

DECREE ON DEMARCATED AREAS ALONG EGYPTIAN BORDERS: EGYPT'S MISCARRIAGE OF ITS INTERNATIONAL HUMAN RIGHTS DUTIES*

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Abstract

As the result to the mass displacements, the Nubians in Egypt were being marginalized almost in all aspects of life. Restless demonstration, advocacy, and petition had been conducted in the hope that by returning to the Nubians' ancestral lands they will have a better future. They finally get answered when the government included the Nubians' rights to return to their homelands in the newly amended 2014 Egyptian Constitution. Within the same year, the government issued Presidential Decree Number 444 of 2014, which demarcated areas parallel to the northern, southern, and western Egyptian borders to be forbidden and restricted areas. The demarcated areas are including the ancestral lands targeted by the Nubians to return. The enforcement of the Decree is de facto impeding the rights of the Nubians to return to their ancestral lands. This article analyses the issue of the Nubians from the perspective of international human rights law, showing that by the issuance and enforcement of Presidential Decree Number 444 of 2014, Egypt has violated its international human rights duties preserved in several international human rights treaties, such as ICERD, ICCPR, ICESCR, and ACHPR.

Intisari

Sebagai hasil perpindahan massal, orang Nubia di Mesir dipinggirkan hampir di semua aspek kehidupan. Demonstrasi, advokasi dan petisi telah dilakukan dengan harapan bahwa jika orang Nubia kembali ke tanah leluhur, mereka akan memiliki masa depan yang lebih baik. Mereka akhirnya mendapat jawaban ketika pemerintah memasukkan hak Nubia untuk kembali ke tanah air mereka dalam Konstitusi Mesir yang direvisi pada tahun 2014. Pada tahun yang sama, pemerintah mengeluarkan Keputusan Presiden Nomor 444 tahun 2014 yang membuat daerah yang sejajar dengan perbatasan utara, selatan, dan barat Mesir menjadi daerah terlarang. Daerah yang dibatasi termasuk tanah leluhur orang Nubia. Penerapan Keputusan tersebut secara de facto menghambat hak orang-orang Nubia untuk kembali ke tanah leluhur mereka. Artikel ini menganalisis isu Nubia dari perspektif hukum HAM internasional yang menunjukkan bahwa dengan terbitnya dan berlakunya Keputusan Presiden Nomor 444 tahun 2014, Mesir telah melanggar kewajiban HAM internasional yang dapat ditemukan dalam beberapa perjanjian HAM internasional, seperti ICERD, ICCPR, ICESCR, dan ACHPR.

Keywords: the Nubians, Egyptian Presidential Decree Number 444 of 2014, international human rights treaties

Kata Kunci: Nubians, Keputusan Preisdan Mesir No. 444 of 2014, hukum hak asasi manusia internasional

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A. Introduction

As today, the Nubians' history has been started way back to the early Neolithic Age (Harkless: 2006). They took a significant role in the Mediterranean-Red Sea world history as Pharaohs of Egypt and Kings of Meroe, on the period between the seventh century B.C. and the fourth century A.D. (Harkless: 2006). Considered as having the descents of a clearly defined civilization, the Nubians are as old as ancient Egypt itself as they bear different ethnicity from the Arabians (Janmyr: 2016). Without doubt, the Nubians was heavily influenced by Egypt because of the social tendency and geographical location. These influences are particularly apparent in Nubian religious practices and burial traditions (Harkless: 2006). They inhabited villages along the banks of the Nile River ("the Nile" or "Nile"), stretching from Aswan in southern Egypt into northern Sudan for thousands of years (Harkless: 2006). Around this area, various Nubian peoples strive to retain their own languages, customs, and cultures (Harkless: 2006).

On 1960s, President Nasser initiated the Aswan High Dam project in order to modernize Egypt. Meanwhile, Nubian villages located along the Nile and under the Lake Nasser. Being submerged shortly after the commencement of the Dam, approximately 50,000 Nubians left with no option than to be settled to the new designated resettlement communities in southern Egypt, around Kom Umbu, about 50kms north of the city of Aswan (Poeschke: 1996). The resettlement by force has caused the marginalization of the Nubians in all political, social, and economy aspects (Poeschke: 1996).

On January 2014, the enactment of Egypt's new constitution with the new elected President Abdel Fattah el-Sisi brought up a fresh wind for the Nubians.

The constitution specifically mentions their rights to return to their ancestral land (Art. 236, *Egyptian Constitution 2014*). However, it turns out that the gesture of the referendum was just an *entr'acte*. The unfortunate situations have not yet left the Nubians. On 29 November 2014, President Abdel Fattah el-Sisi issued Presidential Decree Number 444 ("Decree 444" or "Decree"), which included a stretch in Nubia adjacent to the Egyptian-Sudanese frontier, as a forbidden and restricted military zone. These areas are including 18 Nubian villages that declared as demarcation areas. The provisions that the Nubians considered as their constitutional guarantee have been declined by the presidential decree in force.

Some has argued that Decree 444 was unconstitutional, but somehow it has not been removed until today. Even, more presidential decree having similar aim with Decree 444 was issued at ease in 2016.¹ Despite the existence of the issue of the constitutionality of Decree 444, this article analyses the accordance of Decree 444 to several binding international human rights treaties for Egypt. Based on a legal research conducted using normative legal research and statutory approach, this article explores international human rights treaties binding for Egypt and Egyptian national laws related with the discussion of the Nubians' rights to return to their ancestral lands.

¹ In August 2016, President el-Sisi issued Presidential Decree Number 355 of 2016 in support of Decree 444. This new decree allocated 922 *feddans* of "Toshka and Forkound" the lands located in Nubians' old villages into a mega-national project.

B. The Nubians' Claim to Return to Their Ancestral Lands and The Enforcement of the Egyptian Presidential Decree Number 444

Decree 444 was intended to protect Egyptian international borders located in the western, southern, and eastern parts of the country. It is also written that the Decree had replaced the Regulation Number 204 of 2010 as the instrument regulating Egyptian demarcation areas of international borders. Decree 444 was also established in consideration of the need to conform to the then newly-established 2014 Egyptian Constitution.

Further, the Decree stipulated two types of area; First, *forbidden areas*, which are only accessible for Egyptian military forces given express authority to protect the demarcated areas; and second, *restricted areas*, which are only accessible to military forces and civilians who have fulfilled specific requirements. It is defined that persons--citizens and immigrants--and transportations--above and under ground--cannot access the forbidden areas.

Article 3 of Decree 444 provides that the restricted areas are accessible for (1) persons granted written military permit; (2) citizens, who have permanent residence permit, whether in Mersa Matruh before 5 July 1967 or in el Bahr, Aswan, El Wadi, El Gadeed before 1 January 1987. The permanent residents of Mersa Matruh Province could even stay without written military permit, but only in the City of El Sallum and not in its high grounds. The residence permit shall also include their assets in those locations. Upon violation to those above provisions, the military forces have been granted authority to perform such measures as seizure of transportation.

Because the Nubians used to live along the banks of the Nile, the areas that they are reclaiming for also extend from Egypt's southern border, 110kms on the eastern

side of the Nile and 25kms to the western side (*Al Jazeera: 2016*). That way, they could live close to their families and relatives who are geopolitically separated by the Egypt-Sudan border.

In the following illustration, it will be shown that among the areas that have been declared forbidden and restricted, there are areas claimed by the Nubians' as ancestral lands to which they have been wishing to return.

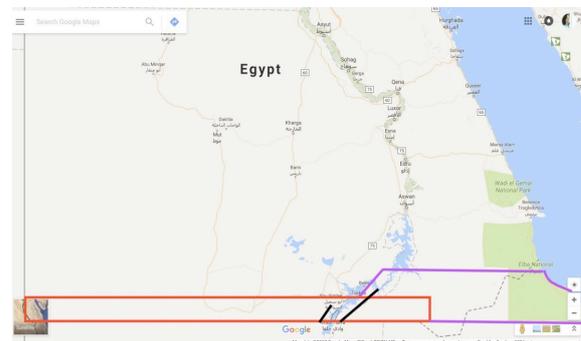


Illustration 1. The area along banks of the Nile claimed by the Nubians (black lines) inward the forbidden (red lines) and restricted (purple lines) areas in the southern Egyptian border. (**Source:** <http://maps.google.com>; Accessed on 26 April 2017.)

The size of this illustration has been modified to fit the format of the journal.

C. The Accordance of Decree 444 with Egypt's International Human Rights Duties

In exercising its full capacity to engage with international relations, Egypt as a sovereign country is bound to the human rights instruments, to which it has expressed consent. Under the United Nations' system, Egypt has successfully ratified almost all of the so-called nine core of international human rights treaties, except for the Convention for the Protection of All Persons from Enforced Disappearance (CED). Even though the Nubians' rights to return to their

ancestral lands are explicitly regulated in Egyptian Constitution 2014, the rights are hardly expressed in international law. However, the situation does not prevent the discussion over those rights, such as what happened in CERD's State Reporting procedure.² By searching the most relevant rights to the rights to return to Nubians' ancestral lands, the discussion carries on upon violation of certain rights that likely happens if the rights to return to Nubians' ancestral lands are not to be granted.

Among the human rights treaties that binding for Egypt, the ICERD, ICCPR and ICESCR are the ones relevant to the discussion of the issue of the Nubians. Also, in the regional level Egypt is one of the Member States of the African Union and a state party to the African Charter on Human and Peoples' Rights.

I. ICERD

According to Article 1 of the ICERD, the term of "racial discrimination" shall refer to "the distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, of an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". In any event, the rights preserved in the ICERD must be accorded to the peoples located in one state party's jurisdiction without any discrimination based on race, colour, descent, or national or ethnic origin.

Moreover, Articles 2 and 5 specify the according of right to adequate development, right to freedom of movement and residence, and right to housing, which are relevant to the discussion

of the Nubians' rights to return to their ancestral lands.

Upon ratification, Egypt has submitted a reservation to Article 22 concerning the automatic referral of dispute settlement to the ICJ. It is noted that Egypt has not expressed its acceptance of individual complaints procedure under the ICERD, in accordance with Article 14 (*Report of the CERD, Supplement No. 18*). Therefore, within the procedure of the ICERD, the only thing left is the procedure of State Reporting under the Committee on the Elimination of Racial Discrimination (CERD).

Within that last submission in April 2014, Egypt attempted to put a substantive discussion of the articles of the ICERD, introducing general information on the protection of human rights in Egypt, while also answering the recommendations addressed by the CERD with specific reference to the issue of the Nubians. From the answers, it can be concluded that the Egyptian government acknowledged the displacement suffered by the Nubians as result to the constructions of the high dams. It also affirmed that the Nubians' right to return to their ancestral lands is constitutionally guaranteed. The absence of the discussion on the Decree 444 should be understood as the Decree came in 29 November 2014, meanwhile this report was received by the CERD in 15 April 2014.

The issuance of the Decree 444 depicted that the Egyptian government's conduct was in contradiction to its prior commitments in respond to the CERD concerns and recommendations. Article 236 of the 2014 Egyptian Constitution guarantees that the border and disadvantaged areas are to be developed and given back to the Nubians, but instead, Decree 444 established the areas as demarcated forbidden and restricted areas. Irrespective of the discussion on the

² See below in Section A.

constitutionality of the Decree 444, in the perspective of international law, the Egyptian domestic law shall not be an excuse for the failure to carry on its international duties.

Granting the Nubians' right to freedom of movement and residence within Egyptian borders is Egypt's international duties under ICERD. This right, however, violated by the existence of the Decree 444 in force. Aside from the prohibition to return to their lands, the Nubians are not provided with locations other than the displacement area in Kom Umbu. Their efforts of peace protest and mobilization campaign are negatively perceived by the government as force, arrest, and judicial harassment followed the events (*Front Line Defenders Urgent Appeal: 2017*). The right to housing in their ancestral lands for the Nubians will also not be available in any event of the enforcement the Decree 444. This treatment happened to be suffered only by the Nubians, indicating the discrimination based on racial background.

Hence, Egypt has failed to respect the Nubians' rights under ICERD, considering that it has deliberately violated the rights to return to their lands and subsequently their right to housing. For a short moment, the Egyptian government was successful in enacting the 2014 Constitution, ensuring the Nubians' right to return to their ancestral lands. However, the contradictive actions taken by issuing the Decree 444 proved that the Egyptian government failed to fulfil the enjoyment of the Nubians' rights under the ICERD. The arbitrary displacement suffered by the Nubians, further marginalization resulted from it, and when those problems are prolonged until now, should also be a proof that the mistreatment is the Egyptian government's failure to protect the rights of the Nubians.

II. ICCPR

Egypt is one among many states who are parties to the International Covenant on Civil and Political Rights (ICCPR). It has ratified ICCPR on 14 January 1982 together with ICESCR. However, Egypt opted not to ratify the two Optional Protocols to the ICCPR (ICCPR-OP 1 and ICCPR-OP 2) and the Optional Protocol to the ICESCR until today.³ Therefore, it excluded individual complaints procedure made under those two conventions.

It is mentioned in Article 1 that by virtue of the right of self-determination, every individual shall also be free in determining their political status and working for the development of economic, social and cultural aspects of life. Moreover, under Article 12 Egypt as State Party has the obligation to accord the right to liberty of movement and freedom to choose residence without differentiating the Nubians' from other citizens.

After the date of ratification, Egypt consequently submitted four reports, which combined into two reports in 1992 and 2002 to the Human Rights Committee. In respect to the right contained in Article 12, Egypt addressed that through the Egyptian constitution Articles 50-54,⁴ The Passport Act No. 97 of 1959,⁵ The Emigration Act No. 111 of 1983,⁶ and Act No. 89 of 1960,⁷ Egypt has protected the rights contained in this article. However, there was no part among those four reports that specifically addressed the Nubians and any measures, which could be associated with them.

³ The first Optional Protocol to ICCPR establishes individual complaint mechanism under ICCPR; meanwhile Second Optional Protocol to ICCPR is aiming at the abolition of the death penalty.

⁴ The 1971 Egyptian Constitution.

⁵ This Act is directed for the Egyptians.

⁶ *Ibid.*

⁷ This Act is directed to the foreigners in Egypt.

Decree 444 by the existence itself was violating the rights of the Nubians under the ICCPR in achieving the freedom of movement and choosing their residences. The Nubians are prohibited to enter and subsequently to reside in their ancestral lands that now declared as prohibited and restricted areas parallel to the Egyptian southern borders. They are not also provided with other lands or locations, indicating that the government only gave the displacement area in Kom Umbu.⁸ In regards also to the impediment of their rights to return back to their ancestral lands, the Egyptian government has failed to respect, to protect and to fulfil the enjoyment of the Nubians' rights under the ICCPR.

III. ICESCR

Having the same spirit of right of self-determination, ICESCR also provides that everyone should have the freedom in determining their political status as well as developing economic, social and cultural aspects of their life. State Parties to ICESCR, including Egypt, therefore, Article 2 particularly obliged to actively undertake to take steps and to ensure the full realization of the rights recognised in this Covenant.

Relevant to the discussion of the rights of the Nubians to return to their ancestral lands, Article 11 provides that Egypt as State Party has the obligation to accord the right of everyone, including the Nubians, to an adequate standard of living, including food, clothing, and housing. By virtue of the right of self-determination, in the event of the Nubians considered that by going back to their ancestral lands they could achieve an adequate standard of living, including adequate food, clothing, and housing, the Egyptian government is

bound to ensure the granting of these rights.

The Committee on Economic, Social and Cultural Rights (CESCR) is the Treaty Body of the ICESCR that monitors the implementation of the rights recognised in the ICESCR by the State Parties of the covenant. Through the regular State Reporting process, CESCR carries out one of the procedures in its monitoring function. Since the date of entry into force for Egypt, it has submitted four reports to the CESCR. The first report in 1998 was the initial report, which was obliged within two years after the date of entry into force.

Together with other issues, toward Egypt's first report, the CESCR concluded recommendations in general that there is a need in establishing a national human rights institution in full compliance to Paris Principles of 1991 (*Concluding Observations of the CESCR for Reports submitted by Egypt, 23 May 2000*). In relevant to Article 11, CESCR urged the government to overcome the massive housing problems by "adopting a strategy and plan of action and by building or providing, low-cost rental housing units" (*Concluding Observations of the CESCR for Reports submitted by Egypt, 23 May 2000*).

As for the second until fourth reports, which was combined and submitted in 11 May 2010, the Egyptian government addressed in detail the government's efforts in the realization of Article 11. Each component such as food, housing, clothing was answered with the government's achievements in providing clean water, healthy sanitation, and establishing national housing projects (*Combined States' Periodic Reports submitted by Egypt, 11 May 2010*). It also marked the establishment of the National Human Rights Council by the Act No. 94 of 2003, in accordance with Paris Principle of 1991

⁸ See above in Section A.

(*Combined States' Periodic Reports submitted by Egypt, 11 May 2010*).

It is a fact that the marginalization and difficulties suffered by the Nubians in the resettlement areas become the underlying reasons of why the Nubians want to return to their ancestral lands near the Nile. Even though the discussions on the Nubians and Decree 444 were absent from those reports, the Egyptian government cannot avoid that it has failed to protect the Nubians' rights under the ICESCR. The Egyptian government is also liable for the marginalization resulting from the displacement suffered by the Nubians. Further, the Decree 444 prevents the Nubians in pursuing a better life with adequate standard of life by going back to their ancestral lands. Therefore, the Egyptian government did not perform its duty in protecting the Nubians' rights under the ICESCR. Moreover, the contrary intention and effectuation of the Decree 444 to the rights recognised by the ICESCR that must be accorded to the Nubians', proved the Egyptian government's failure in fulfilling the full realization of those rights.

IV. ACHPR

Other than to several human rights instruments under the United Nations' system, as a state party Egypt is also obliged to adhere to the African Charter on Human and Peoples' Rights. Whether standing as a part of whole population of Egypt or as a part of indigenous people located in Egypt, the Nubians are in both ways entitled to the rights preserved by ACHPR.

By virtue of Articles 1 and 2 of ACHPR, Egypt has the responsibility to recognise and guarantee the enjoyment of the rights and freedoms under ACHPR. It is also promulgated that in recognising the rights and freedoms under ACHPR, States

must "undertake to adopt legislative or other measures to give effect to them". Further, the rights and freedoms shall be accorded "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".

Under ACHPR, Articles 12, 14, 22, and 24 are relevant the discussion of the Nubians' right to return to their ancestral lands. The provisions guaranteed the enjoyment of peoples on right to freedom of movement and residence, right to property, right to development, and right to a general satisfactory environment favourable to the peoples' development.

Having submitted reservation to only Articles 8 and 18 (3), Egypt in this particular discussion is obliged to abide by the according of those above-stated rights to all individuals within Egypt's jurisdiction, including the Nubians. Other than reservation, there were several conducts done by Egypt in reference to ACHPR, such as the submission of state's periodic report to the African Commission on Human and Peoples' Rights (ACmHPR).

In its latest state report, the Egyptian government acknowledged that there are human rights problems and stated its readiness to attend those problems (*Concluding Observations of the ACmHPR for Reports submitted by Egypt, 30 December 2004*). Based on that report, ACmHPR recommended the government to "respect the right to freedom of movement and residence". Therefore, by the expressed commitment to address the concerns and recommendations of ACmHPR, Egypt is obliged to inform the steps it has taken between the times to its supposed submission of state report in 2007 (*Concluding Observations of the ACmHPR for Reports submitted by Egypt, 30 December 2004*).

However, not only that the next report was overdue, the government went to blatantly disregard the recommendation given by ACmHPR. Instead of taking action to alleviate the existing human rights problems, implementing the recommendations given by ACmHPR, while also behaving in conformity with ACHPR, the issuance of Decree 444 in 2014 illustrated the government's non-fulfilment of its duties under ACHPR.

ACmHPR noted that the Egyptian government has arbitrarily issued arbitrary declarations of curfews, thus, they had infringed the freedom of movement (*Concluding Observations of the ACmHPR for Reports submitted by Egypt, 30 December 2004*). This corresponding situation with the Nubians' impediment to return to their ancestral lands proved the government's failure to enact domestic law in conformity with its international human rights duties.

Under Article 12, the Nubians' right to their ancestral lands as their properties shall be guaranteed by the State. The government may oppose by justifying that the designation of Decree 444 is for the "public need" and "general interest". Article 12 also mentions that the deprivation of this right based on those two reasons must be in accordance with "the provisions of appropriate laws". However, ACHPR and the 2014 Egyptian Constitution guarantee the right to the possession for the Nubians' ancestral lands. It is very unlikely that the "appropriate laws" would also refer to the laws contradicting the ACHPR. Therefore, rather than Decree 444, the government may only take the Nubians' right by an appropriate law, which adhere to ACHPR.

By pursuing their right to return to their ancestral lands, the Nubians were hoping for better life than the situation they suffered in the resettlement area.

Therefore, the government shall also guarantee their rights to development in their ancestral lands and their rights to have a favourable environment to their development by allowing them to return. For that reason, the issuance and effectuation of Decree 444 have hampered the Nubians to enjoy these rights. It hence evident that the Egyptian government's miscarriage of its international human rights duties is caused by the failure to respect, to protect, and to fulfil the rights exlaimed in ACHPR.

D. Concluding Remarks

Despite the issue of the constitutionality of Decree 444, it should be evident that Decree 444 is not in accordance with Egypt's international duties bestowed by several legally binding international human rights treaties, especially ICERD, ICCPR, ICESCR, and ACHPR. Even if it can be argued that Decree 444 might be justified under national laws, Egypt could not use its national law to excuse itself from the non-fulfilment of its international duties.

According to Articles 2 and 12 of ICCPR, the Nubians are ought to be granted with the freedom of movement and choosing their residence by the government without being differentiated from other individuals. There were no discussions of the issue of the Nubians in any of Egypt's national reports submitted to the Human Rights Committee. Nevertheless, it cannot be denied that the effectuation of Decree 444 prohibits the Nubians to enter and subsequently to reside in their ancestral lands. For this reason, the Egyptian government has also failed to respect, to protect and to fulfil the enjoyment of the Nubians' rights under ICCPR.

By the issuance of Decree 444, the government have simultaneously disregarded the rights of the Nubians

recognised in ICESCR. It is enshrined in Article 11 that the Nubians have the right to have an adequate standard of living and their families. The government are liable for the marginalization in almost all aspects of life suffered by the Nubians as effect of the displacement. Decree 444, which prevents the Nubians to return to their ancestral lands, manifestly contravenes the rights of the Nubians in pursuing a better life with adequate standard of living.

It has been also proven that the Nubians qualify to be classified as "peoples" referred in ACHPR. The Nubians' right to freedom of movement, as well as to right to property and right to development are guaranteed under ACHPR. By virtue of the obligations, the government should undertake to accord these rights. However, the enforcement of Decree 444 only demonstrated the government's failure to comply with ACHPR.

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