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## Introduction

Famously described as “the right to have rights,” nationality – and the identity documentation to prove this nationality – are fundamental rights in and of themselves, and operate as requirements to access a huge swath of government services and other basic rights. As a result, when implementing legislation that centrally impacts nationality, such as digital identity systems (digital ID), governments *must* carefully consider program impacts and design programs that further the realization of human rights, not risk their violation.

*Without an ID card, there’s so many difficulties. You cannot travel, you cannot get your rights. You are nothing if you have no ID card.*

–Double Registered Individual in Garissa, Kenya

Recognizing the fundamental nature of nationality, this report is intended to support advocacy regarding the proposed digital ID in Kenya. Students and faculty at the University of California, Berkeley’s International Human Rights Law Clinic (the Clinic) and Haki Na Sheria Initiative (HSI), a Garissa-based Kenyan CSO, developed the report from January to April of 2023, including a week of key informant interviews in Nairobi.

At the outset of the partnership between HSI and the Clinic, HSI identified human rights impact assessments (HRIA) as a possible tool to better evaluate the human rights risks of Kenya’s proposed digital ID. A systematic evaluation of the human rights risks of legislation, a HRIA offers the opportunity to ground the assessment of legislation in a State’s human rights obligations and address risks accordingly. Because a HRIA might complement the Data Protection Impact Assessment required by Kenyan High Court in the 2020 decision following the challenge to Huduma Namba, we focused on how a HRIA could address concerns of exclusion and discrimination as a result of digital ID. This report summarises both the potential value of HRIAs and the legal obligations that may require Kenya to conduct a HRIA prior to the implementation of digital ID.

The structure of the report is as follows. Part II outlines background on digital ID and communities possibly affected by discrimination and exclusion. Part III outlines the parameters of an effective HRIA and examples of effective HRIAs in other jurisdictions Part IV describes the relevant legal obligations that would require Kenya to conduct a HRIA. Part V provides a series of the potential rights violations that would be identified through an effective HRIA, and Part VI discusses a series of recommendations for governments, CSOs, involved international organizations, and community-based organizations.

## Background on digital ID: what is it and why is it so problematic?

On 20 November 2018, the Kenyan National Assembly enacted Statute Law Act No. 18 (hereinafter the Act), that established the National Integrated Identity Management System (NIIMS) and Huduma Namba in Kenya.<sup>1</sup> Intended to be a single source of personal information for Kenyans, the government began collecting extensive personal information from individuals, including biometrics, to

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<sup>1</sup> *Nubian Rights Forum & 2 others, v. The Hon. Attorney General & 6 others*, Republic of Kenya in the High Court of Kenya at Nairobi, Constitutional & Judicial Review Division, Consolidated Petitions No. 56, 58 & 59 of 2019 ¶¶ 1-2 (Jan. 2020), [https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2021/10/Petition\\_56\\_58\\_59\\_of\\_2019\\_Consolidated.pdf](https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2021/10/Petition_56_58_59_of_2019_Consolidated.pdf).

generate a unique identifier known as Huduma Namba.<sup>2</sup> Huduma Namba was intended to serve as an individual's primary identifier.<sup>3</sup>

In 2019, a coalition of civil society organizations<sup>4</sup>, (hereinafter the Coalition) brought suit against the government, arguing that 1) the legislative process to amend the Act was unconstitutional; 2) the Act threatens violations of the right to privacy; and 3) the Act marginalized communities.<sup>5</sup> The Court found for the petitioners on privacy issues, finding that the information that the government collected in 2019 was excessive, and that additional security and data protection frameworks needed to be implemented before the Huduma Namba could go into effect.<sup>6</sup> However, the Court found against petitioners on issues of discrimination, finding that there was insufficient evidence of differential treatment of Nubians and other at-risk groups.<sup>7</sup>

*Digital ID is something that the government has created, and has been registering people in. Some people are saying it's good for us, others aren't. In my opinion, the government hasn't explained whether this thing is good or not. Right now, digital ID is not working in Kenya.*

-NG

In 2023, the newly elected government announced its intention to introduce the Unique Personal Identifier (UPI) and Third Generation ID, fashioned as alternatives to the Huduma Namba system. Reminiscent of the American social security system, the UPI system will assign babies an ID number at birth, which will integrate into their digital ID when they turn 18.<sup>8</sup> The Third Generation ID is a digital ID for those who are already adults.<sup>9</sup> One of the main questions arising is whether the government intends on utilizing the information previously collected in 2019 under the Huduma Namba programme.<sup>10</sup> However, as evidenced by interviews conducted with key stakeholders in Nairobi, there is very little information

<sup>2</sup> *Id.* at ¶ 12.

<sup>3</sup> *Id.* at ¶15.

<sup>4</sup> Members of the Coalition include Nubian Rights Forum, Kenya Human Rights Commission, Namati, Open Society Justice Initiative, Access Now, and Haki Na Sheria Initiative.

<sup>5</sup> *Nubian Rights Forum & 2 others, v. The Hon. Attorney General & 6 others*, Republic of Kenya in the High Court of Kenya at Nairobi, Constitutional & Judicial Review Division, Consolidated Petitions No. 56, 58 & 59 of 2019 ¶¶ 12-15 (Jan. 2020).

<sup>6</sup> *Nubian Rights Forum & 2 others, v. The Hon. Attorney General & 6 others*, Republic of Kenya in the High Court of Kenya at Nairobi, Constitutional & Judicial Review Division, Consolidated Petitions No. 56, 58 & 59 of 2019 ¶¶910; 911; 920; 919; 922 (2020).

<sup>7</sup> *Nubian Rights Forum & 2 others, v. The Hon. Attorney General & 6 others*, Republic of Kenya in the High Court of Kenya at Nairobi, Constitutional & Judicial Review Division, Consolidated Petitions No. 56, 58 & 59 of 2019 ¶¶992; 996 (2020).

<sup>8</sup> Rachel Achieng' & Joshua Kitili, *An Overview of the Digital ID System and the Unique Personal Identifier in Kenya*, Strathmore University, Centre for Intellectual Property and Information Technology Law, available at: <https://cipit.strathmore.edu/an-overview-of-the-digital-id-system-and-the-unique-personal-identifier-in-kenya/> (Feb. 28, 2018).

<sup>9</sup> Rachel Achieng' & Joshua Kitili, *An Overview of the Digital ID System and the Unique Personal Identifier in Kenya*, Strathmore University, Centre for Intellectual Property and Information Technology Law, available at: <https://cipit.strathmore.edu/an-overview-of-the-digital-id-system-and-the-unique-personal-identifier-in-kenya/> (Feb. 28, 2018).

<sup>10</sup> Rachel Achieng' & Joshua Kitili, *An Overview of the Digital ID System and the Unique Personal Identifier in Kenya*, Strathmore University, Centre for Intellectual Property and Information Technology Law, available at: <https://cipit.strathmore.edu/an-overview-of-the-digital-id-system-and-the-unique-personal-identifier-in-kenya/> (Feb. 28, 2018).

publicly available as to when the government plans to implement these programs, or how people will interact with them.<sup>11</sup>

*I am a victim of double registration, but today I got my ID. I am very happy to have ID. I am a real Kenyan today.*

– JB

Lack of ID affects individuals in all aspects of their lives. Without IDs, people are restricted in their abilities to own property, access healthcare and education, travel, and work.<sup>12</sup> There are three primary groups of people who currently face barriers in accessing national IDs and other citizenship documentation: double registered individuals, Nubians and other Muslim communities, and individuals unable to access birth registration generally (including individuals in border communities and from socially or economically disadvantaged communities).

Double registered individuals are Kenyans who were erroneously registered as refugees during a severe drought in Northern Kenya that coincided with the Somali civil war.<sup>13</sup> UNHCR camps set up in Kenya for Somali individuals began to accept Kenyans who needed access to food.<sup>14</sup> Many of these individuals did not realize that they were registered as refugees until they came of age and attempted to access ID cards.<sup>15</sup> Because they were registered as refugees, they were not able to also access national ID cards, and without them.<sup>16</sup> In 2016 and 2019, the government held “de-registration” sessions to try to correct this issue, and some people were able to access IDs.<sup>17</sup> Additionally, in January of 2022, the Kenyan government announced that it would issue 14,000 ID cards to victims of double registration.<sup>18</sup> However, many more victims of double registration still exist, facing severe discrimination in various spheres of daily life as a result of their inability to access identification documents.<sup>19</sup>

<sup>11</sup> Interview with Coalition members (March 29, 2023). The Kenyan government appears to be concerned that the 2019 information gathering exercise cost an estimated 11 billion Kenyan Shillings and does not want that money to go to waste.

<sup>12</sup> HAKI NA SHERIA, BIOMETRIC PURGATORY: HOW THE DOUBLE REGISTRATION OF VULNERABLE KENYAN CITIZENS IN THE UNHCR DATABASE LEFT THEM AT RISK OF STATELESSNESS, 5-6 (2021), [http://citizenshiprightsafrika.org/wp-content/uploads/2021/11/Haki-na-Sheria\\_Double-Registration\\_Nov2021.pdf](http://citizenshiprightsafrika.org/wp-content/uploads/2021/11/Haki-na-Sheria_Double-Registration_Nov2021.pdf).

<sup>13</sup> Privacy International, *When ID Leaves You Without Identity: The Case Of Double Registration in Kenya* (Dec. 20, 2021), <https://privacyinternational.org/video/4412/when-id-leaves-you-without-identity-case-double-registration-kenya/>

<sup>14</sup> *Id.*

<sup>15</sup> HAKI NA SHERIA, BIOMETRIC PURGATORY: HOW THE DOUBLE REGISTRATION OF VULNERABLE KENYAN CITIZENS IN THE UNHCR DATABASE LEFT THEM AT RISK OF STATELESSNESS, at 30.

<sup>16</sup> *Id.* at 15.

<sup>17</sup> *Id.* at 17.

<sup>18</sup> *Kenyan Government Plans to Issue 14 000 National Identity Cards for the Double Registered*, KIOS FOUNDATION (Feb. 9, 2022), <https://kios.fi/en/2022/02/kenyan-gorvenment-plans-to-issue-14-000-national-identity-cards-for-the-double-registered/>.

<sup>19</sup> HAKI NA SHERIA, BIOMETRIC PURGATORY: HOW THE DOUBLE REGISTRATION OF VULNERABLE KENYAN CITIZENS IN THE UNHCR DATABASE LEFT THEM AT RISK OF STATELESSNESS, at 15.

**In addition to discrimination and administrative hurdles, cost becomes a significant barrier for many. As GJ explains:**

*There are so many hurdles to obtaining the ID, even after the 2019 vetting process for people that are double registered. Whenever documents would have to go to or from Nairobi, someone would demand money. It was 70,000 kSH just to send forms to Nairobi. If you did not pay, they would not send the forms, they would just leave them.*

-GJ

“Border” and Muslim communities are subject to mandatory “vetting procedures” before they can access IDs.<sup>20</sup> The vetting process is cumbersome and invasive; though this description focuses on the Nubian community, it is akin to the vetting procedure for border and other Muslim communities.<sup>21</sup> Nubian Kenyans must be vetted by a panel of Nubian elders,<sup>22</sup> in the Nairobi neighbourhood in Kibera, regardless of where they live.<sup>23</sup> The Nubian vetting panel meets only on Tuesdays and Thursdays for limited hours.<sup>24</sup> The committee of elders is not subject to any form of guidelines governing their decision whether to grant an ID, and the process is highly arbitrary.<sup>25</sup> Nubian Kenyans have described being rejected as a result of personal conflicts or issues with those on the vetting panels, however, are never provided with an explanation for either a positive or negative outcome.<sup>26</sup> Legal representatives are not permitted to attend the actual vetting hearings meaning it is difficult for legal aid organizations to offer full and effective representation to

those seeking an ID.<sup>27</sup> When the elders do ask for specific documentation, it is often documentation the Nubian Kenyans are unable to access, such as a grandparent’s birth certificates or land-deeds.<sup>28</sup> Sometimes, Nubian Kenyans are left waiting for their ID cards for years, without any explanation from the elders, and

<sup>20</sup> NAMATI KENYA, THE VICIS OF DISCRIMINATION: THE IMPACTS OF VETTING AND DELAYS IN THE ISSUANCE OF ID CARDS IN KENYA, 5 (Jan. 25, 2019), <https://namati.org/resources/vices-of-discrimination-impacts-of-vetting-delays-in-issuance-of-id-cards-kenya/>. In 2015, the Open Society Justice Initiative estimated that nearly 50% of Nubians were subjected to vetting, as compared to 7% of non-Nubians. Ben Oppenheim & Brenna Marea Powell, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya*, OPEN SOCIETY JUSTICE INITIATIVE, 11 (2015), <https://www.justiceinitiative.org/uploads/0a6472de-a975-4a3b-b3ad-2b979891d645/legal-identity-2030-agenda-lessons-kibera-kenya-2051216.pdf>.

<sup>21</sup> NAMATI KENYA, THE VICIS OF DISCRIMINATION: THE IMPACTS OF VETTING AND DELAYS IN THE ISSUANCE OF ID CARDS IN KENYA, at 5-6. The Kenyan government has long vetted “border communities” to protect national security, but provides little information about which communities are vetted, what specific vetting procedures they are subject to, and why they have been chosen. For instance, after decades of vetting, the Pemba community in Southeast Kenya was recently granted citizenship rights. Though this is ultimately a positive step for the Kenyan government and the Pemba community, more information is required as to why the government made this decision for this particular border community, and not others. See Fred Nasubo, *Statelessness: Pemba Community’s Fight for Citizenship and Identity*, THE ELEPHANT (Jan. 30, 2023), <https://www.theelephant.info/topic/identity/?print=pdf-search>.

<sup>22</sup> NAMATI KENYA, THE VICIS OF DISCRIMINATION: THE IMPACTS OF VETTING AND DELAYS IN THE ISSUANCE OF ID CARDS IN KENYA, at 2. Nubians also experience a more burdensome vetting process than members of other communities who do go through vetting. 33.8% of Nubians who are vetted say that they had to attend two or more vetting committee meetings. Ben Oppenheim & Brenna Marea Powell, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya*, at 11.

<sup>23</sup> Interview with Coalition Member (March 29, 2023).

<sup>24</sup> NAMATI KENYA, THE VICIS OF DISCRIMINATION: THE IMPACTS OF VETTING AND DELAYS IN THE ISSUANCE OF ID CARDS IN KENYA, at 5.

<sup>25</sup> Interview with Coalition Member (March 29, 2023). NAMATI KENYA, THE VICIS OF DISCRIMINATION: THE IMPACTS OF VETTING AND DELAYS IN THE ISSUANCE OF ID CARDS IN KENYA, at 5-8.

<sup>26</sup> *Id.*

<sup>27</sup> Interview with Coalition Member (March 29, 2023). NAMATI KENYA, THE VICIS OF DISCRIMINATION: THE IMPACTS OF VETTING AND DELAYS IN THE ISSUANCE OF ID CARDS IN KENYA, at 4-5.

<sup>28</sup> Interview with Coalition Member (March 29, 2023). NAMATI KENYA, THE VICIS OF DISCRIMINATION: THE IMPACTS OF VETTING AND DELAYS IN THE ISSUANCE OF ID CARDS IN KENYA, at 5-6.

meanwhile, are unable to access government services, or participate in society.<sup>29</sup> As a result, many Nubian Kenyans turn to measures such as using a family member’s ID, or adopting a fake, non-Nubian name.<sup>30</sup> However, while these strategies allow Nubian Kenyans to survive, they often have lasting, and unintended consequences for individuals and their future offspring.<sup>31</sup>

Finally, economically<sup>32</sup> and socially<sup>33</sup> disadvantaged individuals may face issues accessing digital ID as a result of inability to navigate convoluted government procedures, and a lack of infrastructure through which to access digital IDs.

Lack of the national ID, or an inability to access the infrastructure to interact with digital ID will result in the exclusion of these communities from the new digital ID scheme. These marginalized communities have been coping with the implications of de-facto statelessness for years as a result of lack of identification: if the digital ID scheme is implemented as planned, these struggles will likely be exacerbated as a result of even further reliance on ID to operate in society.

## Background on HRIAs: What makes a HRIA effective?

### What is a Human Rights Impact Assessment?

The purpose of a HRIA is to employ a “systematic process, grounded in international human rights law... to investigate the potential impact of laws, policies, programs, projects, and interventions on the human rights of individuals, population groups, or general society.”<sup>34</sup> By grounding the HRIA in binding international human rights law, HRIAs are able to address a more universal range of human rights impacts than other assessments, such as data protection assessments, and the binding nature of human rights law increases accountability.<sup>35</sup>

To achieve its goals and fulfil the international legal obligations outlined in the following section, a HRIA must be effective. International human rights bodies, such as the World Bank have outlined various guidelines on the parameters and guidelines for conducting a HRIA to ensure an assessment that is effective

<sup>29</sup> Interview with Coalition Member (March 29, 2023). NAMATI KENYA, THE VICES OF DISCRIMINATION: THE IMPACTS OF VETTING AND DELAYS IN THE ISSUANCE OF ID CARDS IN KENYA, at 5-9.

<sup>30</sup> Interview with Coalition Member (March 29, 2023).

<sup>31</sup> Interview with Coalition Members (March 29, 2023).

<sup>32</sup> For example, the World Bank estimated in 2020 that only 30% of Kenyans have access to the internet, and only 70% of Kenyans have access to the electricity. *Individuals Using the Internet, Kenya*, WORLD BANK: WORLD TELECOMMUNICATION/ICT INDICATORS DATABASE, (2020), <https://data.worldbank.org/indicator/IT.NET.USER.ZS?end=2020&locations=KE&start=2020>; *Access to Electricity (% of Population), Kenya*, WORLD BANK: GLOBAL ELECTRIFICATION DATABASE, (2020), <https://data.worldbank.org/indicator/EG.ELC.ACCS.ZS?locations=KE>.

<sup>33</sup> For instance, digital ID expert Grace Mutungu’ described the difficulty single mothers face in accessing IDs for their children, because government officials often do not accept maternal last names or require the biological father’s citizenship documentation. Interview with Grace Mutungu’ (March 29, 2023).

<sup>34</sup> Kasey McCall-Smith, *Good better best? Human rights impact assessment in crisis lawmaking*, THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS (2022), <https://www.tandfonline.com/doi/full/10.1080/13642987.2022.2057955>.

<sup>35</sup> Simon Walker, *Human Rights Impact Assessments. Emerging Practice and Challenges*, in Eibe Riedel et al. (eds.), *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW* (Oxford: Oxford University Press, 2014), <https://academic.oup.com/book/1746/chapter/141406094>; THE WORLD BANK & NORDIC TRUST FUND, *HUMAN RIGHTS IMPACT ASSESSMENTS: A REVIEW OF THE LITERATURE, DIFFERENCES WITH OTHER FORMS OF ASSESSMENTS AND RELEVANCE FOR DEVELOPMENT* x (Feb. 2013), <https://documents1.worldbank.org/curated/en/834611524474505865/pdf/125557-WP-PUBLIC-HRIA-Web.pdf>.

in both identifying human rights risks and possible solutions.<sup>36</sup> Throughout the process of compiling this memo, the Clinic spoke to several experts on digital ID and civil society leaders, who also shared their perspectives on the criteria for an effective HRIA. The guidance from international bodies and perspectives of experts are compiled throughout this section.

Experts and international bodies have emphasized four core criteria for a HRIA for digital ID:

*(1) Public and transparent*

Making the results and process transparent and public will be critical to ensure that a HRIA is not simply deployed as a tick-box exercise tool by the government to argue that they have engaged on human rights issues, while failing to make any real change.

*(2) Inclusive*

Experts also emphasized the importance of ensuring that any HRIA is inclusive, both of the range human rights risks and of affected populations.<sup>37</sup> Experts expressed concern over the ways in which public participation as mandated by the Kenyan Constitution has historically focused only on Nairobi, where it has even been conducted, and excluded some of the most vulnerable populations.<sup>38</sup> To be meaningfully inclusive, a HRIA would need to be able to capture the experiences of individuals who may not be able to engage with written materials on digital ID, whether due to language, accessibility, or literacy issues. A HRIA should also consider how a digital ID might function for certain populations while failing others as a result of ethnic or religious discrimination or broader accessibility issues, such as lack of internet access.

*(3) Iterative*

Any HRIA must be an iterative process, not a one-off, checkbox exercise. A fully transparent process that is inclusive of different factions of Kenyan society will be crucial in preventing an HRIA from becoming performative. To be effective, the government could provide initial information to the public and CSOs, allow time for comment, revise its proposals, and then allow additional comment. This process would ensure that any digital ID proposal meaningfully incorporates findings from a HRIA.

*(4) Engage with the human impact of digital ID*

Finally, and critically, a HRIA must engage with the human aspects of the impacts of digital ID. Collecting and sharing individual stories about the impact of digital ID, with individuals' consent, will allow for the government and public more generally to better understand how human rights risks will play out in practice, and the very real consequences of not addressing these risks. Stories collected will also serve as a powerful advocacy tool.

Taking these findings and essential elements, experts proposed that a HRIA must consider the ways that UPI and third generation ID will be implemented, must be informed by the relevant international and domestic legal frameworks (both on the requirement to conduct a HRIA generally, and relevant law for the impacted rights), must include current and historical issues of exclusion, and must address how the new digital ID scheme will remedy these issues.

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<sup>36</sup> THE WORLD BANK & NORDIC TRUST FUND, HUMAN RIGHTS IMPACT ASSESSMENTS: A REVIEW OF THE LITERATURE, DIFFERENCES WITH OTHER FORMS OF ASSESSMENTS AND RELEVANCE FOR DEVELOPMENT x.

<sup>37</sup> Interview with Coalition Members (March 29, 2023); Interview with Access Now (March 30, 2023); Interview with Grace Mutungu' (March 29, 2023).

<sup>38</sup> Interview with Coalition Members (March 29, 2023).



## Comparative examples

In addition to the international and regional jurisprudence on HRIAs, there are various examples in State practice that can be used to argue that HRIAs offer a critical, if not necessary, strategy for States to meet their positive obligations to respect, protect, and fulfil.

Several States have adopted human rights compatibility procedures designed to ensure that all legislation does not violate the State’s human rights obligations.<sup>39</sup> These procedures all involve some type of ministerial review, where a member of Cabinet must provide a brief statement or report to Parliament on whether the proposed bill is compatible with human rights.<sup>40</sup> For example, in Canada, all proposed bills are accompanied by a Memorandum to Cabinet, which requires an analysis of any implications for rights protected in the Canadian Charter of Rights and Freedoms.<sup>41</sup> The Minister of Justice will also examine compatibility and his findings to the House of Commons if he finds the bill to be incompatible.<sup>42</sup> Another procedure some Commonwealth jurisdictions have adopted is having a legislative committee responsible for reviewing existing laws and proposed bills for their human rights implications.<sup>43</sup> The Australian Parliamentary Joint Committee on Human Rights reviews all existing and proposed federal legislation for human rights compatibility.<sup>44</sup> It considers “whether the legislation could be applied in ways which limit human rights,” and if so, whether those limitations are permissible under international human rights law by meeting reasonableness, necessity, and proportionality tests.<sup>45</sup> If a measure is found to have a limiting impact on human rights, then the compatibility statement provided by the ministry must include a “detailed, reasoned and evidence-based assessment.”<sup>46</sup> Whereas the Canadian model only guarantees ministerial review of human rights compatibility, the Australian model requires both the executive and the legislative functions of government to integrate critical analysis of human rights impacts into their law-making procedures.

While the specific concept of a “Human Rights Impact Assessment” is not evidence in state practice of ex-ante evaluation of legislation, it is becoming increasingly common for states to take into account human rights-related considerations as they conduct the more broadly applicable “Regulatory Impact Assessment” (RIA). RIAs originated from the OECD as ex-ante cost-benefit analyses that States carried out before implementing regulations that could have substantial consequences for businesses and the

<sup>39</sup> See Elin Elizabeth Weston, *Section 19 of the Human Rights Act 1998: Importance, Impact and Reform*, 42–85 (2013) (Ph.D. dissertation, King’s College London), [https://kclpure.kcl.ac.uk/portal/en/theses/section-19-of-the-human-rights-act-1998\(1f30141e-d2a3-48df-9a73-b1c36a09a88f\).html](https://kclpure.kcl.ac.uk/portal/en/theses/section-19-of-the-human-rights-act-1998(1f30141e-d2a3-48df-9a73-b1c36a09a88f).html).

<sup>40</sup> See *id.*, at 46, 61, 78 (noting the practice of “ministerial certification” in Canada, New Zealand, and Australia).

<sup>41</sup> Canadian Bill of Rights, S.C. 1960, c 44 s 3(1); DEPT. OF JUST. ACT, R.S.C. 1985, c J-2 s 4.1(1).

<sup>42</sup> CAN. DEPT. OF JUST., GUIDE TO MAKING FEDERAL ACTS AND REGULATIONS 155 (2nd ed. 2001),

<https://www.canada.ca/en/privy-council/services/publications/guide-making-federal-acts-regulations.html>.

<sup>43</sup> See Elin Elizabeth Weston, *Section 19 of the Human Rights Act 1998: Importance, Impact and Reform* at 46, 61, 78 (noting the practice of “parliamentary scrutiny” in Australia).

<sup>44</sup> Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) pts 2–3 (rev. 2015) (Austl.),

[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r4420](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4420).

<sup>45</sup> AUSTR. PARLIAMENTARY J. COMM. ON HUM. RTS., GUIDANCE NOTE 1: EXPECTATIONS FOR STATEMENTS OF COMPATIBILITY 1–2 (2021), [https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights\\_ctte/guidance\\_notes/guidance\\_note\\_1/01\\_Guidance\\_Note.pdf?l](https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/01_Guidance_Note.pdf?l)

[a=en&hash=4CE0BFF2F3CA3C32EAD58AD932DB73E89494455D](https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/01_Guidance_Note.pdf?l).

<sup>46</sup> AUSTR. PARLIAMENTARY J. COMM. ON HUM. RTS., GUIDANCE NOTE 1: EXPECTATIONS FOR STATEMENTS OF COMPATIBILITY 3 (2021), [https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights\\_ctte/guidance\\_notes/guidance\\_note\\_1/01\\_Guidance\\_Note.pdf?l](https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/01_Guidance_Note.pdf?l)

[a=en&hash=4CE0BFF2F3CA3C32EAD58AD932DB73E89494455D](https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_1/01_Guidance_Note.pdf?l).

economy.<sup>47</sup> Over the past few decades States have expanded the role and function of RIAs in their policymaking infrastructure to implicate states’ international human rights obligations.<sup>48</sup>

The RIA systems in Ghana and South Africa demonstrate how the use of RIAs in evaluating the socio-economic and equality impacts of legislation is a key innovation of the past few decades that has facilitated States’ implementation of their international human rights obligations.

In Ghana, RIAs evaluate the impacts on social equity and fairness of all draft legislation.<sup>49</sup> The comprehensive analysis should “identify significant impacts on specific social groups (e.g. poor people, the aged, working men and women, persons with disabilities, parents, children, families, youth, women, religious and linguistic minorities, taxpayers, etc),” and whether the proposed legislation will cause disparate outcomes between these groups.<sup>50</sup> Each Cabinet Memorandum must also have a section analysing gender equality and must consider how gender dynamics are influenced by other factors such as geographical location, socio-economic group, disability, and religion.<sup>51</sup>

South Africa has adopted a Social Economic Impact Assessment System (SEIAS).<sup>52</sup> Like Ghanaian RIAs, SEIAS is designed to integrate considerations of equity and fairness into the law-making process.<sup>53</sup> South Africa’s SEIAS Guidance states that “in a deeply unequal society like South Africa any policy will have unequal impacts. It is therefore not possible simply to compare estimates of costs and benefits. Rather, impact assessments must analyse costs and benefits to different groups.”<sup>54</sup> Thus, key to the South African model is gauging the distributional effects of proposed legislation in order to combat structural inequalities. If SEIAS or the Ghanaian RIA were applied to digital ID, the unique position of the Nubian and Somali communities and other marginalized groups would have to be considered in depth prior to legislation and implementation.

<sup>47</sup> See, e.g., OECD, RECOMMENDATION OF THE COUNCIL OF THE OECD ON IMPROVING THE QUALITY OF GOVERNMENT REGULATION 3 (2022), <https://legalinstruments.oecd.org/public/doc/128/128.en.pdf>.

<sup>48</sup> See, e.g., OECD, OECD REGULATORY POLICY OUTLOOK 2021 79 (2021), <https://www.oecd.org/publications/oecd-regulatory-policy-outlook-2021-38b0fdb1-en.htm> (observing that “it is now mandatory to assess the impacts of regulations on poverty, on gender equality, and on the environment in 29, 32, and 32 OECD members, respectively.”). Other areas of impact that have received increased attention in RIAs include social goals (31 countries), sustainable development (29), specific social groups (30), income inequality (28), and the impacts on specific regional areas (26). *Id.* at 80.

<sup>49</sup> See, e.g., CABINET SECRETARIAT OF GHANA, CABINET MEMORANDUM MANUAL 21 (2007), <http://www.cabinetgovernment.net/docs/addis-ababa/4e-ghana-cabinet-memorandum-manual.pdf> (“Decision makers need to know the impacts of the options that are before them. For example, will the proposed option affect different groups or regions in different ways: will there be obvious winners and losers? Who? At what cost?”).

<sup>50</sup> *Id.* at 24.

<sup>51</sup> *Id.* Annex 5 of the Manual provides a Gender Assessment Tool that guides a gender equality and human rights analysis. *Id.* at 53–54.

<sup>52</sup> S. Afr. Nat’l Assemb. Comm. of Small Bus. Dev., *Socio-Economic Impact Assessment System: Department of Planning, Monitoring and Evaluation Briefing*, PARLIAMENTARY MONITORING GROUP (Feb. 22, 2017), <https://pmg.org.za/committee-meeting/24010/>.

<sup>53</sup> See e.g., S. AFR. DEP’T OF PLAN., MONITORING, AND EVALUATION, SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM (SEIAS) INITIAL IMPACT ASSESSMENT TEMPLATE (PHASE 1) 3 (Dec. 9, 2016), [https://static.pmg.org.za/180731SEIAS\\_Report.pdf](https://static.pmg.org.za/180731SEIAS_Report.pdf) (“What social groups would gain and which would lose most from each of the three options? Consider specifically the implications for households earning under R7000 a month; micro and small business; black people, youth and women; and rural development.”).

<sup>54</sup> S. AFR. DEP’T OF PLAN., MONITORING, AND EVALUATION, SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM (SEIAS) GUIDELINES, at 4.

## The Law: International law imposes a requirement on Kenya to conduct a Human Rights Impact Assessment.

Pursuant to its international legal obligations, Kenya is required to evaluate the human rights impacts of government programs and address any potential human rights risks. A HRIA in line with the criteria in the above section offers the ideal opportunity to do so. Failure to conduct some form of a HRIA may also result in a violation of Kenya's obligations with respect to a number of rights. International legal obligations are accompanied by relevant domestic obligations, including the requirement to engage in public participation as outlined in the Kenyan Constitution.<sup>55</sup> This memorandum focuses on relevant international legal obligations, but these necessarily must be considered in the context of domestic obligations. We outline the relevant international obligations throughout the following section.

### Kenya has an obligation to monitor the impacts of legislation on its human rights obligations.

Pursuant to treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), Kenya has an obligation to “undertake to take steps,” toward the realization of its various treaty obligations, including the right to social security, health, employment, and others.<sup>56</sup> Under the African Charter on Human and People's Rights (ACHPR), Kenya has a similar obligation to “undertake to adopt legislative or other measures to give effect” to the rights outlined in the African Charter.<sup>57</sup>

A HRIA allows the State to assess its progress towards these human rights obligations and demonstrate that actions are reasonable under the circumstances.<sup>58</sup> As the UN Special Rapporteur on Health noted in the context of the right to health, “without such a methodology [as a HRIA], a Government cannot know whether its proposed policies, program[s] and projects are on track to progressively realize the [right to health], as required by international human rights law.”<sup>59</sup> International human rights bodies have outlined similar logic for other human rights obligations. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, as an example, notes that States may violate their obligations under the ICESCR through the failure to monitor the realization of economic, social, and cultural rights and through the failure to reform legislation that is incompatible with the realization of these rights.

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<sup>55</sup> FACTSHEET 14: PUBLIC PARTICIPATION IN THE LEGISLATIVE PROCESS, PARLIAMENT OF KENYA: THE NATIONAL ASSEMBLY (2022), <http://www.parliament.go.ke/sites/default/files/2022-08/FS14%20Public%20Participation%20in%20The%20Legislative%20Process.pdf>; CONSTITUTION OF KENYA, Arts. 1, 10, 35, 118, 119, 124, 201, 221, 232 (2010),

<sup>56</sup> UN General Assembly, International Covenant on Civil and Political Rights, Art. 2 (Dec. 16, 1966) 999 U.N.T.S. 171, <https://www.refworld.org/docid/3ae6b3aa0.html> ; UN General Assembly, International Covenant on Economic, Social and Cultural Rights, Art. 2 (Dec. 1966) 993 U.N.T.S. 316, <https://www.refworld.org/docid/3ae6b36c0.html>. Both the ICCPR and the ICESCR were ratified by Kenya in 1972. *International Covenant on Civil and Political Rights | Treaties Database*, <http://kenyalaw.org/treaties/treaties/159/International-Covenant-on-Civil-and-Political-Rights>; *International Covenant on Economic, Social and Cultural Rights | Treaties Database*, <http://kenyalaw.org/treaties/treaties/873/International-Covenant-on-Economic-Social-and-Cultural>.

<sup>57</sup> Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), Art. 1, (June 27, 1981), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), <https://www.refworld.org/docid/3ae6b3630.html>.

<sup>58</sup> Gillian MacNaughton, *Human Rights Impact Assessment: A Method for Healthy Policymaking*, 17 HEALTH AND HUMAN RIGHTS 1 (June 11, 2015), <https://www.hsph.harvard.edu/hhrjournal/2015/04/human-rights-impact-assessment-a-method-for-healthy-policymaking/>.

<sup>59</sup> Paul Hunt, *UN Special Rapporteur on the right to the enjoyment of the highest attainable standard of health, Interim Report to the General Assembly*, UN Doc. No. A/62/214 ¶44 (2007), <https://undocs.org/Home/Mobile?FinalSymbol=A%2F62%2F214&Language=E&DeviceType=Desktop&LangRequested=False>.

Without a HRIA, the Kenyan government “cannot know whether its proposed digital identity project and resultant policy and legislation – will promote or deter the realization of its progressive human rights obligations. Articles 2(5) and 2(6) of the constitution of Kenya affirms the place of international law in the hierarchy of laws and as part of Kenyan law.<sup>60</sup> They provide that the general rules of international law shall form part of Kenyan law, and that treaties and conventions ratified by Kenya shall form part of the Laws of Kenya.

The Organization of African Unity and African Commission have required State parties, including Kenya, to monitor and self-report the status of ACHPR and African Charter on the Rights and Welfare of the Child rights in their countries and has prohibited measures that reduce the enjoyment of rights.<sup>61</sup> These requirements, among others, demonstrate Kenya’s obligation to consider the impacts of policies on human rights. A HRIA fills this gap.

Kenya has an obligation to investigate where it “knows or ought to know” of a human rights risk.

Kenya also has a legal obligation to protect against human rights violations where it “knows or ought to know” of a human rights risk.<sup>62</sup> Civil society organisations and community members have consistently raised human rights risks stemming from a digital ID with the Kenyan government, and the State knows or ought to know of the risks.<sup>63</sup> The Kenyan High Court has specifically noted the “possibility of exclusion” as a result of a digital ID system.<sup>64</sup> Because Kenya is aware of the human rights risks, the State has a duty to investigate the risks that do exist and prevent consequent human rights violations. A HRIA, if conducted effectively, affords the ideal opportunity to properly investigate and fulfil the duty to protect.

Kenya has an obligation to investigate and address discriminatory impacts of government policies.

There are also obligations to conduct a HRIA because of the particular rights implicated by digital ID, namely the right to be free from discrimination and the right to nationality.

The African Commission has described non-discrimination as “a general principle which permeates the enjoyment of all rights guaranteed in the Charter,” demonstrating the fundamental nature of Kenya’s obligation to ensure that its policies do not risk exclusion based on race, ethnicity, religion, or other statuses.<sup>65</sup> Under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Kenya is required to “take effective measures to review governmental, national, and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial

<sup>60</sup> CONSTITUTION OF KENYA, Art. 2.

<sup>61</sup> Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, Art. 62, (July 11, 1990) CAB/LEG/24.9/49, <https://www.refworld.org/docid/3ae6b38c18.html>; AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, PRINCIPLES AND GUIDELINES ON THE IMPLEMENTATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS, ¶¶ 20; 26-27, [https://archives.au.int/bitstream/handle/123456789/2063/Nairobi%20Reporting%20Guidelines%20on%20ECOSOC\\_E.pdf?sequence=1&isAllowed=y](https://archives.au.int/bitstream/handle/123456789/2063/Nairobi%20Reporting%20Guidelines%20on%20ECOSOC_E.pdf?sequence=1&isAllowed=y).

<sup>62</sup> Maria Monnheimer, *Applying the Due Diligence Framework to the Field of Human Rights Protection*, in DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL HUMAN RIGHTS LAW 204–257 (2021).

<sup>63</sup> Letter, Coalition of Civil Society Organizations to the Clerk of the National Assembly, *Re: The Huduma Namba Bill* (Jan. 7, 2022), <https://defenderscoalition.org/joint-memoranda-submitted-to-parliament-on-huduma-bill-national-assembly-bill-no-57-of-2021/>.

<sup>64</sup> *Nubian Rights Forum & 2 others, v. The Hon. Attorney General & 6 others*, at ¶1012.

<sup>65</sup> *The Nubian Community in Kenya v. The Republic of Kenya*, ACHPR 317/06, ¶ 123 (Feb. 28, 2015), <https://www.justiceinitiative.org/litigation/nubian-community-kenya-v-kenya>.

discrimination wherever it exists.”<sup>66</sup> The definition of racial discrimination includes “any distinction, exclusion, restriction or preference” based on a variety of characteristics, including ethnic origin, which has the purpose or effect of impinging on the enjoyment of basic rights and freedoms.<sup>67</sup> As various regional human rights bodies and CSOs have emphasized, existing identity documentation processes in Kenya have the effect of perpetuating discrimination against the Nubian community, Kenyan Somalis, and other ethnic and religious minorities.<sup>68</sup> By entrenching this existing discrimination, digital ID as proposed will have the “effect of... perpetuating racial discrimination,” in violation of CERD, and the policy must be reviewed and reformed.<sup>69</sup> As previously discussed, HRIAs offer one of the most effective processes for this required review and reform.

Kenya has an obligation to monitor nationality processes to ensure that they are consistent and equitable.

Digital ID policies also go to the core of the right to nationality, creating particular obligations for Kenya. In a previous case against Kenya, the African Commission has held that “nationality is intricately linked to an individual’s juridical personality and that denial of access to identity documents which entitles an individual to enjoy rights associated with citizenship violates an individual’s right to the recognition of his juridical personality.”<sup>70</sup> International human rights bodies have also emphasized that that States are required to monitor the processes that afford nationality to ensure that the application is consistent and equitable, particularly where procedures are discretionary, such as is the case with existing vetting processes.<sup>71</sup> To ensure that individuals’ rights to nationality do not continue to be violated through the implementation of digital ID, Kenya must ensure processes are “fair... [and] devoid of discrimination and arbitrariness,” and monitor the implementation of digital ID to ensure it is “consistent and equitable.”<sup>72</sup> Without a systematic process such as HRIA, the State will be unable to fulfil this monitoring requirement, and consequently violate its obligations with respect to nationality.

Kenya has an obligation to monitor and ensure that domestic legislation does not violate children’s rights.

Finally, Kenya is required to conduct an HRIA or some form of monitoring because of the impacts of digital ID on children. Under the Convention on the Rights of the Child, Kenya is required to undertake

<sup>66</sup> UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, Art. 2 (CERD), (Dec. 21, 1965), 660 U.N.T.S. 195 21, <https://www.refworld.org/docid/3ae6b3940.html>. The CERD was ratified by Kenya on September 2, 1990. *Convention on the Elimination of All Forms of Racial Discrimination / Treaties Database*, <http://kenyalaw.org/treaties/treaties/872/Convention-on-the-Rights-of-the-Child>.

<sup>67</sup> UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1, (Dec. 21, 1965), 660 U.N.T.S. 195 21, <https://www.refworld.org/docid/3ae6b3940.html>.

<sup>68</sup> See e.g., NAMATI KENYA, VICES OF DISCRIMINATION: THE IMPACTS OF VETTING AND DELAYS IN THE ISSUANCE OF ID CARDS IN KENYA, HAKI NA SHERIA, BIOMETRIC PURGATORY: HOW THE DOUBLE REGISTRATION OF VULNERABLE KENYAN CITIZENS IN THE UNHCR DATABASE LEFT THEM AT RISK OF STATELESSNESS, (2021), BRONWEN MANBY, STATELESSNESS AND CITIZENSHIP IN THE EAST AFRICAN COMMUNITY, UNHCR (Sept. 2018), <https://data.unhcr.org/en/documents/download/66807>.

<sup>69</sup> UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, Art. 2.

<sup>70</sup> *The Nubian Community in Kenya v. The Republic of Kenya*, at ¶ 140.

<sup>71</sup> UN High Commissioner for Refugees (UNHCR), *Background Note on Discrimination in Nationality Laws and Statelessness*, 7 (Oct. 20, 2021), <https://www.refworld.org/docid/616fda104.html>; NAMATI KENYA, VICES OF DISCRIMINATION: THE IMPACTS OF VETTING AND DELAYS IN THE ISSUANCE OF ID CARDS IN KENYA.

<sup>72</sup> *The Nubian Community in Kenya v. The Republic of Kenya* ¶ 151.

all appropriate measures to ensure the rights of children outlined in the Convention.<sup>73</sup> These required measures include a requirement to “ensur[e] that all domestic legislation is fully compatible with the Convention.”<sup>74</sup> The Committee on the Rights of the Child has recommended child impact or social impact assessments in order to fulfil this requirement to ensure legislation is compatible.<sup>75</sup>

## The Findings: What human rights standards are implicated and what risks might be identified?

An effective HRIA would address the risks that digital ID violates the right to be free from discrimination.

A properly conducted HRIA would identify various risks of the right to be free from discrimination, requiring action on the part of the Kenyan government. The relevant international case law and application to digital is summarised in this section.

The right to be free from discrimination is well-established in international law. Systemic racial or ethnic discrimination is enshrined as *jus cogens* norm, meaning that States are prohibited from engaging in systemic discrimination under any circumstances.<sup>76</sup> The Universal Declaration of Human Rights, which has been accepted as customary international law by major international bodies, establishes the right for all individuals to be free from discrimination.<sup>77</sup> Kenya has accepted various treaty obligations to prevent and take positive measures to eliminate discrimination wherever it exists.<sup>78</sup>

<sup>73</sup> UN General Assembly, Convention on the Rights of the Child, Art. 4 (Nov. 20, 1989), 1577 U.N.T.S. 3, <https://www.refworld.org/docid/3ae6b38f0.html>. The CRC was ratified by Kenya on September 2, 1990. *Convention on the Rights of the Child | Treaties Database*, <http://kenyalaw.org/treaties/treaties/872/Convention-on-the-Rights-of-the-Child>.

<sup>74</sup> UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, ¶1 (Nov. 27, 2003), CRC/GC/2003/5, <https://www.refworld.org/docid/4538834f11.html>.

<sup>75</sup> Committee on the Rights of the Child, *Concluding Observations on Ecuador*, UN Doc. No. CRC/C/ECU/CO/4 ¶37 (2010), <https://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-ECU-CO-4.pdf>; Committee on the Rights of the Child, *Concluding Observations on Colombia*, UN Doc. No. CRC/C/COL/CO/3 ¶73 (2006), <https://www.refworld.org/docid/45377ee30.html>.

<sup>76</sup> Gay McDougall, *International Convention on the Elimination of All Forms of Racial Discrimination*, UN LEGAL, <HTTPS://LEGAL.UN.ORG/AVL/HA/CERD/CERD.HTML>. Though, in practice, the *jus cogens* nature of systematic racial discrimination is rarely invoked, the status as a *jus cogens* norm reinforces the fundamental nature that the right to be free from racial discrimination enjoys in customary international law.

<sup>77</sup> UN General Assembly, *Universal Declaration of Human Rights*, Art. 4 (Dec. 10 1948), <https://www.refworld.org/docid/3ae6b3712c.html>; Ionel Zamfir, *The Universal Declaration of Human Rights and its Relevance for the European Union*, EUROPEAN PARLIAMENT (Nov. 2018), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS\\_ATA\(2018\)628295\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA(2018)628295_EN.pdf).

<sup>78</sup> African Charter on Human and Peoples' Rights ("Banjul Charter"), Art. 1; International Convention on the Elimination of All Forms of Racial Discrimination, Art. 2; Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, Arts. 3; 22, (July 11, 1990) CAB/LEG/24.9/49, <https://www.refworld.org/docid/3ae6b38c18.html>; Convention on the Rights of the Child, Art. 2; International Covenant on Civil and Political Rights, Art. 26.

**NG is from Garissa and went to the refugee camp as a young child during the famine. Nobody explained what it meant to be registered in the refugee database until he went to register for his national ID in 2018, when he was stopped because of his double registration. In the five years since, he has attended multiple vetting processes, to no avail, and as he explains, the lack of ID impacts every aspect of his life:**

*There's so many difficulties. The hardest thing for me is that I'm graduating, but I can't get a job. I am a taxi driver right now, but I cannot get a driver's license without an ID. I have been stopped by the police and have to explain my situation – that I cannot get an ID and I am a breadwinner for my family. If someone has the heart of humanity, they will tell you to go. If they do not, you have to come up with a Plan B. You cannot get your rights without an ID. You cannot travel – if I try to leave town, I will be jailed by police officers. You are nothing if you do not have an ID card, and it is not just me. There are so many people I know who are double registered, who are facing the same situation.*

-NG

Digital ID systems risk violating the right to be free from discrimination for several groups: 1) the Nubian community, Kenyan Somalis, and other groups subject to vetting; 2) double registered individuals; and 3) individuals unable to access birth registration more generally. Discrimination occurs in both documentation processes themselves, and in access to the plethora of services that require government ID.

With respect to discrimination in documentation processes, the African Commission has already held that Kenyan vetting processes constitute discrimination because they unjustifiably resulted in different treatment towards Kenyan Nubians, with the effect of nullifying their enjoyment of the right to nationality and other rights.<sup>79</sup> As established by the African Commission, vetting processes have no basis in Kenyan law, are prone to abuse, and impair the fundamental dignity of affected persons by requiring them to undergo lengthy and invasive processes.<sup>80</sup> The government has not addressed how it will design digital ID systems to ensure they do not sustain and aggravate this discrimination. Individuals who have been unable to obtain an ID because of discriminatory vetting processes will be unable to enrol in digital ID, excluding them from “recognition of their

juridical personality,” on the basis of unjustifiable differentiation among ethnic groups.<sup>81</sup> The government has stated that it will replace vetting with “grassroots verification” processes, but there is no indication that grassroots verification will have a clear basis in law or address the targeting and discrimination concerns with vetting.<sup>82</sup>

Double registered individuals are also similarly required to undergo lengthy and arbitrary vetting processes. As with vetting processes for Nubians, Kenyan Somalis, and others, the vetting processes for double registered individuals have no clear basis in law and allow for extensive discretion, creating significant room for discrimination. Individuals who are unable to obtain identity documentation for other reasons, such as the economic and administrative hurdles to documentation or barriers for single mothers, will also be excluded from digital ID.

<sup>79</sup> *The Nubian Community in Kenya v. The Republic of Kenya*, at ¶ 81.

<sup>80</sup> *Id.* at ¶¶ 65, 126–28.

<sup>81</sup> NAMATI KENYA, VICES OF DISCRIMINATION: THE IMPACTS OF VETTING AND DELAYS IN THE ISSUANCE OF ID CARDS IN KENYA, NAMATI; *The Nubian Community in Kenya vs. The Republic of Kenya*, at ¶140.

<sup>82</sup> Interview with Haki Na Sheria (March 28, 2023).

Digital infrastructure hurdles also may result in discrimination. In 2020, the World Bank estimated that only 30% of Kenyans have access to the internet,<sup>83</sup> and only 70% of Kenyans have access to electricity.<sup>84</sup> Further, 17% of the population is illiterate.<sup>85</sup> The government has not indicated what infrastructure will be *necessary* for people to consistently access digital IDs, and has not indicated whether it will or will not provide this necessary infrastructure to all areas of Kenya. Where this infrastructure is unavailable, individuals will be unjustifiably excluded.

Because the government has stated that digital ID will be required for government services, all individuals referenced above who are unable to obtain a digital ID will be discriminated against in accessing services and realizing fundamental rights.

An effective HRIA would need to identify and address the above risks of discrimination, in both access to ID and subsequent access to services, along with other risks of discrimination.

An effective HRIA would address the risks that digital ID violates the right to nationality.

Digital ID also implicates fundamental concerns for the right to nationality, and an effective HRIA must take these into account. The right to nationality is outlined in customary international law, such as the UDHR, and Kenya's treaty obligations.<sup>86</sup> To fulfil the right to nationality, Kenya is required to take affirmative measures to remove barriers to citizenship that disproportionately affect minorities and vulnerable groups and prevent direct and indirect discrimination.<sup>87</sup>

International human rights bodies have found violations of the right to nationality where 1) gaps in legislation leaves individuals without protections for statelessness;<sup>88</sup> 2) a State fails to take sufficient

<sup>83</sup> *Individuals Using the Internet, Kenya*, WORLD BANK: WORLD TELECOMMUNICATION/ICT INDICATORS DATABASE.

<sup>84</sup> *Access to Electricity (% of Population), Kenya*, WORLD BANK: GLOBAL ELECTRIFICATION DATABASE.

<sup>85</sup> *Literacy Rate, Adult Total (% of People Aged 15 and Above)*, WORLD BANK & UNESCO INSTITUTE FOR STATISTICS, (2021), <https://data.worldbank.org/indicator/SE.ADT.LITR.ZS?locations=KE>.

<sup>86</sup> African Charter on Human and Peoples' Rights ("Banjul Charter"), Art. 1; Universal Declaration of Human Rights, GA Res. 217A(III), Art. 15; International Covenant on Civil and Political Rights, Art. 24; *International Covenant on Civil and Political Rights | Treaties Database*, <http://kenyalaw.org/treaties/treaties/159/International-Covenant-on-Civil-and-Political-Rights>; Convention on the Rights of the Child, Art. 7; Convention on the Rights of the Child | Treaties Database, <http://kenyalaw.org/treaties/treaties/872/Convention-on-the-Rights-of-the-Child>; African Charter on the Rights and Welfare of the Child, Art. 6.

<sup>87</sup> UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXX on Discrimination Against Non Citizens*, (Oct. 1, 2022), <https://www.refworld.org/docid/45139e084.html>; UN High Commissioner for Refugees (UNHCR), *Background Note on Discrimination in Nationality Laws and Statelessness*, at 16.

<sup>88</sup> Human Rights Committee, *Views adopted by the Committee under article 59(4) of the Optional Protocol, concerning communication No. 2918/2016* \* \*\* \*\*\*, ¶¶8.4-8.5, CCPR/C/130/D/2918/2016, (Jan. 20, 2021), <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICaqhKb7yhstmourIju%2F14z6o8I4G3YTJPKxgZbjfVofnUxDYNf5e2B5e%2BzpsOxE43guYFPKxUJGRB6fV0qixA4nVIZpg%2Btup1LygYiRxxh7J256K6D9A3U7J9dVSxEoAf0TIxuQPRiz8Q%3D%3D>.



measures to guarantee against statelessness;<sup>89</sup> and 3) where unfair obstacles inhibit access to documentation for certain groups.<sup>90</sup> All three situations apply to the proposed digital ID systems.

First, individuals who are unable to access identity documentation will fall through gaps in digital ID legislation, leaving them without the international protections of a nationality.<sup>91</sup> Second, Kenya has failed to take any positive measures to ensure that digital ID does not exacerbate exclusion. In its arguments in the 2020 case addressing *Huduma Namba, Nubian Rights Forum & 2 others v. The Hon. Attorney General & 6 Others*, the Kenyan government submitted no arguments regarding the steps it has taken to address the violations in the *Institute for Human Rights and Development in Africa*, instead disputing the jurisdiction of the African Commission.<sup>92</sup> Further, the government has not made any public statements regarding the steps it will take to address the “possibility of exclusion” as a result of digital ID as identified by the High Court.<sup>93</sup> Finally, the unjustifiable barriers to documentation for certain groups, as outlined in the previous section on discrimination, will result in unfair obstacles to digital ID.

An effective HRIA would analyse these risks, as well as other risks to the right to nationality, and require a response from the Kenyan government.

An effective HRIA would address the risks that digital ID violates economic, social, and cultural rights.

Finally, an effective HRIA would evaluate and address the risks that individuals who are unable to access digital ID will experience violations of various economic, social, and cultural rights, such as the right to social security and right to work.

The ACHPR contains a number of economic and social rights including the right to participate in government,<sup>94</sup> the right to property,<sup>95</sup> the right to work,<sup>96</sup> the right to health,<sup>97</sup> the right to education,<sup>98</sup> the right to have a family,<sup>99</sup> and freedom of movement.<sup>100</sup> All of these rights impose positive

**For TB, who had to wait over three years to obtain his ID, having an ID has allowed him to support his family and the opportunity to consider having one of his own.**

*My parents are still alive, and now that I have my ID I am able to help them, help myself, and help my other relatives. Because I have an ID, I am able to support my family. I was able to get a job in a public school, where the conditions and the pay is much better than my old private position. Now that I have an ID, I hope to get married and have a family. It has changed everything.*

-TB

<sup>89</sup> *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, Decision No 002/Com/002/2009, ¶55, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), (Mar. 22, 2011) <https://www.refworld.org/cases.ACERWC.4f5f04492.html>.

<sup>90</sup> *The Nubian Community in Kenya vs. The Republic of Kenya*, at ¶¶133-34; *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, at ¶55.

<sup>91</sup> For example, in the case of double registered individuals, individuals are unable to access protections as a refugee nor as a Kenyan national. Digital ID systems will incorporate this exclusion, exacerbating gaps in protection.

<sup>92</sup> *Nubian Rights Forum & 2 others, v. The Hon. Attorney General & 6 others*, at ¶941 (2020).

<sup>93</sup> *Id.* at ¶1012 (2020).

<sup>94</sup> African Charter on Human and Peoples’ Rights, Art. 13.

<sup>95</sup> *Id.*, Art. 14.

<sup>96</sup> *Id.*, Art. 15.

<sup>97</sup> *Id.*, Art. 16.

<sup>98</sup> *Id.*, Art. 17.

<sup>99</sup> *Id.*, Art. 18.

<sup>100</sup> *Id.*, Art. 12.

obligations on the State to “give effect” to them in a manner consistent with the due diligence obligations described above.<sup>101</sup> For example, in *The Nubian Community in Kenya vs The Republic of Kenya*, the African Commission held that “if a State Party fails to respect, protect, promote, or fulfill any of the rights guaranteed in the Charter, this constitutes a violation of Article 1 of the African Charter.”<sup>102</sup> The current digital ID proposal would require digital ID to access the government services necessary to realize many of the above rights, including health, movement, and others. Because of the limited information that has been released by the Kenyan government regarding how digital ID will interact with government services, the mechanisms through which digital ID will result in discrimination are still unclear. However, to the extent that individuals are unfairly unable to access digital ID, and digital ID is required to access government services, those individuals will be discriminated against in access to the rights realized through government services.

## Recommendations

Based on our research, and as informed by conversations with affected individuals and engaged organizations in Kenya, we make the following recommendations to government, international organisations and development partners, communities, and civil society organisations respectively:

### Government:

1. **Pause implementation of digital ID immediately.**
2. **Meanwhile, conduct a transparent, inclusive human rights impact assessment:** that considers both a) the communities that currently face barriers to accessing IDs, and b) how those communities will be affected by digital ID. By conducting an HRIA, the government will be able to better understand how digital ID can be implemented successfully, and set an example for other nations considering the move to digital ID. The HRIA holds the following benefits
  - **Ensure the successful implementation of digital ID:** if digital ID were to be rolled out without meaningful reform, thousands of Kenyans would be unable to access digital ID simply because they do not have or cannot access national IDs, or because they do not have access to the necessary infrastructure. A digital ID system will only work efficiently and effectively to assist the government with its core functions when it is accessible to all Kenyans. A HRIA will help the government identify which groups need IDs, the barriers to obtaining IDs, before the transition to digital ID, ensuring a smooth transition to digital ID.
  - **Avoid litigation:** Civil society organizations have concerns about discrimination, exclusion, and privacy. If these concerns are not addressed *before* the rollout of digital ID, lawsuits are inevitable. If a lawsuit goes forward, it is entirely likely that the government will have to roll back, or reverse the implementation of digital ID. Understanding the issues associated with the digital ID transition now can allow the government to get ahead of these issues.
3. **Conduct a new data-collecting exercise:** the data collected in 2019 pursuant to the proposed rollout of Huduma Namba is a sunk cost. In light of the significant issues with the 2019 data collection process, in particular vis-à-vis the right to privacy, and how complex a data sanitisation

<sup>101</sup> *Id.* Art. 1.

<sup>102</sup> *The Nubian Community in Kenya v. The Republic of Kenya*, at ¶ 170.

exercise may be, a new data collection exercise would allow the government to circumvent any potential legal or practical problems in the use of the previously collected data.

### **International Organisations and Development Partners:**

1. **Encourage the Kenyan government to pause implementation, and conduct a human rights impact assessment:** a HRIA will ensure the effective implementation of digital ID in Kenya, and will set the precedent encouraging other jurisdictions to conduct HRIAs before implementing major development projects.
2. **Participate in the impact assessment:** By actively, transparently and meaningfully participating in the impact assessment, drawing on their global expertise, international organisations can act as fully engaged partners and assist with the development of a sustainable and inclusive digital ID.
3. **Avoid long term costs:** Implementing digital ID in an environment that will result in the exclusion of thousands of Kenyans will be more expensive in the long run – a HRIA can help development partners consider the financial and other complications that will result from premature implementation.

### **Communities:**

1. **When possible, prepare for digital ID by getting a national ID:** for help getting IDs, work with Community Organizations such as Haki na Sheira Initiative, Nubian Rights Forum, Haki Centre, and ParaNET.
2. **Engage in advocacy and share your stories:** not everyone knows that not all Kenyans experience vetting. Share your stories with the government, community organizations, community, friends, family, news outlets and the internet! Use #myidmyright to share your vetting story on Twitter.

### **CSOs:**

1. **Understand the legal obligation to conduct an HRIA, and encourage the government to do so:** use this guide to better understand why the government should conduct a human rights impact assessment, and advocate that they do so immediately.
2. **Conduct mini, community-based HRIAs:** to better understand the different needs of different communities, and to better advocate for the needs of your community in anticipation of digital ID, conduct mini-HRIAs. Share your findings with the government, and insist that they make change.
3. **Consider the legal obligation to conduct a human rights impact assessment as a part of any litigation strategy:** Insisting that the government conduct an HRIA can ensure the equitable implementation of digital ID, and ensure that they do before future development projects.

## Conclusion

By adhering to its domestic, regional, and international legal obligation to conduct a human rights impact assessment, the Kenyan government can: a) Address, for the first time, the historic exclusion of marginalised groups such as Nubians, double-registered individuals, and border communities from accessing citizenship documentation, b) ensure the successful implementation of digital ID by addressing infrastructure barriers in under-privileged communities and c) enhance public trust through the adoption of transparent processes.

The ID system in Kenya, including its exclusionary aspects, is inherited from the colonial-era *Kipande* system, which required identification documents to be carried around the men's necks at all times, in a metal container suspended on a chain.<sup>103</sup> Unless the Kenyan government acts now, its Third Generation ID will perpetuate this colonial legacy of exclusion. But if it does change course, Kenya has the opportunity to create a model digital ID framework for the rest of the world to emulate.

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<sup>103</sup> Grace Mutung'u, *Digital Identity in Kenya: Case study conducted as part of a ten-country exploration of socio-digital ID systems in parts of Africa*, RESEARCH ICT AFRICA, 11 (Nov. 2021), <https://researchictafrica.net/publication/digital-identity-in-kenya-case-study-conducted-as-part-of-a-ten-country-exploration-of-socio-digital-id-systems-in-parts-of-africa/>.