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THIRD OPEN LETTER

TO: IGAD Secretariat
Intergovernmental Authority on Development
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IGAD Technical Committee
Somali National Reconciliation Conference
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Dear Mr. Chairman,

We draw your attention to the Charter that has been adopted at the current Somali Reconciliation Conference in Nairobi on September 15, 2003. In January 2003, we reported to Mr. Kiplagat/Chairman of the Conference our deep concerns regarding the chore national and human rights issues that continue to be ignored in the Conference. In June 2003, we submitted to Mr. Kiplagat and to the participants of the Conference, for their consideration, a historic document intended to create, with the future Somali Government, a “Covenant on the Identity and Rights of the Indigenous Peoples of the Benadir and Inter-riverine Region of Southern Somalia”.

The following points summarize our views on some of the important provisions in the Charter that were adopted to protect human rights, regulate native land rights, the clan quota system vs. universal suffrage, native rights to resources, and the question of unitary state vs. federalism. We will conclude our review with a brief examination of the responsibilities and obligations that we attach to the involvement of IGAD in the Reconciliation Talks.

In putting together this report, we were inspired by the proclamation of General Assembly Resolution 48/163 of 21 December 1993 regarding the inauguration of the International Decade of the World’s Indigenous People (1995-2004).

1. **HUMAN RIGHTS**

We refer to the United Nations Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Accordingly, Governments must abandon their policies of intervening in the organization and development of

indigenous peoples and must grant them autonomy, together with the capacity for managing the relevant economic processes in the manner which they themselves deem appropriate to their interests and needs”. And that, “Self determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future”.

The same document reminds us, “It must also be recognized that the rights to self determination exists at various levels and includes economic, social, cultural and political, factors. In essence, it constitutes the exercise of free choices by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they live and to set themselves as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State, including the individual and collective right to be different and to be considered different, as recognized in the statement on Race and Racial Prejudice by UNESCO in 1978”. We must definitely appreciate these important breakthroughs in the defense of the human rights of indigenous peoples.

Back in 1950, when the UN Trusteeship Council handed over the administration of Somalia to Italian Administration, considerable attention was given to the protection of the human rights of the Somali people in light of the possibility that the Italian Colonials in the country might revert back to the good old days. To prevent that, the UN Trusteeship Council negotiated the enforcement of a Declaration of Constitutional Principles as part of the Trusteeship Agreement, beyond the reach of any legislation that the Italian Authority imposed on the Territory. The UN Trusteeship Council assured the Somali people that former hard core fascists in the colony would not be allowed to participate in the administration of the Territory. Under the present circumstances, when it is obvious that the political, social, cultural, and human rights of the Somali people continue to be denied, it is more than reasonable to expect that a similar requirement, insisting on the introduction of a Bill of Rights, and the banning of war criminals altogether, would be in order.

Now, that Article 14.1 of the Charter wants us to believe that, “The Somali Republic shall recognize and enforce all international human rights conventions and treaties to which the Republic is a party”, we have nothing to do but to ask what are the covenants and international agreements on human rights that the previous Somali Governments ever signed and adopted? Anybody who lived in Somali in the past 35 years, of which 20 years were painfully consumed under the oppression of a ruthless military dictatorship and 15 years of lawlessness, knows the answer. Instead of tackling the challenges posed by the widespread human rights abuses in the country, the Charter persuades the Somali people to have faith in an empty slogan which bears no truth to reality.

Article 69.1 gives the impression that the Charter supports the protection of human rights, “The Transitional Federal Government of the Somali Republic shall uphold the rules of international law and all international treaties applicable to the Somali Republic and subject to the legislative Acts of Parliament, international laws accepted and adopted shall be enforced”. Why subject the upholding of the rules of international law and all international treaties, especially those on the protection of human rights, to the Acts of a

Parliament, handpicked by warlords, and to which has been mandated the authority to alter and repeal any legislation? Especially, when taken into consideration the weight of Article 3.3, “The validity, legality or procedure of enactment or promulgation of this Charter shall not be subject to challenge by or before any court or other State organ”.

To our knowledge, there are no past conventions on human rights to which the Somali States have ever become parties since independence in 1960. There is not even one single phrase in the Charter to indicate the need to use international human rights instruments as a legitimate guide in developing the common law in Somalia. There is no mention that where the current Charter and the 1960 Constitution fail, and mind you, there are plenty, that international law becomes part of the domestic law. To sustain that the Charter recognizes all the human rights conventions that the previous Somali Governments signed since independence is a misrepresentation of the realities of the country. We challenge anyone to bring forth a list of the international human rights conventions to which past Somali Governments have ever been a party.

In this context, we would like to point out that the indigenous people of Southern Somalia, namely those along the coasts of the Benadir and the Inter-riverine region, desperately need special protection. They bear the trauma of over half a century of colonial rule, part of which was consumed directly under the brutal regime of Italian Fascism (1900 – 60), thirty years of nepotism and clan rule (1960-90), and a decade and half of lawlessness and havoc (1990-present). They lack the education, the connections, the culture, the confidence, and the spirit with which to come out of the shadows of an alienating and unworthy dominant regime. They have developed inherent weaknesses, which makes them incapable of defending themselves against those who are taking their land and property with the use of force and/or fraudulent legislation. They are unable to promote their own interests when dealing with members of the armed clans. From the outbreak of the fighting to the present, the world has repeatedly documented the genocide and ethnocide that is committed against them. Under the International Covenant on Civil and Political Rights, they are identifiable victims. They need international protection.

The ancient land of the Benadir, from Mogadishu, Merka, Barawa, and Kisimayo, was balkanized, first by the Colonial Regime, and later by the Military Dictatorship, despite the wishes of the native Benadiri people to remain united, under one regional administration. We seek recognition of the identity and rights of the indigenous peoples of the Benadir and the inter-riverine region of Southern Somalia, including recognition of their historic original boundaries from Mogadishu to Kisimayo, in accordance with the “Covenant on the Identity and Rights of the Indigenous Peoples of the Benadir and Inter-riverine Region of Southern Somalia”.

Ultimately, we solemnly believe that human rights can be protected in Somalia only if they are entrenched in the form of a Bill of Rights. This is a guarantee and a necessity for the protection of human rights as the nation moves towards decentralization.

2. LAND

The African Charter on Human and Peoples' Rights, adopted on June 27, 1981, to which the IGAD states are a party (ref. Article 6A of the IGAD Agreement), clearly stipulates in Article 14 that, "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provision of appropriate laws".

The United Nations Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities states, "Indigenous peoples have a natural and inalienable right to keep the territories they possess and to claim the land of which they have been deprived... The recognition and protection of land rights is the basis of all indigenous movements and claims today in the face of the continuous encroachment on their land... Millenary or immemorial possession should suffice to establish indigenous title to land, official recognition and subsequent registration in the absence of specifically applicable legislative or executive measures explicitly extinguishing aboriginal rights. As these rights are not "created" by legislation, neither should they be extinguishable by unilateral acts.... Recognition here means acknowledgement of a *de facto* situation that provides a basis for the existence of a right. Official recognition and subsequent registration should follow as a matter of course, once possession and economic occupation is established".

In other words, the Benadir and the inter-riverine region of Southern Somalia, inhabited by native indigenous people whose recorded history goes as far back as the X Century and beyond, are not *terra nullius*; belonging to no one, a doctrine, which has been discredited by international law, and which was extensively used to justify the occupation of native land during the colonial era in Africa and elsewhere. Where then does the Mbagathi Charter stand when it states in Article 66.1 that, "Land being Somalia's primary resource and the basis of livelihood for the people shall be held used and managed in a manner which is equitable, efficient, productive and sustainable"? Further, Article 66.2 of the Charter stipulates that, "The Government shall define and keep constant the national land policy and framework of the land in the Somali Republic which shall ensure the registration, use, ownership, access, occupation, management rights, security, interests and title of the land". This does not only have the flavor, but is a continuation and the conclusion of the colonial decrees (1915 – 1960) and later of the military dictatorship (1969 – 90) that seized property and land belonging to the indigenous people of Southern Somalia in the interest of the colonial concessionaires and their close clan families, respectively. To our knowledge, however, and under international law, the fact of the matter is very simple: one cannot give, nor regulate, what one does not own

Again, Article 27.3 of the Charter, continues that, "The right to own private property shall be guaranteed by law, which shall define its contents and the limits of its exercise". But this is misleading because it does not apply, nor does the Charter recognize native land rights in the Benadir and in the Inter-riverine region of Southern Somalia. This is a violation of the right to own property of segments of the population and as such, it is discriminatory in nature.

It is also very important to note that the Charter is silent on the principle of "voluntary abandonment" which is widely used by the armed thugs throughout the coastal cities of the Benadir to seize property and land belonging to nationals. This principle cannot be

applied to persons who have been forced to flee their homes under wartime conditions or sell their homes under duress and extortion, something quite common in Southern Somalia. The suggestion in Article 71.4 that, “In respect of private property currently held illegally, Government shall endeavour to restore it to the rightful owners”, meaning that the role of the Government is limited to an “attempt”, as far as restitution is concerned, is very troubling, given the highly advanced character of the Somali hostilities. We believe that the effects of judicial and administrative decisions based on voluntary abandonment of land and all forms of property must be held null and void, as a precondition for a genuine reconciliation. Anything less than full and unconditional restitution of seized private and public property under war time conditions is a losing proposal.

3. CLAN QUOTA SYSTEM VS. UNIVERSAL SUFFRAGE

In our previous communication (ref. Open Letter to Ambassador Bethwel Kiplagat, dated June 2003), we explained that modern societies protect individual rights above all else on the understanding that all other rights are subordinated to individual rights and freedoms because only the individual is sacred and has dignity, not the group, not the clan, however defined. We stressed that the group rights model, if not followed to the letter, under an atmosphere of equality, would result in the preservation of the nightmare of clan hegemony, injustice, institutional violence, and regional instability. We warned that clan rights, backed by a false majority, under conditions that basically blackmail the success of the peace talks, unless certain set asides are not guaranteed, remain the obstacle to the resolution of the Somali crisis. We noted that neither the United Nations Trusteeship Administration of 1950, nor the Somali Constitution of 1960, gave any merit to this type of model.

But to read the intent of the Charter, as far as the clan model is concerned, one has to refer to Article 21.4 which states that “any political party of a military character or tribal nature shall be prohibited”. But this is polished language because it is contradicted by Article 30.2 of the same Charter which comes back to remind us that “Should any vacancy (that is parliamentary seat) arise after the coming into force of this Charter the relevant clan/sub-clan shall appoint a new member”. This is extremely dangerous because it is the legitimization of the distribution of parliamentary representation on a clan quota system, determined by warlords. Whoever is not included in this “takeoff”, and mind you that there are many, will be cut out, and will remain without any political rights. This is tantamount to offering the warlords, on a silver plate, not only the legitimacy that they desperately need, but also the power to rule which they were never able to achieve in 14 years of destruction and havoc, because of the lack of support from the Somali people and from the international community.

On purely legal grounds, absent universal suffrage, neither those who promote the clan quota system, nor IGAD can establish the basis for assigning a 0 (zero) factor to some clans, 0.5 (zero point five) factor to other clans and 1.0 (one) factor to some other clans for the distribution of parliamentary seats. To put the gravity of the slow down of Mbagathi in prospective, one has to ask since when did Somalia begin to have first class citizens, second class citizens and third class citizens? Further, the provisions of Article

14.2.C which states that “Every citizen shall have the right to vote upon attainment of 18 years of age” are misleading. The same is true about the provisions of Article 21.6 which states that, “All Citizens possessing the qualifications required by law have the right to vote and be elected to Public Office”. But these articles are misleading because the voting right is recognized only within the clan group, as the right is not extended to all nationals, as stipulated in Article 30.2 of the same Charter which comes back to remind us that “Should any vacancy (that is parliamentary seat) arise after the coming into force of this Charter the relevant clan/sub-clan shall appoint a new member”. This is a very serious omission, a regrettable setback to political advancement and national unity.

We believe that there can be no substitute to universal national suffrage as the only means by which any future Somali government can claim legitimacy. Any plan which rejects universal suffrage and which approves of a power sharing mechanism based on franchise rights only within clan groups, living within their group area, is undoing the work of a century of urbanization, economic development, and national integration. Such constitutional provisions, if ever adopted, would exclude millions of alienated groups who do not belong to any of the armed militias, either as voters or as candidates for electoral office.

In this regard, a United Nations supervised national election, like the one carried out in Liberia in July 1997, in the presence of prestigious non-profit organizations, such as the Carter Center, would help remove the unrelenting confusion and mystification that is continuously raised over the distribution of political representation in the country.

4. RESOURCES

The United Nations Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities states, “In many legal systems, mineral and hydrocarbon deposits belong to the State, so that the granting of licenses for the exploration and mining of deposits is handled mainly by the government authorities. As the land belongs to the indigenous communities, they must be allowed to share in the profits resulting from such mining activities. They must also be compensated for damage caused. Still more important, they must be allowed to participate in the process of granting exploration and mining licenses and to examine all the potential consequences of the proposed exploration and mining activities. Particular care should be taken to ensure that the licenses or concessions granted by the State are not of such a kind, or awarded in such quantities, or so extensive that they negate the right of the indigenous peoples to enjoy the use of their land”.

Article 27.2 of the Charter, however, states that. “The Government shall encourage, support and provide full guarantee to foreign investment in the country as specified by law”. Article 67.1 continues, “The natural resources of the country such as the minerals, water, flora and fauna shall be public property and a law shall be enacted which defines the manner of exploitation for the common good”. Clearly, there is complete silence over the role that the communities will play and what benefits they will derive from the riches that are being taken from their land. There is no distinction made between what

constitutes developmental investment and what constitutes robbery of the national resources.

On this question, the referenced UN Documents stipulates that, “Since indigenous rights to land include the right to all natural resources contained therein and it is the communities concerned that will suffer all the consequences of mining and prospecting, current mining and prospecting should be suspended until negotiations are held with the indigenous populations concerned”. The document continues, “The protection and preservation of existing indigenous land bases from exploitation by multinational corporations without the explicit consent of the communities concerned should be guaranteed.... Existing laws and criteria for the adjudication of priorities, which currently favour non-indigenous people and transnational corporations, should be studied and revised so as to arrive at more just arrangements that would fully recognize indigenous land rights”.

This applies to the oil explorations as much as to any other resource in the country.

5. UNITARY STATE vs. FEDERALISM

We understand the underlying concerns that lead vast sections of the Somali people to dismiss the unitary state because of fear of abuse of power by the central authority. So much pain and suffering have been caused to innocent civilians in the countryside and in the cities by the military dictatorship that ordinary citizens legitimately question the validity of a central authority which cannot deliver and protect its own citizens. This is the background against which we inevitably must see the debate between a unitary state versus federalism and it is driven by the inspiration of the vast majority of defenseless citizens to escape the oppression of a despotic unitary state.

Despite this revolting reality, there are serious doubts about the economic feasibility of four or five separate city-states, under the present backward state of the economy. Further, the same tenets of set asides, clan privileges, power concentration, abuse of power, and mismanagement, that brought down the unitary state are inherent in the existing breakaway city-states, where power is concentrated in the hands of one or to two clan families. The matter is further complicated by the ambition of certain militia leaders to preserve their personal and clan leadership at any cost, be it at the national level or at the city-state level, and is based on fear of losing power and of majority rule rather than a rational judgment of the real interests or needs of the people of Somalia. Indeed, the dismissal of the unitary state is a prelude to the downward proliferation of clan feuds and hostilities in every corner of the country, as is already the case in the existing city-states. The problems of the Somali people, as far as the abuse of power is concerned, hence, do not go away by throwing away the baby with the dirty water.

It is interesting to note that, despite the announcement of a Federal system, the Charter shies away from mentioning the names, number and boundaries of the states, districts, and municipalities, which will form the federal state. The headache, that could have been saved the Somali people, starts with the touchy borders of the regions, districts, and municipalities, many of which have naturally changed their clan composition, over a

century of urbanization and national integration. These are natural processes that cannot be reversed with the ink and paper of Mbagathi and are based on the social and economic reality of the country, which finds support in the millions of Somalis whose concerns are not voiced in the talks. As the matter of regional demarcations are never raised in the Charter, it is silently passed out to the Parliament which has the authority to invoke the provisions of the 1960 Constitution, implying that, absent open debate and consensus, the matter might be resolved in the corridors of the parliament and that force might be used to balkanize certain regions, something quite typical of the good old boys.

There is nothing to prove that a democratic decentralized unitary state, of constitutional checks and balances, of separation of powers, of a multi-party state, and of a judicial bill of rights to guarantee public and private powers, with regional autonomy, based on equal rights and equal opportunity for all individuals, cannot serve the people of Somalia. The future Somali State must have the duty to promote a single national identity and loyalty, but at the same time, recognize, protect, and develop the positive aspects of cultural and linguistic pluralism.

6. IGAD INVOLVEMENT

After reviewing the contents of the charter, which unmistakably deny vast sections of the Somali population their God given right to equal rights, mind you with the endorsement of IGAD, we are bound to go on record that what is branded as a pragmatic resolution of the Somali crisis is nothing more than the meeting of the minds of two stake holders in the Somali crisis: the neighboring governments of Kenya and Ethiopia on one side, and the Somali warlords on the other side. We are bound to state that not even the future stability of the region as a whole was taken into consideration when IGAD bows to the demands of clan oligarchies, bent on holding the Somali people captive for another century.

We have a feeling that, in this case, the concept of dispute resolution stems up and dwells upon the common place notion that the Somali people are immature and unprepared to appreciate anything other than the rule of warlords and backward clan elders. This, despite the historic assessments made by the United Nations Advisory Council in 1950 that, unmistakably, the Somali people, including the very men and women who live deep in the countryside, are more than prepared to appreciate the fruits of equal rights, equal opportunity, and freedom.

Are we reminded once again, as in the old colonial days, and are we to understand that the Somali people are a primitive race for whom there is no need to make provisions in an enduring document such as the Charter? By all accounts, one has to wonder why the IGAD neighboring countries are so inclined to endorse a burdensome Charter that is going to hold the Somali people captive for a long time to come? Why not see the pain and suffering of millions of decent Somalis, children, women, and the elderly, who continue to look towards the international community for genuine solidarity and support? Why continue to portray Somalia as nothing more than a sanctuary of warlords and backward clan elders? One wonders whatever happened to the courage and determination of IGAD to facilitate a genuine reconciliation for the suffering people of

Somalia? There are many troubling and unanswered questions associated with the capacity of IGAD to function as a facilitator of genuine reconciliation.

IGAD has assumed the responsibility to facilitate the “Reconciliation”, it has the knowledge of the facts, it can foresee the negative impact that this Charter would have on the rights of the vast majority of unarmed groups in the country, it has thereby an obligation to use diligent care when dealing with the political, social, economic and cultural rights of the vast majority of unrepresented Somalis. It has an obligation towards the region and international community to work towards genuine peace and long term stability in the region. IGAD has the duty and the obligation to conform to a certain standard of conduct for the protection of the rights of the Somali people against unreasonable risks. “Though the defendant did not himself light the fire, yet immediately, he is as much the cause of it as if he himself put a candle to the rick for it is well known that hay will ferment and take fire if it be not carefully stacked.” Certainly, we will hold the neighboring governments of IGAD responsible for any drop of blood that will be shed from the suffering people of Somalia, for facilitating for the warlords the opportunity to take power in Somalia, for getting them off the hook, and for hurling the Somali people into the doldrums of a long and unending clan war.

We will exhaust all avenues with your office. We hope that you will give us a written explanation clarifying the matter and whether IGAD will provide any remedies. In our view, IGAD still has the time to move these motions, rectify the Charter and bring it into conformity with the contemporary standards of justice and human rights. We reserve the right to pursue the matter under the provisions of International Law.

Sincerely,

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