¹⁶⁷ During this time, the Nubians had wanted the soon-to-be first independence Government of Kenya to recognize them as citizens of Kenya and also to recognize Kibera as their ancestral homeland given to them by the British. Nubians were short changed by the new Government. The Nubian community did not receive acknowledgment in the new constitution of Kenya. According to one Nubian, Tom Mboya who was vocal during the drafting of the new constitution assured Nubians that they were Africans and thus they did not need to worry about recognition by the Government in writing.¹⁶⁸

¹⁶³ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

¹⁶⁴ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 8

¹⁶⁵ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

¹⁶⁶ Ibid

¹⁶⁷ Ibid

¹⁶⁸ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

The period after independence witnessed various counts of marginalization, neglect of their human rights and discrimination against Nubians in especially Kibera. During Jomo Kenyatta's reign in power, Nubians were caught up in a vicious cycle where the Government did not recognize them as citizens and instead forcibly grabbed their land in Kibera. From the 4.197 acres of land that was allocated to Nubians, the portion of land deteriorated as the Government continued in its efforts to grab land away from the Nubians to create room for metropolitan estates.¹⁶⁹ Many Nubians became homeless as the Government grabbed their land in prime locations and slowly maneuvered the community into the central part of Kibera which was viewed as the lower side of Kibera. According to one witness recount, the Kenyan Government used to forcibly evict them out of their property and Nubians were not offered cash reimbursements for the land taken from them.¹⁷⁰ The government also used the tactic of offering, lower grade municipal housing that had been built in different parts of Kibera as part of the Government solution to settling the community. These municipal housing in Kibera were not free and the priorities had not been given to Nubians.¹⁷¹ Nubians were only given access to a small portion of the new municipal estates on sale. The Nubians who could afford it were able to pay the down payment on the house and eventually settled the mortgage through monthly payments.¹⁷² Nubians during the Kenyatta and Moi era of government felt that the Government had intentionally ignored their plea to their ancestral homes. According to one report, the

¹⁶⁹ Interview conducted with Zeinab Rehan, September 2011, Karanja-Kibera

¹⁷⁰ Interview conducted with Khaltouma Ali, September 2011, Karanja-Kibera

¹⁷¹ Interview conducted with Zeinab Rehan, September 2011, Karanja-Kibera

¹⁷² Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 20

Government to date still fails to recognize Nubians as citizens. The report maintains that any Nubian who arrived in Kenya after 1945 are not citizens of Kenya.¹⁷³

It was important to note that during the post-independence period, Kibera was not only occupied by Nubians. According to one witness recollection, “Nubians welcomed the other ethnic communities into Kibera to live with them. However, the continued government marginalization of Nubians, made them experience a lot of opposition from other ethnic communities in Kibera. Neighbouring ethnic communities began conflicting with Nubian property owners by also claiming that the land belonged to them and that Nubians were not Kenyan citizens.”¹⁷⁴

By the early 1980s under the Moi era of government, the situation took on a worse toll. By then, a lot of the Kibera land had been grabbed by the government to make room for emerging metropolitan estates. Nubians were squeezed and centralized around the Makina area of Kibera. This was done intentionally by the government so as to reduce their domination and control over Kibera.¹⁷⁵ Kibera no longer belonged to the Nubians as other ethnic communities had taken over most of the once owned Nubian area.¹⁷⁶ The elders in the Nubian community tried to address these concerns with the administrative government of Moi on a number of occasions but none of their concerns were addressed.¹⁷⁷ By then, the land issue had become an important part in the marginalization of Nubians. Nubians now felt like they were minorities in their ancestral land.

¹⁷³ As seen in *The Nubian Community in Kenya v. Kenya*, Government Response to African Commission Comm. No. 317/2006. This was reviewed in Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/2006, 17 May 2010, pp. 9

¹⁷⁴ Interview conducted with Zeinab Rehan, September 2011, Karanja-Kibera

¹⁷⁵ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 21-24

¹⁷⁶ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

¹⁷⁷ Ibid

3.4. Present grievances

3.4.1 Identification and citizenship of Nubians

All Nubians should be entitled to Kenyan citizenship by virtue of the constitution in Kenya. Under section 89 of the constitution it states that: "Every person born in Kenya after 11th December 1963 shall become a citizen of Kenya if at the date of his birth one of his parents is a citizen of Kenya; except that a person shall not become a citizen of Kenya by virtue of this section if at the date of his birth – a) his father possesses immunity from suit and legal process as is accorded to the envoy of a foreign state accredited to Kenya; or b) his father is a citizen of a country with which Kenya is at war and the birth occurs in a place then under occupation by that country."¹⁷⁸

In essence, all Nubians are entitled to citizenship by virtue of this law. However, the government has failed to recognize them as citizens. As a method to dishearten Nubians in their application of citizenship, the government uses rigorous, discriminatory measures for granting citizenship to Nubians.¹⁷⁹ This is done through the vetting process. Nubians are the only non-border¹⁸⁰ ethnic community in Kenya that has to go through a complex, humiliating process of vetting before identification (ID) cards and passports are issued. The vetting process is a tedious process that requires all Nubians to oblige and undergo before getting national identification cards and passports.¹⁸¹ This process will require that Nubians produce supporting documents for, "Kenyan nationality, such as their grand-parents' identification documents, which other Kenyans do not have to provide. Unlike other Kenyans, they must be questioned by the "vetting

¹⁷⁸ The Constitution of Kenya, 1963 (repealed), (the National Council for Law Reporting: Nairobi) Revised Edition 2009 (2008)

¹⁷⁹ Ibid

¹⁷⁹ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 14

¹⁸⁰ Ibid, pp. 4

¹⁸¹ Ibid

committee” and given their approval. Nubians must also visit the Magistrates’ Court in order to swear an affidavit in support of their claim and must pay a fee to the Court.”¹⁸²

The vetting process hinders their recognition as citizens because it hampers the process by which Nubians can access their basic fundamental rights.¹⁸³ Although this vetting process also applies to Arabs in coast province as well as Kenyan Somalis, Nubians are the only non-border ethnic group subjected to this. Government of Kenya has supported the vetting process by claiming that this will determine whether they are rightful citizens of Kenya.¹⁸⁴ However, for a community that has lived in Kenya since pre First World War era, it is unfair to subject Nubians to this process.

From previous witness recount, the present Government has failed to process the documentation of Nubians in the same pace as all other citizens. Two examples can be used to illustrate this: One from a Nubian who was born and bred in Isiolo. When he applied for his national ID card and went through the vetting process, he had to wait for two years until his national ID card was issued. Luckily he was able to apply for university admission using his waiting card. The vetting process in this case still applied to prove that he was a Kenyan citizen.¹⁸⁵ A second example comes from a Nubian youth born and bred in Busia. During his national ID card application process, the district administration had failed to recognize Nubians as a tribe and instead, he was classified as “others”.¹⁸⁶

The vetting process of identification ensures that Nubians obtain national identification cards and passport as these are essential documents needed for everyday life in

¹⁸² Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 30

¹⁸³ Ibid

¹⁸⁴ Ibid

¹⁸⁵ Interview conducted with Dafalla Kamal Zubair, September 2011, Karanja- Kibera,

¹⁸⁶ Interview conducted with Rashid Omar, September 2011, Karanja--Kibera,

Kenya. Without these documents an adult Nubian who is above 18 years cannot get access to education, employment opportunities and in most cases they experience difficulties in access to health care, equal opportunities as given to all Kenyans and in some cases they are not able to set up their personal businesses as they cannot access personal loans. The Kenyan government in the past has failed to grant this vital national documentation to Nubians. From some examples provided by Nubians, one Nubian mother stated “She applied for national ID cards for her two sons last year, till to date the national identification cards have not been processed in Kibera.”¹⁸⁷

The failure of the Government to promptly provide Nubians with these vital documents has hampered their opportunities to education and employment. In a report done by the Kenya National Commission on Human Rights (KNCHR), the vetting process can be seen as “a requirement without any legal or official basis for the registration of applicants resident in urban settings and border districts.”¹⁸⁸ This process is a tiresome, irrelevant process which has no legal basis. This process is unfair to the Nubians and their sense of nationality as Kenyans. The vetting process makes “Nubians feel like slaves in their own homes.”¹⁸⁹ They are denied basic human rights as governed in not only the constitution of Kenya but in international laws touching on human rights. Nubians are further denied access to essential services such as education, health care, employment, right to vote and right to travel. As a result of this, a big portion of Nubians are living in utmost poverty and are segregated from society. Looking at Kibera for example, most Nubians rent out their properties to tenants who provide them with a source of income¹⁹⁰. However without the essential access to for example, passports and national identification cards,

¹⁸⁷ Majority of the youth population today have undergone this tedious vetting process however the Government has been seen to intentionally delay the process of providing the national Id cards.

¹⁸⁸ Kenya National Commission on Human Rights, *An Identity Crisis: A Study on the Issuance of National Identity Cards* (2007)

¹⁸⁹ Interview conducted with Fatma Mahmoud, September 2011, Olympic- Kibera,

¹⁹⁰ Interview conducted with Khaltouma Ali, September 2011, Kibera

Nubians have failed to apply to educational opportunities, apply for loans from banks that can help them run their businesses and at times even health care is restricted to providing identification cards.¹⁹¹ According to one witness interview, she feels that Nubians are living from hand to mouth and in all regard the Kenyan Government is to be blamed for this state of affairs.¹⁹²

3.4. 2 *Ancestral land*

Failure to recognize Nubians as Kenyan citizens is just one of the hindrances to the progress and address of Nubian issues. Without granting Nubians citizenship and the tenure of land to Kibera, Nubians cannot be recognized and protected as a minority group. Nubians have in the last four decades been seeking recognition and title deeds to Kibera. The land grievances of Nubians can be blamed from the time the new independent government came into power.¹⁹³ The ancestral land debate has been a topic that has been ignored by the various successive administrative governments. Nubian ancestral land from experiences dating as far back as post-independence Kenya, were forcibly taken and made into government property.¹⁹⁴ The Government has been at the centre of this mess. During Kenyatta's era, Nubian land in various parts of Kibera was forcibly and in some cases violently taken from them. Nubians were not even compensated by the government.¹⁹⁵ Whereas previously, each Nubian family owned about 5 acres of land in Kibera, this land was snatched from them and Nubians had to find new plots within Kibera which were smaller in size. As one elder recalls, Nubians in the late 1960s had previously been able to herd cattle and even have portions of the land for farming in Kibera. By

¹⁹¹ Interview conducted with Khaltouma Ali, September 2011, Kibera

¹⁹² Ibid

¹⁹³ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 44-46

¹⁹⁴ Ibid

¹⁹⁵ Interview conducted with Amani Salim, September 2011, Karanja-Kibera.

the time the new independent Government had set its eyes on Kibera, Nubian plots were grabbed and subdivided thus Nubians were only left with a small portion which could only accommodate their small family.¹⁹⁶ The lack of farming and grazing land for Nubians posed a threat to not only their food security but also to their daily source of income and survival. During the time, many Nubians who were forced out of their property were forced to move in with relatives as they were left homeless when the government eviction process begun.¹⁹⁷

This government eviction process was seen as a move to create residential estates which today can be seen around the Kibera area. Big portions of the land today that was grabbed from the 4,197 acres allocated to Nubians can be seen as part of the prime land and property areas of Nairobi-Kibera area. Even as the Government was grabbing this land from Nubians, they were not offered any solution and nor reimbursement by the Kenyan Government.

During the 1970s, the government had by then started a slum upgrading program which aimed at building cheaper municipal housing to replace the mud houses of inhabitants in Kibera. The slum upgrading program offered a temporary solution to Nubians who could afford to purchase the municipal housing.¹⁹⁸ To date portions of the land that once belonged to Nubians and that were forcibly taken from them can be seen across Kibera area. For example, Lumley area was grabbed to make room for Ajani estate; Nubian houses near Kenya Science and Technology were grabbed to make room to Jamhuri estate; Moi Girls secondary school in Woodley was forcibly grabbed from Nubians during Moi's tenure to make room for the school

¹⁹⁶ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 44-46

¹⁹⁷ Interview conducted with Khaltouma Ali, September 2011, Karanja-Kibera

¹⁹⁸ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 16

property.¹⁹⁹ The clearance of Nubian plots continued on in the late 1970s to make room for the growing estates being built across the various areas once inhabited by Nubians.

Even as the government set up municipal housing in some areas of Kibera, priority was not given to Nubians. The municipal housing was in favour of those who could afford to purchase the houses and pay the mortgage.²⁰⁰ Nubians were not extended any special privilege. In many instances, some Nubians were unable to afford these properties as they were expensive. For example according to the Open Society Justice Initiative report, in one particular instance, only 30 units were assigned to Nubians from 300 new homes that the government had built. The 30 houses allocated to Nubians were single rooms irregardless of how many members a family had. Whereas, the other 300 houses sold to other individuals were two-bedrooms with toilets and bigger in size.²⁰¹ The government showed open discrimination against Nubians and in return, the Nubians felt these levels of discrimination and marginalization from the government.²⁰² Without security of tenure given to Nubians and their property, Nubians risk eviction at any time and in essence this makes Nubians to live cautiously among other ethnic communities and in the present vulnerable environment.

Nubians feel that they continue to live like “aliens” in a country they call home.²⁰³ The sad state of affairs to which Nubians live in Kibera has in many counts sparked formal complaints logged by the community through the Kenyan Nubian Council of elders. The Kenyan Nubian Council of elders has on many counts approached the administrative Governments of Kenyatta, Moi and now President Kibaki’s present Government. The Council has even

¹⁹⁹ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 16

²⁰⁰ Ibid

²⁰¹ Ibid, pp. 18

²⁰² Interview conducted with Zeinab Rehan, September 2011, Karanja-Kibera

²⁰³ Interview conducted with Amani Salim, September 2011, Karanja-Kibera

approached the Ministry of Lands to try and seek security of tenure however the Ministry has failed to address their concerns on all occasions.²⁰⁴

According to the Governments Lands Acts, land can only be issued under the President's authorization and the Commissioner of lands who will issue the title deeds.²⁰⁵ To date, Nubians have never been given title deeds to Kibera; this issue has been outstanding from pre-colonial times when Nubians were granted livelihood in Kibera however the British had not given them title deeds to the land. The Government has done little if anything to address their concerns. The refusal of the Kenyan Government in recognizing Nubian claim to citizenship and ancestral land are closely linked together. Without these key two areas being recognized, Nubian community is living in marginalization with basic rights such as access to water, health care and electricity being restricted to them. Kibera to date from reports done by organizations such as the United Nations has proved to us that Kibera inhibits one of the worst living conditions for human beings in Kenya. 60% of the population is unemployed whereas only as small portion of the population earn basic income which still falls below the Kenya Growth domestic profit (GDP).²⁰⁶ The Nubian population is living in poverty and this can by all means be blamed to their lack of access to citizenship, education, basic human rights and proper living conditions as stipulated in the constitution of Kenya.

Furthermore, Nubian education is gradually deteriorating. Nubians had started a school in Kibera to educate not only Nubians but also children from neighbouring communities. As many members of the community were living in poverty, Nubians have been forced to subject their

²⁰⁴ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

²⁰⁵ The Government Lands Act. Part II – Administration, Special Powers of the President, Section 3(a)

²⁰⁶ Nubians are living in advent poverty. Based on a report conducted by: Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 21

children to poor public education systems which are at reach within Kibera.²⁰⁷ During the post-election violence, the school was targeted and damaged in the ethnic violence and since then a new administration from one of the major ethnic communities took over. The complaints facing Nubians is that the school was built by them but this was forcibly taken from them. Poverty does not allow them to enroll their children in better, private schools away from Kibera. Furthermore, the present situation can be seen to be affecting the Nubian youths. Elderly Nubians have complained of an emerging group of Nubian youth born out of poverty and the rising cases of primary school drop outs. A rising population is now growing in poverty and without access to education; this leaves no room for growth and progress of Nubians.

From the 4,197 acres that were given to the Nubians, currently there is only 780 acres which till to date has not been officially allocated to Nubians as their ancestral land. Under President Kibaki's current rule, the Nubian Council of Elders was able to approach the president in 2007, during a public meeting at the State House. The Nubian Council of Elders was able to address their concerns over their ancestral land in Kibera. President Kibaki at the meeting promised Nubians a collective title deed for 780 acres of Kibera, vowing that this title deed will be issued within three days.²⁰⁸ The President may have the power under the Government Lands Act²⁰⁹ to authorize over all unoccupied land in Kenya however the promise made to Nubians in 2007 has yet to be fulfilled.²¹⁰

²⁰⁷ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 20-21

²⁰⁸ Nubian Council of Elders had approached the President on grounds of pleading their case for: citizenship, ancestral land and recognition as a 43rd ethnic community in Kenya.

²⁰⁹ Chapter 280 of Kenyan Laws, the Government Lands Act. Part II – Administration, Special Powers of the President, Section 3(a)

²¹⁰ The evidence is seen in the letter written by the Kenyan Nubian Council of Elders to the Prime Minister and Member of Parliament for Langata Constituency Nairobi, 24 August 2009, recalling that on 19 November 2007, the Secretary of the Cabinet and Permanent Secretary in the Office of the President wrote to the Permanent Secretary of the Ministry of Lands with a Presidential directive that the Nubian community should be allocated 780 acres of land

Kibera is at the centre of land conflicts between Nubians and other ethnic communities who are also claiming ownership to the land. For example, during the post-election violence in 2007/2008, the Nubian community faced a lot of opposition from the majority ethnic communities of Luo, Kisii and Kikuyu.²¹¹ Ancestral land grievances are the biggest issue facing Nubians today. Without the recognition of their land in Kibera, Nubians will have no place to call home.²¹² The Government has failed to recognize the dire need to address their land issue. Kibera has become a breeding ground for politicians to serve their personal agendas with majority ethnic communities.

The 1992 political clashes in Kenya was a second example that illustrated the clashes between Nubians and other ethnic communities. Nubian landlords faced a lot of opposition and violence from tenants coming from the Luo community. According to Yusuf Abdalla, some tenants had refused to pay their rent to Nubian landlords and even in some cases a number of Nubians lost their property to squatters who claimed ownership over their property and accused Nubians of being foreigners in Kenya.²¹³ Nubians are peaceful people however in times of conflict with other ethnic communities over land their own in Kibera, the community has been forced to adjust to harsh, defensive tactics to deal with opposing ethnic communities.

4.3 Statelessness and Recognition as the 43rd ethnic community in Kenya

The Nubian community is neither accepted by the Kenyan Government as Kenyan citizens nor are they recognized by their country of origin, Sudan. In this regard Nubians are

with a title deed as soon as possible. As highlighted in: Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 5

²¹¹ Interview conducted with Mustafa Mohammed Kamseer, September 2011, Kibera

²¹² Interview conducted with Khaltouma Ali, September 2011, Kibera

²¹³ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

regarded as *de facto* stateless people.²¹⁴ Nationality under the Universal Declaration of Human rights Article 15 (1) states that “everyone has the right to nationality”. Under Article 15 (2) it states “(n) o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”²¹⁵ Nationality is a basic human right to which every human being is entitled to. From an international perspective of how national states can withdraw the nationality of a person, this can be seen to be violating the Universal Declaration of Human rights. Nubians do not get easy access to identification cards, passports, death and birth certificate provisions like all Kenyans. According to Walker, “the ultimate cause of statelessness is grounded on the principle of sovereignty and arises out of conflict of nationality laws.”²¹⁶ On a stateless individual, the repurcation of government actions on their nationality does take a toll on them. According to Walker, the evil of statelessness can be viewed from two perspectives, “1) his treatment by the country wherein he resides and 2) his inability to present or have presented on his behalf a claim for a wrong suffered in or at the hands of another territorial community.”²¹⁷ Nubians are continuously denied basic human right such as freedom of movement, freedom of speech and basic living conditions which all other Kenyans should enjoy. Nubians have been pushing for their recognition as citizens of Kenya and not to remain as a stateless community as they are currently viewed.

Kibera land issue is still one of the biggest issues between Nubians and the Kenyan Government.²¹⁸ The continued failure by the administrative government to recognize them as citizens and also owners of Kibera has taken on a big toll on Nubians and their perception and

²¹⁴ Adam. H. A., ‘*The Nubians and Statelessness: History in Defining Modern Lives*,’ pp. 6

²¹⁵ Walker, J. D, ‘Statelessness: Violation or Conduit for Violation of Human Rights?’ *Human Rights Quarterly*, Vol 3, No. 1, (1981) pp. 106

²¹⁶ Ibid. pp. 107

²¹⁷ Ibid. pp. 108

²¹⁸ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

interaction with the rest of the populations. Nubians have for a long time been engaging with the Kenyan Government and Ministry of immigration and Ministry of planning to include the community as the 43rd ethnic community in Kenya. From a Nubian Council elder's witness recount, the Government under Otieno Kajwang's ministry has recognized them as 43rd ethnic community. Nubians were given a formal letter recognizing them.²¹⁹ However the notice of Nubians being recognized as the 43rd ethnic community of Kenya has not been officially gazetted in Government press. Nubians are experiencing opposition from a section of Government who are not willing to grant them this recognition as it will affect the outcome of Kibera land dispute. Without this gazette notice, Nubians will still be regarded as "aliens" and "third class citizens."

3.4.4 Agenda in the African Court

The Nubian community is facing a lot of backlash from the mainstream society and especially from the current Government. Thus to forward and seek address to their Nubian agenda as a minority group, the Kenya Nubian Council of elders chose to take their complaints to a higher level i.e. the African Court which provides protection to minorities under the African Union Charter.

In reference to Article 5 (d) iii of the African Charter, it states that: "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice; (b) The right to security of person and

²¹⁹ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service; (d) Other civil rights, in particular: (i) The right to freedom of movement and residence within the border of the State; (iii) The right to nationality; (v) The right to own property alone as well as in association with others; (vi) The right to inherit; (e) Economic, social and cultural rights, in particular: (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; (ii) The right to form and join trade unions; (iii) The right to housing; (iv) The right to public health, medical care, social security (iv) The right to public health, medical care, social security and social services; (v) The right to education and training.”²²⁰

The government has in many ways failed to abide by the Covenant’s standards stipulated in the African Charter. The Nubian Council of elders took their complaints to the African Charter in 2008 with the need to address their grievances of “Lack of identification as citizens of Kenya: Nubians were subjected to marginalization and vetting process that proved to be a rigorous, long process. Many Nubians were denied access to basic human rights that should have been extended to them as Kenyans. Secondly, addressing the issue on statelessness was also important. Nubians wanted the African Charter to recognize them as citizens of Kenya who deserve equal opportunities as all other Kenyans. Thirdly, ownership to their ancestral land of Kibera. Nubians wanted title deeds to be issued to them to prove they are owners of Kibera. Fourthly, the need for recognition by the Kenyan government as a 43rd ethnic community in Kenya: Nubians had

²²⁰ African Charter on Human and Peoples Rights (1981)

logged their request since independence when they wanted to be recognized as the 43rd ethnic community in Kenya. This will give Nubians equal rights and privileges as extended to other ethnic communities.”²²¹

The African court is viewed as a more effective legal system of addressing the concerns of Nubians. The African Charter entitles individuals to the enjoyment of rights and freedoms as guaranteed in Article 2 of the Charter.²²² In addition, the Charter gives emphasis on equality of every individual right before the law. Thus the Kenyan law cannot refute the laws governed in the Charter. Nubians believe that the present Government cannot be able to address their concerns as minorities thus even as Nubian concerns have been logged in the African court since 2008, they believe the superiority and effective nature of the international laws will be able to pass court rulings that will be in their favour and not the Kenyan government’s favour.

Even as the Nubians anticipate the outcome and court ruling of the African Court, there is an emergence of a new issue that can have the ability to escalate conflict in Kibera. According to Haji Yusuf, “from the 780 acres that President Kibaki has promised to grant to the Nubians, a new debate on the land issue is on how to divide the 780 acres. The government prefers the 780 acres is shared with the other ethnic communities residing in Kibera i.e. other ethnic communities are given 300 acres and the remaining portion is to be divided among the Nubian population. On the contrary, Nubians want to maintain the whole portion 780 acres of land as their own and from there they can work out how this can be distributed to other ethnic

²²¹ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

²²² Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 55-60

communities in Kibera through rental systems.²²³ However until the government recognizes and issues the title deed of Kibera to Nubians, this issue over land distribution will remain pending.

3.5 Conclusion

The issue here is that the past and present secessions of Governments have intentionally ignored the Nubian situation. Ignoring the toll to which this group of minorities is being affected by marginalization, discrimination and labelling as “aliens”. The Government has for a long time been acting on their issues on ground of false promises. In the words of one Nubian youth, “Nubians are being treated like third class citizens”. The Government has failed to recognize them and Nubians to date are still being treated like foreign “aliens”. To date, there are still a number of issues that need to be addressed. Firstly, access to Kenya nationality and national documentation. Nubians are entitled to nationality under the Kenya law however; the Government has failed to recognize them as citizens. The classification of Nubians as “aliens” is still an issue in as far as citizenship. Nubians are currently living as stateless people without any protection from the state. They do not enjoy the rights and privileges extended to all Kenyans as stipulated in the national law of the country. Secondly, the title deeds to their ancestral home of Kibera, this has remained pending for a long time and Nubians still continue to log their complaints on both the national and international law arenas.

²²³ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, September 2011, Kibera.

CHAPTER FOUR

4.0 UNDERSTANDING THE PLIGHT OF NUBIANS

4.1 Introduction

The previous chapter discussed the history and present situation of Nubians, this chapter will present an in depth analysis on the situation of Nubians. On the basis of the data collected from the Kenyan Nubians case study, it proves that there is a dire need for the Nubian situation to be recognized and addressed by the Government of Kenya. The Kenyan Government is in many ways blamed for the continued problem of Nubians, however, the challenge now is on how Nubians as a minority group can have their rights and privileges given to them without causing discontent among other ethnic communities. The continued occurrence of minority grievances has attracted a lot of attention from not only the state level but also on an international platform. Nubians in Kenya have had their grievances ignored by successive Governments since post-independence. This ongoing structural violence on Nubians has the capability of escalating into violent actions if Nubians are triggered. The Government's inaction and reluctance has in some way proved to be a focal point for Nubians to be triggered into violent actions over their ancestral home. This chapter critically analyses the data collected on Nubians, it reviews the position of the literature, theoretical assumptions and the historical tactics involved. This analysis will be important in testing the hypothetical assumptions.

4.2 Ethnicity as a cause of conflict

Ethnic identity is an important phenomenon that can be used to understand the extent to which social conflict and marginalization of Nubians has been contributed to ethnicity. According to Horowitz, ethnic identity by its nature 'creates feelings of loyalty, interest, and

fears of extinction.’²²⁴ According to a seventh generation Nubian, “Nubians feel a sense of belonging in Kenya. Their forefathers were brought here by the British colonial masters but they call this home. Their families have been born and bred in Kenya. Kenya is where we call home.”²²⁵ The ethnicity of Nubians has been used to classify them as a minority group. This is because, based on their ethnicity, the Kenyan Government has classified them as an “others” community. They are not being recognized as a Kenya ethnic community based on the fact that their origin lies in Sudan and that their ethnicity by naturalization and birth cannot be used to classify them as Kenya.²²⁶ Nubians have on different occasions felt that the government has failed to recognize their community as a Kenyan ethnic community. They feel that they are “third class citizens” in a place they call home.²²⁷ The violations they have been facing have in many ways been able to play with not only their psychological state but also their physical state. According to one Nubian witness, “the government has completely failed to recognize Nubians as Kenyans. This has in many ways led to the outburst of Nubian generations who feel that they have to fight for their rights as Kenya citizens and rights to their ancestral land of Kibera. Nubians are now clinging to their sense of belonging, culture and ethnicity as a way to protect and remind them of who they are.”²²⁸

Ethnicity has played centre stage in all if not most of the issues facing Nubians. Their ethnic community background can be traced back on their Sudanese roots in Nuba Mountain.

²²⁹ Nubians have been in Kenya for over a century now. Their claim to being Kenyan citizens has solid ground on the basis of their naturalization and birth in the Kenyan society. Nubians call

²²⁴ As quoted in Saideman, S., ‘Discrimination in International Relations: Analyzing External Support for Ethnic Groups’, *Journal of Peace Research*, vol. 39, no. 1, 2002, pp. 23

²²⁵ Interview conducted with Fatma Adam, September 2011, Karanja- Nairobi

²²⁶ Interview conducted with Dafalla Kamal Zubeir, September 2011, Kibera,

²²⁷ Ibid.

²²⁸ Interview conducted with Mustafa Mohammed Kamseer, September 2011, Kibera,

²²⁹ Parsons, T, ‘Kibera is our blood: The Sudanese military legacy in Nairobi’s Kibera location, 1902-1968’, *The International Journal of African Historical Studies*, Vol 30, No 1, (1997) pp. 87-88

Kenya home as the Government of Sudan does not recognize them as citizens. The Nubian claim over citizenship and access to ancestral land can be seen as a structural issue that the Government has failed to address on various counts. According to Second Vice Chairman at the Nubian Council of elders, “the government has on various counts failed to recognize their written plea for citizenship. As representatives of the Nubian community as a whole, we have presented our case in front of three successive governments. None of which have been able to address our concerns for land ownership of Kibera and representative as the 43rd ethnic community in Kenya. This present situation has led to many of us believing that the government has intentionally refused to recognize us with an aim of completely decapitating our rights and needs as Kenyan citizens. To that effect, we chose to take our case to the African Court in Ghana which we see as a more effective legal system that can be able to deal with our grievances in Kenya.”²³⁰

Based on the international laws governing protection of minorities, the Kenyan Government has in many ways failed to recognize Nubian ethnicity. The lack of recognition has led to many Nubians feeling disloyal and disinterested in the way the government has handled their issues. Based on one elderly witness recount, “the government has failed to recognize us and thus we live only for our daily bread and survival of our families. Nubians continuously face discrimination from the Kenyan government but after so many years of fighting for our rights, it seems prudent for us to continue fighting.”²³¹

According to Article 3 (1) of the African Charter, “every individual shall be equal before the law”.²³² Nubians have experienced continuous violence being orchestrated to them by the

²³⁰ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, Olympic Kibera, September 2011

²³¹ Interview conducted with Zeinab Rehan, Karanja-Nairobi, September 2011

²³² African Charter on Human and Peoples Rights (1981)

successive Kenyan governments. These forms of violence have taken the form of both threats of violence and structural violence. Dating as far back as the post-independence period, Nubian land in Kibera was forcefully grabbed from Nubian families by the then Kenyatta administration who were making room for the growth of estates in Nairobi.²³³ Furthermore, even as the Nubian community had been promised recognition by political leaders such as Tom Mboya in the period adding up to independence and the drafting of the new constitution,²³⁴ the failure of the government to recognize them as citizens and ancestral owners of Kibera was the beginning of the long structural violence battle with the Kenyan government. The ethnicity of Nubians can be seen as an important trait of what they consider their sense of belonging and loyalty to society. Without this ethnicity or recognition by the general public, the Nubian community stands a risk of falling back from society completely and being regarded as a non-existing ethnic community. One example a Nubian elder emphasized was that in Uganda for example, the Nubian community have been recognized in the constitution and they have been given their rightful place in the Ugandan society as part of the ethnic communities that make up Uganda. "Nubians in Uganda do not feel what the Nubians in Kenya are feeling. They belong and they are recognized whereas, we have been fighting for our rights for over five decades now and yet we are not being recognized as part of the Kenyan community. This can in many ways be blamed on the failure of the Kenyan Government to recognize us as citizens."²³⁵

Based on the theoretical framework of structural violence, the grievances facing Nubians can in many ways be blamed on the structures put in place by the government to avoid giving solutions to any Nubian grievances. As one Nubian stated, when Kenya was receiving

²³³ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, Olympic Kibera, September 2011

²³⁴ Ibid

²³⁵ Interview conducted with Hussein Mahmoud, Kibera, September 2011

independence, the Nubian community had approached the soon-to-be first Kenyan Government with an aim to seek recognition as an ethnic community however Nubians were never recognized in the 1963 constitution.²³⁶ The 1963 first constitution would have been the best placed time to give recognition to Nubians. However, the then government failed to do this and so even as other successive governments came in, the inherited Nubian problem was present continuously but none of the governments wanted to address this.²³⁷

According to Galtung, the longer a population feels deprived and feels their grievances have not been met; there are some chances that the structural violence can lead to actual violence. Nubians have tried approaching the government on countless times with an aim to find a redress to their problems. On the other hand, the government has been seen to intentionally avoid the Nubian issue with the intention to continue the structural violence already taking place.

According to the international law standards such the Universal Declaration of Human Rights (UDHR), all human beings deserve equal recognition and equal rights. Nubians as not only a minority group but as a small ethnic community in Kenya, they have been facing various forms of violations on their property, livelihood, citizenship and wellbeing.²³⁸ These violations have been orchestrated by the Kenyan Government's failure to recognize their ethnicity, culture and wellbeing as a community. This form of violence has in the past not only used threats to violence but also force to try and emphasize the government's position on them. According to one witness recollection, during the Moi era of government, Nubians had been forcefully evicted from their properties in Kibera with no reimbursement. The government then was making room

²³⁶ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, Olympic Kibera, September 2011

²³⁷ Ibid

²³⁸ Humphrey J. P., 'Universal Declaration on Human Rights', *International Journal*, Vol 4. No. 4 (Autumn, 1949), pp. 353-355

for the growing metropolitan estates which to date are for example, Ayani estate, Woodley estate and Olympic estate.²³⁹ According to another elderly Nubian woman's recollection, she had been forcefully evicted from her four acre property in Kibera to make room for government expansion. The government did not reimburse her for her property instead she was obliged to find new housing settlement and pay a down payment and take a mortgage on a new municipal housing in Karanja estate which she still lives in to date.²⁴⁰

Nubians as an ethnic community under threat can be seen to be uncertain of their future in Kenya. Based on the elderly communities' recollection, many of them seem to have accepted their fate as a fallen ethnic community that continues to face government abuses.²⁴¹ However out of the grievances facing Nubians their representation in the Nubian council of elders continue to fight for their rights and to fight for change as a minority group.

The continued threats or use of violence on Nubians can be a risk to the society as a whole. The government's failure to give them the Kibera title deed and recognize all Nubians as citizens can be seen as some of the indications and use of structural violence. As Galtung rightfully put it, "violence breeds violence".²⁴² The government continues to deny them recognition and in return the community continues to face marginalization as an ethnic community. This has the capabilities of leading to an outburst of violence if the community is triggered into it. Looking at past actions on the Nubian community, the major ethnic communities in Kibera for example have in the past used violence against the Nubian community to try and take over Nubian plots. Kibera has been used as a tool to orchestrate political motives

²³⁹ Interview conducted with Amani Salim, Karanja-Nairobi, September 2011

²⁴⁰ Interview conducted with Zeinab Rehan, Karanja-Nairobi, September 2011

²⁴¹ Ibid

²⁴² Galtung, J., 'Culture of Violence', *Journal of Peace Research*, Vol. 27, No. 3 (1990), pp. 295

uprising politicians.²⁴³ The government has declared they are the rightful owners of Kibera whereas the Nubian community in Kibera continues to claim ownership of the land. However as Kibera inhabits populations from the major ethnic communities, they have been able to orchestrate the structural violence being propagated by the government. Politicians in past rallies in Kibera have been seen to use derogative terms that have promoted discrimination and violence against Nubians.²⁴⁴ This breed of violence or threats to violence especially from the Luo ethnic community has been triggered by politicians and the Government's stance on Nubians. Nubians who are in many cases landlords in Kibera have had to use threat or force to protect their properties from destruction by other ethnic communities. In 2001 for example, the Nubian community were triggered into violence when major ethnic communities tried to forcefully evict them from their properties claiming the land does not belong to them.²⁴⁵

Nubians as a minority group are constantly living under threat from not only the government but from superior ethnic communities. Politicians in their quest to maintain votes in Kibera have triggered an immense ethnic divide between Nubians and the Luo community and Nubians and the rest of the ethnic communities.²⁴⁶ Nubians who have been earning their source of income from the plots they rent out to other communities are now facing a backlash from other communities. Nubians are being accused of owning plots that do not belong to them. They are constantly being harassed and called "aliens".²⁴⁷ To some extent, some members from the Nubian community have even lost their properties due to the continued threats and use of force by members from the Luo community.²⁴⁸ An example was witnessed during 2004 general

²⁴³ Interview conducted with Mustafa Muhammed, Olympic, September 2011

²⁴⁴ Interview conducted with Hussein Mahmoud, Kibera, September 2011

²⁴⁵ Ibid

²⁴⁶ Ibid

²⁴⁷ Interview conducted with Fatma Abdalla, Kibera, September 2011

²⁴⁸ Interview conducted with Mustafa Muhammed, Kibera, September 2011

elections: some ethnic communities threatened Nubians on various counts that they will be forcibly evicted out of Kibera. Nubians in retaliation to these threats posed by other ethnic communities have had to use force and threats of violence to protect their properties. According to one witness, the Nubian youth for example have been instrumental in protecting Nubian properties during periods of land clashes in Kibera.²⁴⁹ The reaction of Nubians can in many ways be seen as counteractions to the continued structural violence they are experiencing. Nubians have had to protect their livelihood. This was born out of fear of losing everything they own. The government has and is still claiming ownership of Kibera as government property however the Nubians have also been very persistent in their efforts to be recognized as Kenyan citizens and as sole owners of Kibera.

As an ethnic community, they are a small community in comparison to the other ethnic communities which live in Kibera. However, Nubians are proud of their culture, religion and heritage. They remain an inferior ethnic community but their solidarity on Kibera and their rights to citizenship remains. Based on Galtung's structural violence component, the violence being orchestrated against Nubians continues to deploy offensive, discriminatory measures against Nubians rights. One of the biggest causes of structural violence comes from the failure of the government to give land title deed to Kibera, this has been an ongoing battle for over four decades and it has in many ways strained the community's progress and determination as Kenya citizens. Nubian claim of Kibera as their ancestral land has rightful ground based on the agreement given during the British colonial era however the current government structure's failure to confirm this has led to a bout of structural violence which has no end.²⁵⁰ The Nubian community through their representative at the Nubian Council of elders continues to forward

²⁴⁹ Interview conducted with Amani Salim. Kibera, September 2011

²⁵⁰ Interview conducted with Hussein Mahmoud. Kibera, September 2011

their complaints to the different administrative successive governments. They continue their plea for recognition as a minority.²⁵¹ Despite the successive governments' reluctance to address their minority concerns, Nubians continue to fight for what they believe is their home and their rightful place in society.

4.3 Defining Nubian minorities from a structural violence perspective

Thornberry states that "ethnicity and perception of 'otherness' are distinctive bases of oppression and underprivileged."²⁵² Nubians exhibit traits that can be used to classify them as a minority group. Nubians can be defined based on their ethnicity and classification. Although definitions of minorities might vary in intensity and national laws of states, Nubians fall within this category of people. Among the majority population living in Kibera, Nubians are currently taking up about a third of the whole population. Whereas on a nationwide level, there may not be a documented population count of Nubians but in comparison to the major ethnic communities in Kenya, Nubians can be seen to belong to the smaller ethnic communities.²⁵³

Referring to the global definition on minorities it states "A group numerically inferior to the rest of the population of a state, and in a non-dominant position, whose members being nationals of the state-possess ethnic, religious or linguistic characteristics differing from those of

²⁵¹ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, Olympic Kibera, September 2011

²⁵² Thornberry .P., "An Unfinished Story of Minority Rights." In Anna Maria Biro and Petra Kovacs (eds). *Diversity in Action Local Public Management of Multiethnic Communities in Central and Eastern Europe*. (Budapest: LGI, 2001), pp. 51

²⁵³ Nubians have not been recognized as an ethnic community in Kenya. During the past census, they have been classified under "others" thus their exact numbers are not known. Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, Olympic Kibera, September 2011

the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religions and language."²⁵⁴

Nubians have a very strong sense of culture and belief. This is one of the unifying traits among the ethnic community. This sense of solidarity and unity when it comes to raising a collective voice against violations being orchestrated against them is what can in many ways classify them among the minority group population. Despite the ongoing discrimination by the Kenyan Government to deny Nubians citizenship, Nubians remain in solidarity of what they believe is their rightful homeland. The government has and is still refusing to recognize them as Kenyan citizens and as rightful owners to Kibera; this has in many ways distraught the minority group. Their sense of belonging to the Kenyan population is present however their solidarity and sense of culture and pride remains superior to them.²⁵⁵

On both the national and international levels, Nubians can be classified as a minority group from not only their ethnic and linguistic association but from the sense of them continuing to preserve their culture and ethnic beliefs. According to one elderly Nubian, Nubians hold a rich culture in society, even as they struggle to seek redress of their status as Kenyan citizens, they have been able to maintain their solidarity, rich cultural beliefs and religious beliefs to the point that their culture is what recognizes them for what they are.²⁵⁶ As a minority group, they hold a rich sense of solidarity and cultural beliefs, from both the national and international perspective, Nubians continue to hold a rich regard in their culture and its preservation which has deeply categorized them in the rank of minority group association. Their association as a minority group may not be based on their population numbers vis-à-vis the rest of the ethnic population but

²⁵⁴ Capotorti, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic minorities*, (New York: United Nations, 1991) para. 568; Makaloo, M. O, 'Kenya: Minorities, Indigenous Peoples and Ethnic Diversity' *Minority Rights Group International and Centre fir Minority Rights Development* (2005) pp. 7

²⁵⁵ Interview conducted with Mustafa Muhammed, Kibera, September 2011

²⁵⁶ *ibid*

there's can strictly be classified as grievances based on cultural, ethnic and religious beliefs. In the past for example, Nubians and their religious and cultural beliefs has been used discriminatory against them to marginalize them from the majority ethnic communities.²⁵⁷ During the 2007 post-election violence for example, one Nubian youth had mentioned that the Makina mosque in Kibera was among the first targets in the ethnic clashes and hatred against Nubians. Nubian youths had to use violence to protect the mosque from further distraction.²⁵⁸

Looking at the national law perspective, the constitution of Kenyans has failed to recognize the group as a minority group despite their presence of rich culture and ethnic beliefs. Based on the national laws of Kenya, the constitution may constitute that every Kenyan deserves equal rights and representation however the constitution does not have any provisions for protection of marginalized groups such as the Nubians. Whereas the international laws such as the African Charter and UDHR have provisions for the recognition of minorities groups, the constitution of Kenya does not have any provisions to the understanding and appreciation of minorities.²⁵⁹ This can in many ways be blamed on the government's reluctance to give minorities recognition; thus forming as a foundation for structural violence. Nubians are fighting for representation and identity as a rich cultural community. The continued violations on their cultural and religious beliefs continue to affect and inhibit psychological perceptions against the rest of the population and especially against the government. As one Nubian stated, "our children are growing up in a defensive environment where they know they have to constantly protect their beliefs and culture and aggressively mingle with society so that they are not classified as 'others'".²⁶⁰ Nubian youths today can be seen to be growing up in a very defensive environment

²⁵⁷ Ibid

²⁵⁸ Interview conducted with Rashid Ibrahim, Kibera, September 2011

²⁵⁹ The Constitution of Kenya, 2010 (the National Council for Law Reporting: Nairobi)

²⁶⁰ Interview conducted with Fatma Mahmoud, Kibera, September 2011

where they constantly feel they have to use threats of violence or at least violence to protect their culture and beliefs. According to one elder, during the 2008 post-election violence, Nubians youths in Kibera who had been threatened by major ethnic communities over a long period of time were finally led into violent action. The Nubian youths in the defence of protecting community property had been triggered into violence outburst in Toi market thus leading to its distraction.²⁶¹

Nubians are driven by the need for equitable resources and need for recognition by Kenya as a whole. Nubians feel that the government has failed to extend to them equal rights and recognition as given to all other citizens. They feel like third class citizens in a place they call home.²⁶² The failure of the government to extend an easy flowing process of getting national documentations such as National identification cards (ID), passport, and birth certificate has affected the perception of the community against the general population. According to a Nubian youth, Nubians have been subjected to tireless vetting process before they are given an identification card. This has been seen as a subjective process that is extended to them yet they feel they are Kenyans and do not require this process to recognize them as Kenyans.²⁶³ Nubian youth especially who require these documentation to apply for college education, apply for jobs and gain access to important livelihood resources have on a number of occasions been denied these documents.²⁶⁴ This is can viewed as just one of the forms of structural violence that the government is using against this minority group. As a minority group, they lack basic fundamental freedoms and this can be blamed on the structures that the government has intentional put in place to marginalize this community. The Government of Kenya is the sole

²⁶¹ Interview conducted with Mustafa Muhammed, Kibera, September 2011

²⁶² Interview conducted with Fatma Adam, Kibera, September 2011

²⁶³ Interview conducted with Dafalla Kamal Zubeir, Kibera, September 2011

²⁶⁴ Ibid

custodians in charge of putting up proper structures that will ensure all Kenyan citizens receive their fundamental freedoms and rights as stipulated on the Bill of rights. According to the Constitution of Kenya, all Kenyans deserve equal rights and privileges according to the bill of rights. However with the Nubian situation, as Nubians are yet to be classified and accepted as Kenyan citizens, the government has put in structures such as the vetting process for application of national ID cards documents and the constant denial to accept Nubians as citizens and owners of Kibera as part of the motives to restrain the minority group from equal access and privileges as stipulated in the constitution.²⁶⁵ These structures are a threat to Nubians and their survival and existence in society; the structures in this case can be defined as structural violence.²⁶⁶

Structural violence is not overt in nature however it ensures that Nubians are restrained from gaining access to basic rights and privileges. This is done through denying Nubians citizenship and ownership to Kibera; constantly harassing and forcibly taking Nubian property in Kibera as was seen during Moi and Kenyatta era²⁶⁷; denying Nubians access to proper health care, proper living conditions, education which in turn affects the productivity of the community. Structural violence against Nubians has manifested for a very long time. According to one witness, violations and marginalization of Nubians started during the post-independence period under the first Kenyan government. Nubians were forced out of their land and they were never recognized in the constitution of Kenya.²⁶⁸ The post-independence violations has formed the foundations for the growing structural violence proponents among the Nubian population, Nubians have inhibited this anger and disfavour towards Kenyan Government policies for

²⁶⁵ Interview conducted with Dafalla Kamal Zubeir, Kibera. September 2011

²⁶⁶ Johan Galtung developed this theory. This theory has been used in relation to how Nubians relate with the mainstream population. More readings on Structural violence can be seen in Galtung, J., 'Culture of Violence', *Journal of Peace Research*, Vol. 27, No. 3 (1990), pp 291-305

²⁶⁷ Interview conducted with Dafalla Kamal Zubeir, Kibera. September 2011

²⁶⁸ Interview conducted with Amani Salim, Kibera, September 2011

decades, especially among the elderly community.²⁶⁹ The government is responsible for this present situation however it has still failed to address their concerns. According to one Nubian youth, "we feel like aliens in society and yet we view ourselves as Kenyans."²⁷⁰

Nubians according to structural violence understanding, lack certain needs that are detrimental to their survival and existence.²⁷¹ These can be broken down as follows; firstly, *survival needs*: Nubians lack the basic access to proper health care, sanitation and shelter. The Government's failure to accept Kibera as their ancestral land has denied Nubians access to title deeds to the plots they own. The government perception of Nubians as aliens has in return led to an outburst of marginalization from other ethnic communities living in Kibera. Without earning a basic income from the plots they rent out to tenants, Nubians are barely able to make ends meet. Furthermore, Nubians are living in poor, small sub-standard living conditions in Kibera whereas in comparison to when they were given the property by the British each Nubian had approximately four to five acres each to practice their farming and livelihood.²⁷² Kibera to date has become one of the biggest slums in Africa. The living conditions are deteriorating, health care access and government spend in Kibera is barely existing, education systems are deteriorating thus the survival of inhabitants of Kibera has remained in the hands of its people.

Secondly, *wellbeing needs*:²⁷³ Nubians do not have access to proper housing in their ancestral land of Kibera. The government has denied them access to build permanent housing on grounds that they do not own the land. According to the Vice Chairman of the Nubian Council of elders, other communities are currently putting up permanent structures in Kibera yet Nubians

²⁶⁹ The elderly Nubian community were exposed to the orchestrated and violations against them since post-independence period.

²⁷⁰ Interview conducted with Fatma Adam, Kibera, September 2011

²⁷¹ Galtung, J., 'Culture of Violence', *Journal of Peace Research*, Vol. 27, No. 3 (1990), pp 295-297

²⁷² Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 24

²⁷³ Galtung, J., 'Culture of Violence', *Journal of Peace Research*, Vol. 27, No. 3 (1990), pp 295-297

who attempted to put up permanent housing on their properties have been stopped by the government and other ethnic communities on grounds that the land belongs to the government and therefore they should seek government approval first.²⁷⁴ The community feels that they have been swallowed up by the other majority ethnic communities in Kibera who are seen to receive more favours politicians who seek political representation.²⁷⁵ In addition, the Nubian community feels they are living in poverty and in poor living conditions with little regard being given by the government to extend any assistance to them. According to one elderly Nubian woman, the municipal property she acquired after her land was grabbed by the Moi government is not sufficient for her to house her big family which includes grandchildren. Whereas her previous property had provisions of land for farming and keeping livestock, the new property is small and she can no longer practice farming as was done in the early 1980s. She is able to sustain her family's livelihood from the rent she gets from rooms she rents out, however even as she lives in Kibera, she feels there is more the government can do to address Nubian social and livelihood concerns. She cannot afford to educate her grandchildren in good schools and is therefore forced to take them to government schools which offer free primary education. In addition, as she is a widow, she is dependent solely on the rent she gets and small scale businesses she carries out in Kibera. She feels there is no future for her grandchildren if Nubians are not given the proper recognition like all other citizens. According to her, Nubians are in many ways being treated like foreigners yet her forefathers called Kenya home.²⁷⁶

²⁷⁴ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, Olympic Kibera, September 2011

²⁷⁵ The Luo community is seen as one of the biggest ethnic communities in Kibera. Nubians believe they are being dominated by this community on grounds that the area Member of Parliament works in favour of the majority ethnic community to declare Kibera their property.

²⁷⁶ Interview conducted with Khaltouma Ali, September 2011, Kibera

Kibera which houses a big population of Nubians is considered one of the biggest slums in Africa with one of the poorest living conditions in Kenya. As wellbeing need, many Nubians cannot afford to enroll their children to proper education systems and the government continues to deny giving them access to proper health care. This has hampered the progress of the community as they feel restricted within Kibera and the government policies towards it. Nubians in Kibera are living in poverty and in poor social conditions. Whereas some Nubians were able to buy the municipal housing in Kibera, a lot of the Nubian population lives in the slum areas of Kibera under temporary structures. Without the proper living, education and health care needs the minority group is seen as almost an extinct group in terms of their social and wellbeing interactions with the resources in place.

Thirdly, *identity needs*:²⁷⁷ the community is put through the rigorous and arbitrary vetting process before being granted identification (ID) cards. According to one Nubian youth from Isiolo, he had to wait for two years before he could get his ID card, yet he had gone through the vetting process which declared him a citizen of Kenya. The lack of identification had almost hampered his opportunity to gain access to an exchange program. Luckily, he was able to use his waiting card to process the necessary documentation.²⁷⁸ In another instance; one witness states that Nubians in Busia are not being recognized as an ethnic community.²⁷⁹ When the youth had to apply for his ID card when he turned 18 years, the district office gave him an alternative of either choosing one of the existing ethnic communities or the option of being classified as 'others'. The Nubian youth, chose the latter.²⁸⁰ This feeling of not being recognized as an ethnic community created a feeling of disloyalty to the government on grounds that he felt that he was

²⁷⁷ Galtung, J., 'Culture of Violence', *Journal of Peace Research*, Vol. 27, No. 3 (1990), pp 295-297

²⁷⁸ Interview conducted with Dafalla Kamal Zubeir, Kibera, September 2011

²⁷⁹ Interview conducted with Rashid Ibrahim, Kibera, September 2011

²⁸⁰ Interview conducted with Rashid Ibrahim, Kibera, September 2011

an alien in Kenya.²⁸¹ In many cases, the government has failed to issue ID cards to some members of the Nubian community. For example, a Nubian mother has complained of the failure of the government to issue ID cards to her twin sons who applied for them in the beginning of this year.²⁸² The vetting process is seen as a tedious, intentional process that the government has used to orchestrate structural violence. Without the vital national documentation, there is no form of identifying Nubians as citizens. Even as some Nubians have not had any issues regarding ID cards, the government has still failed to formally recognize Nubians as citizens by abolishing the vetting process and recognizing Nubians in the new constitution. Without the vital national documents, Nubians are unable to seek access to good education and in return it affects their outcome to good employment opportunities in the Kenyan market. The government's reluctance to offer solutions to the Nubian citizenship issue has portrayed the outcome of structural violence on Nubians which is poverty among the community especially the ones living in Kibera. In addition, to date, Nubians have not been granted citizenship nor granted identification as one of the Kenyan ethnic communities.

Lastly, *Freedom needs*:²⁸³ Nubians are denied their fundamental freedom of worship, culture, ethnicity and ownership to Kibera. Nubians do not have a sense of belonging in Kenya. They constantly feel that they are being regarded as 'others' or 'aliens' yet they are as much citizens as all other Kenyans are.²⁸⁴ From the elderly, middle aged and Nubian youth, Nubians felt that the government was intentionally denying them citizenship so that they cannot enjoy rights and freedoms as stipulated in the constitution of Kenya. Under the new constitution of Kenya, Article 27 which stipulates, "Every person is equal before the law and has the right to

²⁸¹ Ibid

²⁸² Interview conducted with Zena Ali, Olympic-Kibera, September 2011

²⁸³ Galtung, J., 'Culture of Violence', *Journal of Peace Research*, Vol. 27, No. 3 (1990), pp 295-297

²⁸⁴ This was a collective finding from the interviews collected. Nubian population sample, Kibera, September 2011

equal protection and equal benefit of the law.” (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.”²⁸⁵ Nubians are not being extended for these fundamental freedoms that the constitution states should be given to all Kenyans. With the unjustified vetting process for declaring Nubians citizens, denial to issue title deed of Kibera and the denial of their citizenship and free religious and cultural practices, they strongly feel that their fundamental freedoms as human beings are not been appreciated. Nubians without the recognition as Kenyan citizens are unable to live and work freely. In addition, the government policy towards Nubians has denied them these freedoms to practice and seek access to basic fundamental needs.

According to Galtung, these four needs fall hand in hand with each other.²⁸⁶ When one or more needs are denied, this creates an imbalance and it can lead to the minority group seeking resources that will help counter the absence of the need. It is therefore important for the Nubian community not only as a small ethnic community but as a minority group to continuously seek recognition and a voice that will help address their concerns to citizenship and land ownership.

4.4 Statelessness and Citizenship

Nubians have undergone over five decades of mistreatment, threats and even in some cases physical violence from governments in power and some ethnic communities in Kibera. From the post-independence period under Kenyatta rule to Moi’s rule and to date under President Kibaki’s leadership, Nubians are still fighting for their rights to citizenship, land ownership of Kibera and fundamental freedoms and rights. Under President Kibaki, Nubians under the Nubian Council of elders were able to seek his consul in 2007 regarding their land ownership title deed

²⁸⁵ Constitution of Kenya, 2010

²⁸⁶ Galtung, J.. ‘Culture of Violence’, *Journal of Peace Research*, Vol. 27, No. 3 (1990), pp 295-297

of Kibera and President Kibaki had promised an immediate redress to their concerns which has since then not born any fruit.²⁸⁷ According to one witness, Nubians have had a long battle with the successive governments of Kenyatta and Moi. Their land was forcibly taken from them through violent means and in some instances threats to violence. They were subjected to poor living conditions and weak living structures in Kibera and the government completely and intentionally failed to recognize their plea to basic human rights.²⁸⁸

Nubians have been fighting for their recognition however their redress with successive governments has not born any fruit. Referring to the UN Article 27 of the International Covenant on Civil and Political rights (ICCPR), under Article 27 it states:²⁸⁹ "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in the community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Nubians have received a backlash for not only being considered "aliens" in Kenya but for also being Muslims. Their religious belief among a majority Christian population has received a lot of threats from other ethnic communities. For example, during the post-election violence in 2007, the Makina mosque in Kibera had come under attack by angry, violent protesters from the Luo community. The Luo claim was that Nubians should leave Kibera immediately as this land did not belong to them.²⁹⁰

Based on Article 27 of ICCPR, Nubians have been denied religious practice, ethnicity and freedom to enjoy their own culture and practice their own way of life. They are constantly

²⁸⁷ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 14-25

²⁸⁸ Interview conducted with Haji Yusuf Abdalla: Second Vice chairman of the Nubian Council of elders, Olympic Kibera, September 2011

²⁸⁹ Mullerson, R., 'Minorities in Eastern Europe and the former USSR: Problems, tendencies and protection,' *The Modern Law Review*, Vol 56, No. 6 (Nov., 1993), pp. 795

²⁹⁰ Interview conducted with Rashid Ibrahim, Kibera, September 2011

being criticized by other ethnic communities in Kibera and this has made them feel more marginalized than even the smaller communities in Kibera. Based on the failure of the Kenyan government to address their concerns as citizens, Nubians have established a case against the Government of Kenya on grounds of them being *de facto* stateless people.

The Nubian community is neither accepted by the Kenyan Government as Kenyan citizens nor are they being given autonomy by the government to practice their culture, religious and ethnics beliefs freely. Nubians can be regarded as *de facto* stateless people.²⁹¹ Nationality under the Universal Declaration of Human rights Article 15 (1) states that “everyone has the right to nationality”. Under Article 15 (2) it states “(n) o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”²⁹² Citizenship is a basic human right to which every human being is entitled to. The fact by which Nubians are being considered *de facto* stateless is in violation of the Universal Declaration of Human Rights (UDHR). Nubians are subjected to the rigorous vetting process which at times denies some Nubians citizenship or access to vital national identification documents such as identification cards, birth certificates, and passport.²⁹³

The government’s reluctance to respond to the Nubian plea has led to Nubians seeking a higher legal power to address their concerns. Under the African Court, Nubians were able to file complaints on their grievances. The Nubian Council of elders is depending on the outcome of the court proceedings at the African Court which will address their concerns as not only minorities but address the violations that the Kenyan government has been practicing against them.²⁹⁴ The

²⁹¹ Adam. H. A., ‘*The Nubians and Statelessness: History in Defining Modern Lives,*’ pp. 6

²⁹² Walker, J. D. ‘Statelessness: Violation or Conduit for Violation of Human Rights?’ *Human Rights Quarterly*, Vol 3, No. 1, (1981) pp. 106

²⁹³ Interview conducted with Rashid Ibrahim, Kibera, September 2011

²⁹⁴ Interview conducted with Haji Yusuf Abdalla: Second Vice chairman of the Nubian Council of elders, Olympic Kibera, September 2011

presence of the African Court has been instrumental to not only Nubians but to international law standards set to protect and address minority rights concerns. Under the African Court, the government is guilty of treating Nubians as 'third class citizens' and denying Nubians their basic rights as citizens of Kenya.²⁹⁵ Furthermore the process by which Nubians are granted citizenship through the vetting process is seen as a subjective process that ensures Nubians are denied citizenship and treated like stateless people.²⁹⁶

According to Article 15 of the Universal Declaration of Human Rights, "everyone has the right to a nationality".²⁹⁷ Nubians are being treated like minorities and from previous recounts; they have been evicted from their homes on counts of not being Kenya citizens and owners of the land in Kibera. The Kenyan government has failed to recognize this fact. As the government is an actor in the continued structural violence being experienced by Nubians, it is right to say that by Nubians approaching the African Court, they will seek a neutral party that will be able to redress their issues against the Government of Kenya. The African Court in this case is seen as the international governing authority that will be able to address the concerns of Nubians as a minority group. According to the African Charter, Article 5 (d) iii of the African Charter, it states that: "In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.."²⁹⁸

²⁹⁵ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 22, pp. 55-58

²⁹⁶ Ibid. pp. 55-58

²⁹⁷ Open Society Justice Initiative, *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 25

²⁹⁸ African Charter on Human rights and People rights (1981)

Nubians have raised their concerns as a vocal minority group to not only the national authority but also to the international law authority of the African Charter. The community has representation in the Nubian Council of elders who continue to act as their lobby group to push for the Nubian agenda and recognition. Despite Nubians being defined as a minority group, they understand that they are entitled to individual and collective human rights and access to fundamental freedoms. However the challenge facing Nubians is that the government has failed in various counts to extend these rights and privileges to them. The government continues to openly practice discrimination and marginalization of Nubians which is in violation of Article 2 of the African Charter.²⁹⁹ In addition, the continued structural violence being orchestrated on Nubians is not only taking a toll on their psychological and physical wellbeing but this has led to an inhibition of anger towards the failed government redress of their concerns. This poses a threat to violent actions which can occur if the community is triggered and from past actions there have been several triggers that have led to violent or threat of violent actions. For example, during the 2001 elections, Nubians were forced into violent actions in Kibera as a method to protect their community from destruction and ethnic hatred against them by other majority ethnic communities.³⁰⁰ During the 2008 elections, Nubians landlord owners were forced to use threats of violence to force tenants to pay their rent dues which the tenants had refused to pay on grounds of the land of Kibera not belonging to Nubians.³⁰¹

The Kenyan government's failure to address the grievances of minorities can not only be addressed by the national laws of Kenya but it will need to be addressed by the standards set by international laws on protection of minorities. However, the challenge faced here is on how

²⁹⁹ African Charter on Human rights and People rights (1981)

³⁰⁰ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, Olympic Kibera, September 2011

³⁰¹ Interview conducted with Amani Salim, September 2011, Kibera.

international law standards will be able to affect the sovereignty of a state which is more paramount than a state's relation on the international level. According to Walker, "the ultimate cause of statelessness is grounded on the principle of sovereignty and arises out of conflict of nationality laws."³⁰² The national law of Kenya has failed to address the citizenship and stateless debate of Nubians however it not that Kenya has failed because of the failure to apply this law on its policies. it is solely based on the government's reluctance and negligence to address the Nubian debate. Nubians as an ethnic community are being intentionally being subjected to discriminatory and offensive actions and this has in turn affected the response by which this minority group will receive equal rights and freedoms as stipulated in the Constitution of Kenya, African Charter and UDHR. Thus there is a need for stronger measures on international laws protecting minorities.

4.5 Ancestral land as the root of the problem

Nubians have always had claim over Kibera. This claim is rightfully their land because Nubians were given this land to settle down after release from duty by the British colonial masters.³⁰³ The ancestral land dispute of Kibera has been at the centre of all the violence and escalation of violence towards Nubians. This has formed one of the biggest issues facing Nubians. According to Haji Yusuf Abdalla, from time in memorial, Kibera was viewed as their ancestral home. The British had given them the authorization to settle in Kibera and since then many generations of Nubians have been born out of this area.³⁰⁴ As a minority group, Nubians

³⁰² Walker, J. D, 'Statelessness: Violation or Conduit for Violation of Human Rights?' *Human Rights Quarterly*, Vol 3, No. 1, (1981) , pp. 107

³⁰³ Parsons, T. 'Kibra is our blood: The Sudanese military legacy in Nairobi's Kibera location, 1902-1968', *The International Journal of African Historical Studies*, Vol 30, No 1, (1997) pp. 88

³⁰⁴ Interview conducted with Haji Yusuf Abdalla, Second Vice chairman of the Nubian Council of elders, Olympic Kibera, September 2011

have a right to seek ownership and title deed to the land that had been given to them by the British. The Kenyan Government in its continued efforts to exhaust the Nubian plight has refused to grant them this title deed. The title deed of Kibera has been used as a tool to continue the government political agenda in the vast population of Kibera but this has been used as a tool to drive discrimination, violence and marginalization of Nubians against majority populations. This form of violation being orchestrated by the government has in many ways formed one of the biggest concerns of Nubians and the structural violations they have been experiencing from successive governments since independence. The government claims ownership over Kibera claiming it is government property however based on the case put across by Nubians and the 1931 Carter Commission, Kibera needs to be respected as a property the Nubians call ancestral homeland.³⁰⁵ The Government in its reluctance to address this land issue can be seen as an enabler of this protracted structural conflict. A case in point was the 2001 violence that broke out in Kibera. This was seen as a consequence of President Moi's visit to Kibera and his statement on illegal informal settlements in Kibera and that landlords had no right to demand rent from tenants. This official statement from the President led to a break out in conflict with about twelve people dead, many injured and the Nubian community fearing for their life and seeking refuge in religious institutions.³⁰⁶

Under the Kenyan constitution, Nubians deserve rights to ownership of property however the government has continuously failed to grant them access to this land. As a way of sparking threats to Nubians, the government through its politicians has spread negative propaganda amongst Kibera community, claiming that Kibera belongs to the government and that it is in the capacity of the government to decide on who will own it. This was directly targeting Nubians

³⁰⁵ Open Society Justice Initiative. *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06, 17 May 2010, pp. 6-16

³⁰⁶ Adam. H. Adam, 'Covert racism', (unpublished), pp. 9

and their earlier claim to Kibera. As one Nubian stated, Nubians have witnessed open propaganda and ethnic hatred against their community being orchestrated by politicians during open public forums. Politicians claim that Nubians should not claim ownership over Kibera.³⁰⁷ This in return has led to the Nubian community receiving threats from other ethnic communities. Nubians have been forced to constantly protect themselves and use threat to violence especially when dealing with tenants on their properties.³⁰⁸

In as much as the government maintains its position that Kibera is government land there is a need to distinguish between government land and ancestral rights of Nubians to own the land of Kibera. Other ethnic communities have also claimed ownership of Kibera however unlike the other ethnic communities; Nubians by virtue of their history with the British can be given an upper hand to the claims over Kibera.³⁰⁹ The ancestral land debate is at the core of all Nubian grievances. This issue has been inherited by successive governments but none of the governments have been able to address this problem. Therefore, this has proved that the governments have openly shown reluctance to address this concern which forms part of the biggest structural issue facing Nubians. Without giving Nubians this ownership over their land, Nubians will have no homeland to settle in nor will they feel they belong in society. The government's failure continues to distract and take a toll on the Nubian community and her progress and association with society. This problem therefore forms a big portion of the concerns raised by Nubians at the African Court. By virtue of Kenya having ratified the African Charter, Kenya can be held accountable on grounds of constantly denying ownership of Nubians to Kibera and continued violations to their human rights.

³⁰⁷ Interview conducted with Fatma Ali, Olympic-Kibera, September 2011

³⁰⁸ Ibid.

³⁰⁹ Refer to: Parsons, T. 'Kibra is our blood: The Sudanese military legacy in Nairobi's Kibera location. 1902-1968'. *The International Journal of African Historical Studies*, Vol 30, No 1, (1997)

4.6 Conclusion

As a minority group in Kenya, Nubians can easily be classified and characterized by their religion, social and economic organizations.³¹⁰ Threats of violence against Nubians by other ethnic communities and the government can be considered as violent actions. This has taken a toll on the minority group's perception and response to psychological and physical association. Minority groups do experience identity, ethnicity, and cultural association issues. The need for a minority group to seek solidarity and to seek redress of their grievances provides a platform for them to live in unity and seek freedoms that are paramount to each and every human being. Nubians have been psychologically and physically threatened to vacate their land and to go back to their country of origin on grounds that they do not belong in Kenya and that they are not citizens. This by all means can categorize them as a minority group. Nubians have experienced various forms of discrimination and structural violence. The lack of access to fundamental freedoms which should be extended to all Kenyans has by this virtue marginalized and segregated the group from the rest of society. The lack of basic needs and resources has led to Nubians constantly searching for equitable sources that can help address their concerns as a minority group. At present, Nubian youths understand the capacity to which their ethnic community is marginalized and experiencing violations of their basic freedom rights.³¹¹ Minority rights therefore needs to be addressed from not only the national level but also the international level. The Nubian issue in particular will require prominence as the inhibition of these forms of structural violence can eventually lead to an outburst of violent actions by the Nubian community.

³¹⁰ Makaloo, M.O & Ghai. Y., 'Kenya: Minorities, Indigenous Peoples and Ethnic Diversity' *Minority Rights Group International and Centre for Minority Rights Development* (2005). pp. 4

³¹¹ Interview conducted with Dafalla Kamal Zubeir, Kibera, September 2011

CHAPTER 5

5.0 FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

Nubians have experienced high levels of structural violence on their community. This can be in many ways tied into the thoughts and perceptions of minority definitions. Based on their ethnic, religious and cultural practices, Nubians have experienced various forms of discrimination, threats and identity-crisis as a minority group. It is therefore important to not only address the concerns of this group of minorities but it is important to appreciate the legal systems both in Kenya and in the international law level that have either been effective or ineffective in protection of this minority group. The Nubian community in Kenya can be classified as a minority group based on the earlier definitions and descriptions given. Nubians have experienced forms of rejection and discrimination from not only the Kenyan Government but the mainstream society as well. The way forward for Nubians would be to seek an immediate redress of their concerns. This will need to be done at both the national level and international law level. The concerns of Nubians just forms part of the main concerns of minorities therefore it is important that state laws and international system recognizes minorities and are able to put laws into effect that will not only monitor minority groups protection but it will ensure that the global growing concern of minorities is raised and addressed effectively.

5.2 Future of Nubians in Kenya

Nubians as a minority group has experienced threats of violence for over four decades. In some instances, the threat to use violence has led to actual use of force on the community. These threats have taken the following forms. Threats from actors: the threats from the Government

and majority ethnic communities who deny them recognition; Threats of denial of their citizenship and threats of losing their ancestral land of Kibera. With the failure of the Kenyan Government to address their concerns and grievances, this has posed a threat to eruption of conflict as Nubians can be triggered into violent actions. Based on Galtung's findings on structural violence, when there is a trigger effect on the group, this can easily erupt into violent and destructive actions by the group.³¹²

Learning from past grievances of minorities across the world, it is therefore important to identify and address the grievances of minorities before minorities are triggered into violent actions. A good case in point is Palestine. Palestine is an example of a minority group that has experienced over six decades of violence in both structural and physical nature. Israel has openly failed to recognize Palestine state and Palestine owned land of Gaza strip. Israel continued to harass and deny Palestinians their basic freedoms, education, freedom of movement and freedom of speech. This eventually led to an outburst from the Palestine community against the Israelis. To date, this violence and conflict between Israel and Palestine has failed to be resolved. The decades of inhibition finally led to an outburst by the Palestinian minority group however since then the international community has failed in its pursuit for peace among the two warring communities.

In the case of Nubians, their defensive violent tactics during the past elections of 2007 can be attributed to their counteraction to the oppression and threats of violence used by other ethnic communities living in Kibera. A build-up of Nubian grievances is still on going and this does pose to be big threat to the security and protection of Nubians. The way forward for Nubians is for the Government of Kenya to set laws in motion that would provide a solution to the Nubian issue and also provide a protection mechanism for minority groups as a whole.

³¹² Galtung, J., 'Culture of Violence', *Journal of Peace Research*, Vol. 27, No. 3 (1990), pp. 295

The challenge facing the current government's perception of Nubians is that they do not appreciate them nor does the government recognize Nubians as a minority group. The challenge here is on whether the Kenyan Government is doing this on grounds of ignorance or just reluctance to accept this minority group. Based on the case study carried out, the government is seen to be carrying out these acts of violations and discrimination on Nubians on grounds of their reluctance to recognize them in Kenya. They intentionally perpetrate structural violence on Nubians and they can be blamed for the failure to find a solution to this issue.

The Kenyan Government's failure to address Nubian grievances has brought about more issues that will need to be effectively addressed. On the international scene, the question now arises as to whether these international laws provide any credibility to the protection of minorities. This does pose a challenge especially as state sovereignty and national minorities fall solely under state jurisdiction therefore international law cannot interfere with this. If a state fails to understand and identify minorities within its territory this poses a big challenge on the international laws on minority protection. With a valid case in point, the African Charter has played a vital role in addressing minority concerns in the African context. A good example was the settlement of the Ogiek minority community in Baringo.

The Nubian community has put their faith in the legal system of the African Court. However, it is important to criticize the legal regimes that are in place for minority protection. Without disregarding the international law perspectives on minority rights, it is also important to appreciate the laws that have been set in motion by other pertinent international covenants on protection of minorities.

5.3 Challenges in International Laws on protection of minorities

In the case of the Nubian case study, international law such as the African Charter has been a more effective legal system in understanding of the issues facing minority groups such as Nubians. State laws in some instances have failed to recognize minorities and their grievances. The Government of Kenya in this case has been one such example; to date the Government refuses to acknowledge Nubian citizenship and ownership over Kibera. The state law of Kenya has already been criticized for the lack of judicial power to protect minorities, it will not be imperative to compare even the international law standards on minority protection.³¹³

On the other hand, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities which was adopted in 1992, includes recommendations on how to resolve minority issues.³¹⁴ The UN Declaration on minorities addresses both the collective and the individual rights of minorities. It is seen as a more grounded non-treaty in that in the preamble, it inspires nations to actively preserve equal rights and minority culture and inspires new awareness of minority rights in international arena. However the recommendations given are only to be used on an international law perspective and therefore some of the grievances that can be experienced by minorities on a national level, cannot be easily addressed as it is the sole responsibility of the state government to identify these issues and find means of addressing minority concerns.

The other challenge posed with this international law is that there is no legal backing as to how states are going to be monitored on their effectiveness of protecting minorities. The Declaration claims ownership as to "inspiring new awareness of minorities and ensuring states

³¹³ Open Society Justice Initiative. *The Nubian Community in Kenya v. The State of Kenya*, Communications 317/06. 17 May 2010, pp. 50-65

³¹⁴ As quoted in Mullerson.R., 'Minorities in Eastern Europe and the former USSR: Problems, tendencies and protection.' *The Modern Law Review*, Vol 56, No. 6 (Nov., 1993), pp. 804

preserve equal rights and cultures of minorities” however on a state level, application of minority protection has in most cases not been effectively applied. Nubians still face outright discrimination and violations of the freedom rights from the Kenyan Government and this is being done in open discrimination by the international legal systems. This case in point shows that a state like Kenya has failed to preserve and offer equal opportunities to minorities.

A comparison of state laws versus international laws on grounds of which law will take precedence over the other when addressing national minority concerns is one that still remains a debate. State laws are protected by the sovereignty of states whereas international laws govern a more global context of states. In as much as a state like Kenya has ratified international laws on minority protection, the challenge still remains on how the international law mechanism will be able to ensure that states abide and follow these laws. Monitoring of international laws has proved to be a challenge to the international community.

5.4 Concluding remarks

Whereas previously, minorities were defined based on ethnicity or population numbers, the Nubians in Kenya have proved that none of these classifications can be used to define them as minorities. The study of Nubians in Kenya has addressed not only the need for proper classification of this community as a minority group but it has also addressed the concerns of the community especially in violation of their basic human rights. Nubians in Kenya are experiencing structural violence on a high level. The government continues to fail to address any of their concerns and this has become a risk as to how the community perceives of not only itself but the majority population as a whole. Nubian grievances have highlighted the need for a proper redress from both the national and international law perspective. This will be important in not

only ensuring peace is achieved in the community but it will prevent future conflicts from occurring based on structural violence that is being perpetrated by the Kenyan Government.

The Nubian ethnic community may be small in population numbers in comparison to the larger ethnic communities. However their grievances are more tailored towards how the Kenyan Government and population at large perceive of them in Kenya. This particular perspective will be important in understanding their grievances as a minority group in Kenya.

Nubians continue to experience “direct discrimination, economic disadvantage, political exclusion, and cultural restrictions, religious practice, cultural traditions, and the formation of cultural organizations.”³¹⁵ Nubian youths today are growing up in an environment which is breeding violence and threats of violence over the land dispute of Kibera. As a minority group experiencing structural violence, Nubians have been pushed to the edge on how much they can take in from the Kenyan Government.³¹⁶ There is a dire need to address their concerns and to somehow push for the formulation of national policies that would protect minorities in Kenya.

As earlier highlighted in chapter one, minority rights appreciation and protection both the collective and individual rights are important in not only keeping peace whether on the national or global context but they are important in preventing conflict. Special protection and empowerment of minorities is therefore considered very important in the protection of minority groups from violations of their dignity. In reference to Article 1, “(1) States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within

³¹⁵ Verkuylev. M., Yildiz A.A., ‘The endorsement of Minority Rights: The Role of Group Position, National Context, and Ideological Beliefs,’ *Political Psychology*, Vol. 27, No. 4 (Aug. 2006), pp. 528

³¹⁶ Interview conducted with Dafalla Kamal Zubair, September 2011, Karanja: Kibera,

their respective territories and shall encourage conditions for the promotion of that identity. (2) States shall adopt appropriate legislative and other measures to achieve those ends.”³¹⁷

The findings from this research prove that Nubians are indeed a minority group who continued to face grievances in the ethnic, cultural, social and political interactions. As a conclusion, it is therefore important to not only identify minority concerns but it has become important to address minority concerns as way to prevent ethnic conflicts. Structural conflict is visible in the Nubian minority case however at the advent that a trigger or threat on the community will lead into a conflict will create an even bigger problem for the Kenya Government to deal with.

On an international law scale, it is important that these laws on protection of minorities become binding to states. Non-binding treaties do not have a fall back framework. When a state discriminates against minorities, there is no legal binding law that they are obliged to follow. Frameworks for international laws on minority protection will therefore need to find mechanisms by which all states will oblige to protect their minorities.

Thus as recommendation it remains an important concern in conflict prevention that grievances of minorities are identified and addressed in good time by both the state and international legal systems. This will ensure that the laws on protection of minorities not only fall within the state jurisdiction but also that international laws respect them. However the way forward for effective protection of minorities now lies on whether the international legal system will provide effective monitoring systems of international laws to monitor application of minority protection within state boundaries.

³¹⁷ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, <http://www2.ohchr.org/english/law/minorities.htm>

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Appendix 1

Interview guide questions

Instructions

- All of the information you give me will be treated as completely confidential and it will not be possible for anyone to identify the information you give me in my project.

Note: The questions below were used as a guide during the interviews regarding the subject in question. The answers provided by the respondents were not restricted to the questions asked. The respondents were allowed to provide broad answers into the subject.

Questions

1. Are you a Nubian born in Kenya?
2. How many generations of your families have lived in Kenya?
3. Have you experienced any grievances while living in Kenya?
4. Do you consider yourself a Kenyan citizen?
5. Do you own the property to which you live in?
6. Do you have access to basic social amenities such as health care, education, employment, national identification?
7. Are there any concerns facing the Nubian community?
8. What is your opinion on how the Kenyan Government is protecting and addressing some of your concerns as a Nubian community?
9. Do you feel the Government has addressed some of your concerns as a Nubian community?