

AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD

Written Comments on Implementation

*Institute on Human Rights and Development in Africa and Open Society Justice Initiative
v. Kenya (Kenyan Nubian Children, Case No. 02/2010)*

4 MAY 2017

I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

1. In September 2011, the African Committee of Experts on the Rights and Welfare of the Child (the Committee) published its first ever decision on a communication, in favor of the Nubian community in Kenya, recommending that Kenya undertake a series of actions to remedy the operation and lasting effects of systemic discriminatory treatment of this community in Kenya's national civil registration and identity documentation procedures.
2. In its reasoning, the Committee expressed particular concern over the risk of statelessness in the situation of Kenyan Nubian children – who are often unable to acquire documentation of their Kenyan citizenship in a country that continues to lack clear processes for determination of citizenship from birth. The decision interpreted Article 6 of the African Charter on the Rights and Welfare of the Child to require that States clarify a child's nationality as close to birth as possible, to avoid creating situations of statelessness and to ensure that children born stateless in Kenya can acquire Kenyan nationality as required by the Charter's Article 6(3). Kenyan Nubians face additional procedural hurdles in applying for identity documentation on the basis of their ethnic and religious identity, which has and continues to cast doubt as to the nationality status of the community as a whole.
3. The Committee recommended in particular that Kenya should:
Take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth;
Take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognized are systematically afforded the benefit of those new measures as a matter of priority;
Implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth.
4. The present written comments build on a briefing paper submitted to the Committee in February 2014 (Annex 1), and also draw from comments submitted to the African Commission on Human and Peoples' Rights in February 2016, pursuant to Rule 112 of the Commission's Rules of Procedure, in the case of *Nubian Community in Kenya v. Kenya*, Comm. No. 317/06 (Annex 2) (finding Kenya in violation of several articles of the African Charter on Human and Peoples' Rights including Article 5 (legal status), and Articles 2 and 3 (equality and non-discrimination). Six years after the Committee's decision, we respectfully call on its members and the Kenyan government to take stock of what has been

achieved and what remains to be done to ensure that all Kenyans, including Nubian children, enjoy their right to nationality on an equal basis with others.

5. We make the following recommendations, which are further elaborated beginning on page 11 of this document. In undertaking all actions toward implementation of the Committee's decision, the Nubian community must be considered an equal partner and accorded agency, access and leadership in determining the pathway to realization of their rights.

Recommendations to the Committee:

- Cooperate with other international bodies, such as the Committee on the Rights of the Child and the African Commission on Human and Peoples' Rights
- Appoint a rapporteur responsible for follow-up in this case
- Request regular reporting on implementation

Recommendations to the Government of Kenya:

- Outlaw vetting on the basis of race, ethnicity, religion, national origin or other status
- Pass legislation that reforms citizenship and registration laws in line with the Committee's decision
- Reform administrative practices to counter corruption and excessive delay in delivery of vital documents
- Set transparent benchmarks, including in relevant national action plans and budget commitments, as part of a comprehensive implementation strategy

II. ADDITIONAL BACKGROUND

6. The following information is based on independent findings by national and international monitoring bodies, consultation with community members in Kenya, empirical research conducted in 2015 commissioned by the Open Society Justice Initiative examining the impact of discriminatory policies and practices relating to the issuance of vital documents (birth certificates, national identity cards and passports) (Annex 3),¹ and real-time data gathered through an ongoing community-based paralegal program supported by Namati and the Open Society Justice Initiative and run by the Nubian Rights Forum, which provides clients in Kibera (primarily but not exclusively Nubian clients) with assistance in obtaining birth certificates, national identity cards, passports and death certificates.²

Progress in Addressing Statelessness

7. There has been progress in addressing statelessness in Kenya. In October 2016, Kenyan President Uhuru Kenyatta issued a presidential directive calling for the registration of the Makonde, a group living in coastal Kenya whose statelessness was previously documented

¹ Annex 3: Open Society Justice Initiative, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya* (2015).

² See Annex 1: Open Society Foundations, Institute for Human Rights and Development in Africa, Namati and Nubian Rights Forum, *Briefing Paper: Implementation of Nubian Minors v. Kenya*, February 2014, at 1; Annex 4: Namati, *Realizing Citizenship Rights: Paralegals in the Nubian Community in Kenya* (project overview).

with the assistance of civil society partners and UNHCR.³ Approximately 1,500 community members received Kenyan citizenship documents in February 2017.⁴ In responding to the Makonde's plea for recognition as Kenyans, the government also extended the deadline for stateless persons to apply for registration for a further three years. Under the current Citizenship and Immigration Act (2011), therefore, stateless persons may seek registration through this provision (Section 15) until August 2019.⁵

No Improvements to Legal Framework

8. But the Makonde's struggle to register as Kenyan citizens also illustrates remaining gaps in the legal and regulatory frameworks that govern the right to nationality and resolution of statelessness in Kenya.⁶ Recognized as stateless, the Makonde were able to seek registration as Kenyan citizens under Section 15 of the Citizenship and Immigration Act (2011), and were issued with documents confirming their Kenyan nationality by registration. Their situation may be contrasted with that of many Nubian children who are not necessarily stateless, but still face discriminatory obstacles in accessing documentary proof of their citizenship.⁷ For citizens from birth, there is still no procedure for obtaining confirmation of citizenship.⁸ There are still no safeguards to ensure that, where a child is in such a precarious situation, their nationality must be confirmed as close to birth as possible, which was a chief concern of the Committee in its analysis of this case.⁹

Security Law (Amendments) Act 2014

9. In fact, things may be getting worse for Nubian children. Community members continue to face heightened security procedures before they are able to obtain national identity cards, explicitly on the basis of their ethnic and religious status (updated data on discriminatory treatment and its impacts is presented below). At the time of the Committee's decision in 2011, vetting procedures had no firm legal foundation, although they were justified on the basis of Section 8 of the Registration of Persons Act, which allows registration authorities

³ Alloys Musyoka, *Kenya's 43rd tribe: Makonde's long journey to identity*, The Nation, Feb. 07, 2017, available at: http://www.the-star.co.ke/news/2017/02/07/big-read-kenyas-43rd-tribe-makondes-long-journey-to-identity_c1501178.

⁴ *Ibid.*

⁵ See Kenya Gazette, Vol.CXVIII-No.125, 14 October 2016, Supplement No. 169, available at: http://kenyalaw.org/kenya_gazette/gazette/volume/MTM3Mg--/Vol.CXVIII-No.125. See also Annex 2: Open Society Justice Initiative, Comments under Rule 112 relating to Implementation of *The Nubian Community in Kenya / Kenya* – Communication 317/06, African Commission on Human and Peoples' Rights, 17 February 2016, at para. 5 (ambiguities persist "(1) in the definition of citizenship, (2) in the means of providing citizenship by birth, and (3) in the application procedures and regulations for birth registration and identity documentation.").

⁶ George Kegoro, *Makonde issue shows different people care for Kenya and are concerned for common interest*, Op-Ed, The Nation, <http://www.nation.co.ke/oped/Opinion/makonde-issue-shows-people-care-for-kenya/440808-3418162-yxrrbx/>.

⁷ See Bronwen Manby, *Statelessness and Citizenship in the East African Community*, United Nations High Commissioner for Refugees, *draft*, September 15, 2016 (forthcoming), at 76 ("For very many people in the groups highlighted as being at risk of statelessness in this study it is not exactly clear if they are stateless or not: they exist in a blurred zone between clearly having a nationality and clearly being stateless.").

⁸ See, e.g. Phelix Lore, *Kenya: Where Citizenship by Registration is Better than Citizenship by Birth*, Citizenship Rights in Africa, 7 April 2016, available at: <http://citizenshiprightsafrika.org/kenya-where-citizenship-by-registration-is-better-than-citizenship-by-birth/>.

⁹ See, e.g. *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v. Government of Kenya*, African Committee on the Rights and Welfare of the Child, Decision, 22 March 2011, at para. 42.

to request additional evidence of entitlement to nationality.¹⁰ In 2014, Kenya enacted a legislative package that brought the notion of vetting firmly within the security framework, but without any attendant safeguards to guide registration authorities' discretion.¹¹ As stated in the Nubian community's submissions to the African Commission on Human and Peoples' Rights on implementation of its 2015 decision on these issues (discussed below):

“Section 8 did not mention vetting committees at all. The amended language [permitting registration authorities to “establish identification committees”] does nothing to contain the scope of discretion exercised by the committees or the executive power to establish them – it merely recognizes, in law, the executive's prerogative as a matter of national security. This move conflates bureaucratic mandates such as registration and provision of documentation of identity with counterterrorism and criminal justice policy, exposing ethnic groups subject to vetting, like the Nubians, to further xenophobia, which now appears state-sanctioned.”

African Commission Decision in *Nubian Community in Kenya v. Kenya*

10. In February 2015, the African Commission on Human and Peoples' Rights declared Kenya to be in violation of the African Charter as a result of its treatment of Kenyan Nubians in respect of their right to nationality (Article 5), to equality and non-discrimination (Articles 2 and 3) and to respect for property rights and protection against forced evictions (Article 14). With respect to access to nationality and statelessness, the Commission recommended that the government of Kenya should: “Establish objective, transparent and non-discriminatory criteria and procedures for determining Kenyan citizenship.”¹²

Draft Registration Law

11. The Kenyan legislature is currently considering draft legislation on identification and registration of persons, including birth and death registration and access to national identity cards.¹³ The legislative initiative presents an important opportunity to introduce changes to the citizenship and documentation frameworks in Kenya to address the Charter violations at the heart of this case. International and Kenyan civil society organizations, including Open Society Justice Initiative, have been pressing for several key protections, which are detailed in a letter circulated by the civil society Coalition on Nationality, Citizenship and Statelessness Empowerment (CONCISE) to members of parliament in September 2016:¹⁴
 - *Maintain availability of late birth registration.* The bill currently eliminates late birth registration altogether after five years, which will disadvantage poor, nomadic, rural and other groups that traditionally face obstacles in accessing birth registration.¹⁵

¹⁰ See Registration of Persons Act (1973) as amended by the Registration of Persons (Amendment) Act (1987), at para. 8. Available at: <http://www.kenyalaw.org>.

¹¹ See Annex 5: Kenyan Legal Provisions (Security Laws (Amendments) Act of 2014, Section 23).

¹² See Annex 6: *Nubian Community in Kenya v. Kenya*, Communication No. 317/06, African Commission on Human and Peoples' Rights, Decision, at para. 171(ii)(a).

¹³ Registration and Identification of Persons Bill, 2014, Kenya Gazette Supplement No. 153 (Senate Bills No. 39); Kenya Human Rights Commission, *Memorandum on the Registration and Identification of Persons Bill, 2014*.

¹⁴ See Annex 7: Coalition on Nationality, Citizenship and Statelessness Empowerment (CONCISE), Recommendations on the Registration of Persons Bill, 21 September 2016.

¹⁵ See also Bronwen Manby, *Statelessness and Citizenship in the East African Community*, United Nations High Commissioner for Refugees, *draft*, September 15, 2016 (forthcoming), at 27 (indicating that the department would like to eliminate late birth registration as it is viewed as “an avenue for fraud”).

- *Rights should not be denied on the basis of lack of identification.* The bill allows government institutions to require identification in order to access services. It is instead recommended that the government “take advantage of these additional entry points – such as schools, banks, or other service providers – to provide the person with the right or service *and* facilitate connections between the person and the needed registration and/or identification processes” (p. 2).
- *Procedures for verifying identity must be applied universally.* The bill provides for the establishment of committees to process applications for registration and identification cards “where citizenship is in doubt.” The current language risks reproduction of the current vetting system or introduction of further burdensome procedures that would disproportionately impact Nubians.
- *Cancellation or revocation of registration or identity documents should occur in specific limited situations and should be distinguished in law and process from revocation of nationality.* The bill allows for cancellation for any “justifiable cause” which is overly broad, nor does it distinguish between cancellation of documents and revocation of citizenship. Because in the Kenyan context possession of documentation has been consistently conflated with acquisition of Kenyan citizenship, the two determinations must be clearly distinguished and access to judicial review of findings of non-entitlement to documentation must be provided for.¹⁶
- *Penalties for failure to register are not recommended.* The bill introduces criminal penalties for failure to register births, including jail time and significant fines. The approach is unrealistic, may be counter-productive (discouraging people from approaching authorities) and would disproportionately impact minority groups and the poor.

Committee on the Rights of the Child Issues Recommendations

12. In January 2016, the United Nations Committee on the Rights of the Child considered Kenya’s most recent reports on compliance with the Convention on the Rights of the Child and in its March 2016 Conclusions the Committee highlighted ongoing concerns with respect to children’s access to birth registration and nationality. Birth registration coverage “has been stagnating in recent years” with particularly low rates in rural and remote areas, and among specific marginalized groups which the Committee identified, including Nubian children.¹⁷ The Committee also recognized that children of Nubian descent “may not have obtained Kenyan nationality despite the measures introduced in the Citizenship and Immigration Act (2011).”¹⁸
13. The Committee made the following pertinent recommendations:
 30. (a) Expedite the adoption of a law that provides universal and free birth registration at all stages of the registration process;

¹⁶ The current Citizenship and Immigration Act (2011) does provide some important due process protections in cases of citizenship revocation, including requiring that the decisions be reasoned and appealable to courts. See Bronwen Manby, *Statelessness and Citizenship in the East African Community*, United Nations High Commissioner for Refugees, *draft*, September 15, 2016 (forthcoming), at 24.

¹⁷ See UN Committee on the Rights of the Child, Concluding observations on the combined third and fifth periodic reports of Kenya, UN Doc CRC/C/KEN/CO/3-5, 21 March 2016, at para. 29.

¹⁸ *Ibid.* at para. 29.

(b) Further strengthen various efforts to ensure the birth registration of all children, in particular in rural and remote areas, including through mapping out and registering those who have not been registered at birth; [...]

(e) Fully implement the decision of the African Committee of Experts on the Rights and Welfare of the Child in the case entitled ‘Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v. the Government of Kenya.’”¹⁹

III. SYSTEMIC PROBLEMS IN CIVIL REGISTRATION AND DOCUMENTATION

14. As the Committee recognized, Nubians are arbitrarily and disproportionately impacted by the Kenyan government’s current policies on issuance of documentation, but those policies are also driven by another layer of administrative failure: the government does not trust its own registration and documentation systems due to widespread corruption.²⁰ While Nubians face systematic discrimination in the way the system is structured with respect to their community, that structure is a symptom of a bigger problem that Kenya must address from a human rights framework, in line with its constitutional principles.
15. Official government organs like the Commission on the Administration of Justice (the Ombudsman)²¹ and the Truth, Justice and Reconciliation Commission (TJRC), have, since the Committee’s decision in 2011, extensively criticized the overall structure and operation of Kenya’s registration and identification systems, as well as the discriminatory impact the current system has on specific communities, including Muslims and Kenyan Somalis.²²
16. The United Nations Office of the High Commissioner for Refugees (UNHCR) recognized the dangers of maintaining an administrative architecture so replete with uncertainty and lack of trust in a set of guidelines on avoiding statelessness as a result of deprivation of nationality. Following an expert meeting on the topic, UNHCR issued its *Tunis Conclusions*, which state:

“Another area of concern is the often poor quality of ‘feeder’ or supporting documents from civil registration systems and other administrative registries in many countries which serve as proof for issuance of identity documents and passports. These documents often contain minor errors or discrepancies relating to the identity of individuals. These realities need to be taken into account in assessing cases of alleged misrepresentation or fraud.”²³
17. The legal framework – the Citizenship and Immigration Act and the Registration of Persons Act – has been repeatedly recognized, including by the Committee, as a key genesis of uncertainty, corruption and discrimination in access to documentation of identity in Kenya. As Bronwen Manby has pointed out, “These provisions have permitted a regime in which any person applying for an ID card may be required, for example, to produce a letter from a

¹⁹ *Ibid.* at para. 30.

²⁰ See Annex 7: Commission on Administrative Justice, Office of the Ombudsman, *An Investigation Report on the Crisis of Acquiring Identification Documents in Kenya*, August 2015.

²¹ *Ibid.*

²² TJRC Report, Vol. IIC, Chapter 3.

²³ UN High Commissioner for Refugees (UNHCR), *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions")*, March 2014, at para. 59, available at: <http://www.refworld.org/docid/533a754b4.html>.

traditional chief in his or her village of origin; even though the person may have mixed “tribal” ancestry and have never been to such a village of origin. Although these rules apply in principle to Kenyans of all ethnicities, additional or alternative proof of entitlement to citizenship and a national ID card are more likely to be demanded (and accepted) for some ethnic groups than others.”²⁴ Even in seeking renewal of documents or replacing lost documents often leads to another round of vetting, such that an individual may never be secure in terms of the government’s recognition of his or her legal identity.²⁵

18. In terms of administrative practices, qualitative information gathered over four years of operating community-based paralegal services in Kibera suggests that core problems include the lack of coordination and political infighting among responsible ministries and statutory bodies; the government’s failure to regulate an elaborate system of brokers peddling false identity documents for exorbitant fees; inadequate training of front-line service providers; and lack of infrastructure especially in rural areas.

IV. DISCRIMINATION AGAINST NUBIANS PERSISTS IN IDENTITY CARD APPLICATIONS, DENYING LIFE OPPORTUNITIES

19. Kenya has not taken steps to address the discriminatory practices that lead to the situation of uncertainty and risk of statelessness faced by Nubian children. In spite of intense criticism from international and national bodies and civil society, none of the recommended legislative changes have been introduced, and instead Kenya enacted the Security Laws (Amendment) Act and has proposed a registration bill that creates more problems than it solves (see paras. 9 and 11, above). Data from the ongoing paralegal project in Kibera indicates that the situation is only getting worse. Meanwhile, new survey evidence gathered in 2015 demonstrates even more clearly the link between these discriminatory practices and missed opportunities.

A. Discrimination

20. In the February 2014 implementation briefing, paralegal data analyzed at that time demonstrated that, for Nubians, all timely ID card applicants had to undergo vetting and that, even with specialized assistance from the paralegals, timely Nubian applications took an average of 17 days to go through this process. The 17-day delay did not include the time an applicant might spend gathering supporting documents to support their appearance in front of the vetting committee. As the vetting process must occur *before* an application is submitted, the practice of vetting makes many Nubians who sought documents on time ultimately late in officially submitting their applications to registration officials.
21. All Nubians continue to be subjected to the vetting process in their attempt to acquire a Kenyan ID card, whether the application is on time (at the age of 18) or late. Based on paralegal case data from Kibera, in addition to all Nubian clients having gone through vetting, several clients of other tribes were also vetted. These applicants were either of Nubian descent (Nubian mother and non-Nubian father) or were of other tribes and Muslim.
22. Nubians are also, because of vetting, required to produce documentary proof of their identity, family history, religious instruction and schooling. These extraordinary document

²⁴ Bronwen Manby, *Statelessness and Citizenship in the East African Community*, United Nations High Commissioner for Refugees, *draft*, September 15, 2016 (forthcoming), 31.

²⁵ *Ibid.* at 32.

requests do not apply to non-Nubians, who typically need to provide only a birth certificate or school leaving certificate plus one parent's ID card.²⁶ Extra requirements for documentary proof remain in place in practice today. Particularly notable in the below paralegal case data, based on over 900 ID applications, is the high level of request for Nubian applicants (on-time or late) to produce documents of their grandparents.

Documents Requested for On-Time ID Card Application	% of Nubian Clients (415 cases)	Documents Requested for Late ID Card Application	% of Nubian Clients (483 cases)
Birth Certificate of Applicant	94%	Birth Certificate of Applicant	84%
School Leaving Certificate	88%	School Leaving Certificate	82%
Mother's ID Card	71%	Mother's ID Card	80%
Father's ID Card	70%	Father's ID Card	79%
Grandparent ID Card	60%	School Result Slips	58%
School Result Slips	59%	Grandparent ID Card	49%
Sworn Affidavit	19%	Religious Certificate	18%
Grandparent Death Certificate	13%	Grandparent Death Certificate	10%
Religious Certificate	8%	Certificate	9%
Mother's Birth Certificate	5%	Sworn Affidavit	5%
Father's Birth Certificate	6%	Mother's Birth Certificate	4%
Other Document	1%	Father's Birth Certificate	3%
Immunization Card	1%	Other Document	2%
		Grandparent Birth Certificate	1%
		Immunization Card	

23. The delays caused by the vetting process have become worse over time. Based on quantitative data collected by paralegals on hundreds of Nubian applicants in Kibera, the average delay caused by vetting has increased from 41 and 42 days in 2013-2014 (on-time and late applications, respectively) to 82 and 109 days in 2015-2017.²⁷ The data shows, on average, even with the assistance of a trained paralegal, Nubians must wait nearly 4 months from the time they start the process until they can submit their application for an identity card, because of the vetting process.

Time Between:	Nubian Applicants, 2013 - 2014		Nubian Applicants, 2015 - 2017	
	Normal Applications (at 18)	Late Applications (over 18 and 9 months)	Normal Applications (at 18)	Late Applications (over 18 and 9 months)
First visit to a government office and vetting	30	21	73	77
Vetting and application submission	11	21	9	32

24. Delays in the processing of ID cards have also gotten worse over time. In 2013 and 2014, on average, it took 92 days for an ID card (normal or late application) to be issued after the applicant passed vetting and submitted his or her forms. Between 2015 and 2017, the average increased to 139 days for the ID card to be issued by government. The chart below

²⁶ See Open Society Foundations, Institute for Human Rights and Development in Africa, Namati and Nubian Rights Forum, *Briefing Paper: Implementation of Nubian Minors v. Kenya*, February 2014, at 5-6.

²⁷ This data is drawn from paralegal cases for which the applicant both received an identity card and the paralegals have recorded a date for each step in the application process. Cases for which certain dates could not be verified were excluded from the analysis.

displays this data disaggregated by normal and late applications. Once issued, the ID card is then sent to the local registrar for collection by the applicant, a process that typically takes more than a month. Other Kenyans can acquire an ID card in as little as 21 days.

Time Between:	Nubian Applicants, 2013 - 2014		Nubian Applicants, 2015 - 2017	
	Normal Applications (at 18)	Late Applications (over 18 and 9 months)	Normal Applications (at 18)	Late Applications (over 18 and 9 months)
Application submission and ID card issuance	95	91	135	145

25. Introduction of new requirements have made the process more burdensome for Nubians. Starting in 2015 the government began requiring applicants in Kibera and Northeastern Kenya to bring their parent in person to provide a thumbprint on his/her child's ID card application form. The thumbprint is required even after the applicant produces his/her parents' documents and passes through the vetting process. The requirement is only being applied in two parts of the country and only to Muslim applicants, including all Nubians. Bringing a parent in person is a significant burden for many applicants, especially those whose parents may be working abroad, and can further delay the process for months.

B. Negative Impact on Life Plans of Nubians, including Children and Young Adults

26. In its decision in the *Nubian Community* case (2015), the African Commission deemed documentation of identity in the Kenyan context a necessity in order to undertake the ordinary "transactions that are necessary to a dignified life."²⁸ In another decision issued at the same time, addressing denial of nationality and statelessness in Côte d'Ivoire, the Commission determined that interference with the right to nationality violated an individual's right to personal development under Article 22 of the African Charter.²⁹
27. In February, April and May 2015, the Justice Initiative conducted qualitative and quantitative research in Kibera focused on the link between access to documentation and core development outcomes.³⁰ This research confirmed that documentation in Kenya is linked with lifetime educational attainment, equal participation in economic life, and political engagement. The report also emphasized that relying on rates of documentation alone masks inequality in access, including lengthy delays and burdensome processes that can also have a stigmatizing impact, further undermining development.³¹
28. Long delays or inability to acquire documentation of identity may cause Nubians to miss a variety of opportunities in life. The majority of paralegal clients in Kibera are seeking documentation in order to pursue higher education, obtain formal employment, travel abroad for work, to register to vote, and to avoid police harassment. When acquisition of an ID card is delayed, Nubian applicants not only need to wait to pursue these opportunities,

²⁸ *Nubian Community in Kenya v. Kenya*, Communication No. 317/06, African Commission on Human and Peoples' Rights, Decision of February 2015.

²⁹ *Open Society Justice Initiative v. Côte d'Ivoire*, Communication No. 318/06, African Commission on Human and Peoples' Rights, Decision of February 2015, at para. 187-194.

³⁰ Annex 3: Open Society Justice Initiative, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya* (2015). The report is based on a population survey (1,179 adults; 624 Nubian and 555 non-Nubian) that looked at development outcomes for individuals with varying levels of documentation as well as key informant interviews (p. 5).

³¹ *Ibid.* at 12-13.

but may completely lose out on personal development such as scholarships, job offers, and other livelihood or education options that expire before a document can be obtained.

29. Justifications for maintaining the current practice of heightened scrutiny applied to particular ethnic and religious minorities in Kenya tend to focus on security, a rationale made more explicit through the inclusion of references to vetting procedures in the Security Laws (Amendment) Act of 2014. However, recent research by the Institute of Security Studies suggests that discrimination and harassment in registration and documentation processes contribute to radicalization in Kenya.³² The intensification of measures taken in the name of countering extremism or safeguarding security not only has a disproportionately negative impact on the lives of many children of Nubian descent; evidence suggests they may be counterproductive in achieving their specified aims, with potentially grave consequences.

V. NUBIANS CONTINUE TO FACE OBSTACLES IN ACCESSING BIRTH REGISTRATION

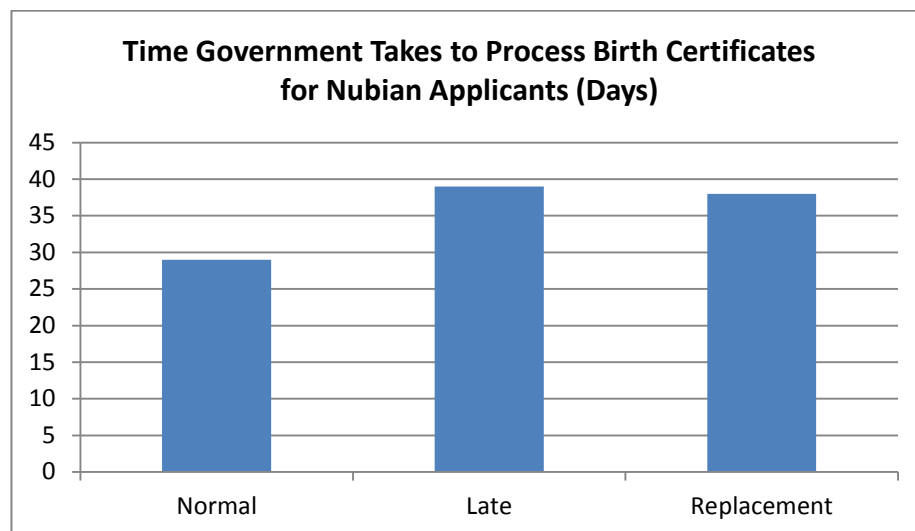
30. Despite major efforts by the government to meet its goal of universal birth registration, which we commend, Nubians in particular still face challenges in birth registration. The Committee found that confirmation of nationality should occur as close to birth as possible. Birth registration is an indispensable tool in this endeavor; yet, Kenya has not improved its practices and the CRC Committee characterized its birth registration coverage as “stagnating” especially in the case of vulnerable minority groups like the Nubians. The draft registration law is not in tune with reality of communities like Nubians, as described above (para. 11). The risk is that the situation would be made worse, where there are ample opportunities to improve access and ensure Nubian children have access to essential benefits like healthcare and education.
31. In the February 2014 briefing to the Committee, we identified burdensome document requests and prolonged processes in general as two key concerns in the administration of birth registration in the case of Nubian children. Evidence from the Nubian Rights Forum paralegal project indicated that Nubians were required to produce more documents overall and that, by more than a factor of seven, Nubians were more often required to obtain a printout of an ID card, a step that entails significant cost and makes both forms of documentation (ID cards and birth certificates) mutually dependent on one another.³³
32. Burdensome document requests remain normal practice for Nubian applicants, particularly those apply for late birth registration (past six months). For example, one parent’s ID card is required to register the birth of a child. In practice, Nubian applicants are asked to produce both parents’ ID cards. Registrars do have some discretion to request additional documents, and submission of school documents, clinic cards, and other requirements are often imposed on Nubian applicants who may be primary or secondary school aged.
33. The vast majority of Nubian applicants in Kibera – 92 percent – are acquiring a birth certificate through the late application process, according to paralegal data on more than

³² See Bronwen Manby, *Statelessness and Citizenship in the East African Community*, United Nations High Commissioner for Refugees, *draft*, September 15, 2016 (forthcoming), at 73 n. 263 (citing Anneli Botha, *Radicalisation in Kenya: Recruitment to al-Sabaab and the Mombasa Republican Council*, ISS Paper 265, September 2014, available at <https://www.issafrica.org/uploads/Paper265.pdf>).

³³ Open Society Foundations, Institute for Human Rights and Development in Africa, Namati and Nubian Rights Forum, *Briefing Paper: Implementation of Nubian Minors v. Kenya*, February 2014, at p.3.

850 Nubian clients. The average age of non-adult late applicants is 6 years old. Many children acquire a birth certificate in order to enroll in school or to sit for school exams, as even in an urban area like Kibera the cost of the birth certificate application fee, the transport to the registration center, and perceived distance and effort required act as deterrents. Should a person turn 18 before acquiring a birth certificate, he or she is unable to apply for an ID card. Meanwhile, in order to apply for a birth certificate, adults must produce an ID card. Paralegals in Kibera have encountered several cases of Nubians caught in this situation, unable to obtain documentation. Only through lobbying the National Registration Bureau on a case-by-case basis have some of the affected clients acquired documents. The high rate of late birth certificate applications further supports the recommendation to the government that the late registration process not be eliminated in the short or medium-term.

34. The process of obtaining a birth certificate remains prolonged, even compared against the government's own standards. The length of the process is similar for applicants of various ethnic backgrounds, but for Nubians the time required may compound other barriers and challenges they face in the process.



35. The Nubian Rights Forum in Kibera and Haki Center in Mombasa have held several mobile birth registration campaigns in partnership with UNHCR Kenya, Namati Justice Initiative, and the Kenyan Civil Registry Services, in 2015, 2016 and 2017. In total 4,704 people were registered, of which 3,978 cases (84%) were late registration. In Kibera where the exercise mainly targeted the Nubian population, over 73% of the cases handled were late registrations. These statistics, in addition to the regular paralegal case data cited above, are a clear indication that there is high demand from the community for birth certificates and that there are still a large number of people without birth registration. While cooperation between civil society and government has produced successful events, these mobile registration campaigns should become part of the normal practice of civil registration, with budgetary allocations made to support the outreach and registration campaigns. These exercises might target excluded communities, such as the Nubians, and women, the poor, and others in remote areas to ensure no child is left at risk of statelessness.

VI. CONCLUSION AND DETAILED RECOMMENDATIONS

36. The following recommendations are made with one overarching principle in mind: the Nubian community in Kenya must be seen as an essential ally in identifying and implementing solutions to the problems addressed in the Committee's decision. The government of Kenya in particular should look to the Nubians for solutions, rather than continuing to burden the community with arbitrary and discriminatory procedures such as vetting committees.

Recommendations to the Committee

37. *Cooperation with other international bodies.* We encourage the Committee to engage with both the United Nations Committee on the Rights of the Child and the African Commission on Human and Peoples' Rights to work jointly with the Kenyan government, stakeholders and the community in order to realize the Kenyan Nubians' right to nationality under international law as articulated in the findings, decisions and recommendations issued by each organ. Such engagement may include, for example, the organization of joint implementation missions to Kenya or the establishment of an implementation working group composed of rapporteurs from each body.
38. *Appointment of a rapporteur.* In conjunction with the above or independently, the Committee should consider appointing a rapporteur to follow-up the implementation of the decision.
39. *Reporting on implementation.* The Committee is also urged to request regular reports from the Kenyan government concerning implementation of recommendations, indicating specific benchmarks toward achieving full compliance.

Recommendations to Government of Kenya

40. On behalf of the Nubian community in Kenya, Open Society Justice Initiative and the Institute for Human Rights and Development in Africa submitted written comments on implementation of the African Commission's decision in the *Nubian Community in Kenya v. Kenya* case, in February 2016, making the following recommendations to the government of Kenya, which we include here with additional updates reflecting further consultation and research:

Outlaw Discriminatory Vetting. Eliminate vetting committees based on actual or perceived personal characteristics such as ethnicity, race, religion, gender, national origin or membership in particular social groups. Publicize this change widely to front-line registration officials.

Legislative Reform: Citizenship, Registration and Documentation. Amend the Citizenship and Immigration Act 2011 and adopt a new registration law, together with implementing regulations and policies, in order to achieve the following:

- Include measures to ensure that citizenship is confirmed as close to birth as possible and that children acquire documentary proof of citizenship.
- Apply any processes for determining eligibility for national identity cards universally, based on limited, rational criteria that prohibit discrimination.
- Provide clear and transparent procedures for acquiring documentation.
- Provide accessible, swift recourse to judicial review in cases of denial.
- Delink acquisition of national identity cards from determination of citizenship.

- Delink acquisition of national identity cards from counterterrorism policy through repeal of Section 23 of the Security Laws (Amendments) Act of 2014.

Administrative Reform to Counter Corruption and Excessive Delay. Reform administrative systems, infrastructure and human capacity to meet the demands of Kenya's population and constitutional principles with respect to identification, registration and access to documentation of identity:

- Work with communities, county and sub-county government to conduct effective outreach and education programs, including mobile registration and documentation exercises.
- Where individuals lack sufficient supporting evidence to successfully register births and other vital events or apply for documentation, establish flexible processes to resolve such cases, with clear guidelines and shared burdens between applicant and government, with decisions subject to judicial review.

41. In addition to the recommendations made to the African Commission, we stress that the following actions are necessary to implement the Committee's recommendations on the rights of Nubian children:

Finalize Kenya's national action plan to address statelessness. Kenya should finalize the current draft national action plan to address statelessness, in conjunction with civil society and UNHCR. While the action plan may not address all aspects of the Charter violations experienced by children of Nubian descent in Kenya, if it is undertaken with long-term prevention of statelessness in mind, including the structural legal and administrative changes recommended here, the national action plan would be an important first step.

Adopt a collaborative, rights-based approach to implementation of the Sustainable Development Goals, especially Goal 16.9 (legal identity for all). The Kenyan government should meaningfully and systematically involve civil society in the development and monitoring of its national action plan to implement the SDGs. Target 16.9 is directly relevant to the realization of access to birth registration and vital documents in the Kenyan context. Civil society collaboration and data collection will be crucial in measuring progress and meeting this target in Kenya, where it is already clear that stagnating birth registration rates, for example, are the result of poor infrastructure and inadequate outreach to minority, nomadic, poor and geographically remote communities.

Increase and systematize efforts to reach rural and remote populations through mobile birth registration and identity card application exercises. In remote areas like the Coastal regions, for example in Kwale county, there is only one registrar serving the entire county and the vastness of the area makes it hard for many locals to access such services. The costs of applying for a "free" service is raised by the transport costs and many do not apply in time, increasing the rates of late birth registrations in the area. The government should either increase the number of registrars in the rural areas or provide them with vehicles and resources to enable them to have mobile registration events that aim to reach the remote villages.

Establish responsible and appropriate data collection on stateless populations, discrimination and risk of statelessness. No reliable projections exist on the number of stateless people in Kenya. The government, with the support of civil society and UNHCR, has undertaken some efforts to map the existence of statelessness. At the same time, problematic requirements leave individuals vulnerable to abuse of sensitive

personal data, like Section 5 of the current Registration of Persons Act, which requires individuals to declare their “race or tribe” in order to obtain an ID card. The decennial census and its 42 tribal codes have taken on an unhelpful significance in the construction of nationality in Kenya. “Having a last name that is not a name belonging to one of these ‘tribal codes’ could be enough for the rejection of an application for an identity card.”³⁴ Efforts are underway to include modules on statelessness the risk of statelessness in the 2019 census.³⁵ The government of Kenya should work with UN agencies, experts and civil society in designing and implementing the census, especially in communities already known to be at risk of statelessness and discrimination in access to documentation of identity.



Laura Bingham, Senior Managing Legal Officer
James A. Goldston, Executive Director
Open Society Justice Initiative



Gaye Sowe, Executive Director
Institute for Human Rights and
Development in Africa

Enclosures:

- Annex 1 Open Society Foundations, Nubian Rights Forum & Namati, *Briefing to the African Committee of Experts on the Rights and Welfare of the Child: Implementation of Nubian Minors v. Kenya*, February 2014
- Annex 2 Open Society Justice Initiative and Institute for Human Rights and Development in Africa, Comments under Rule 112 relating to Implementation of *The Nubian Community in Kenya / Kenya* – Communication 317/06, African Commission on Human and Peoples’ Rights, 17 February 2016
- Annex 3 Open Society Justice Initiative, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya* (2015)
- Annex 4 Namati, *Realizing Citizenship Rights: Paralegals in the Nubian Community in Kenya*
- Annex 5 Kenyan Legal Provisions (excerpts from the Kenyan Constitution 2010 and relevant legislation)
- Annex 6 *Nubian Community in Kenya v. Kenya*, Communication 317/06, African Commission on Human and Peoples’ Rights, Decision, February 2015
- Annex 7 Coalition on Nationality, Citizenship and Statelessness Empowerment (CONCISE), Recommendations on the Registration of Persons Bill, 21 September 2016

³⁴ Bronwen Manby, *Citizenship and Statelessness in Africa: The Law and Politics of Belonging* 197 (2016).

³⁵ Oda Lykke Mortensen, *Confronting Statelessness with Statistics*, ReliefWeb, 27 March 2017, available at: <http://reliefweb.int/report/world/confronting-statelessness-statistics>.