

Committee on the Elimination of Racial Discrimination: Submission for Review of Kenya

AUGUST 15-16, 2011

TABLE OF CONTENTS

Executive Summary	page 2
Background	page 3
Kenya's Violations of CERD	page 4
Conclusions and Recommendations	page 9



Executive Summary

1. The Open Society Justice Initiative (“Justice Initiative”) tenders this submission in preparation for Kenya’s periodic review by the Committee on the Elimination of Racial Discrimination (“the Committee”) on August 15-16, 2011. We examine two issues: ethnic discrimination in access to citizenship, and inadequate legal redress for mass atrocities, occasioned by political manipulation of ethnic rivalries, in the wake of the 2007 Kenyan elections. These issues have given rise to violations of Articles 2, 5 and 6 of the Convention on the Elimination of Racial Discrimination (“CERD”).
2. The Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. We foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counter terrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources.
3. The Justice Initiative has worked in Kenya since 2005 when our partner foundation, the Nairobi-based Open Society Institute for East Africa (OSIEA), was first set up. For the past six years, we have focused on the linkage between discrimination and citizenship, gathering information on the Nubian community in Kenya that led to the filing of two cases before international fora challenging the longstanding practice of ethnic discrimination in relation to confirmation of citizenship. In 2010, we expanded our focus in Kenya to advocate for national accountability for international crimes committed after the country’s 2007 elections. We conducted in-depth research on Kenya’s capacity and will to foster accountability for the post-election violence.
4. Kenya is in the midst of a major legal reform process which provides a unique opportunity to remedy CERD violations highlighted in this submission. Its citizenship laws are being revised. Amid reform of the criminal justice system, a serious conversation is taking place about national accountability for crimes committed during the post-election violence. In its Concluding Observations, we ask the Committee to recommend that Kenya:
 - Abolish discriminatory barriers which impede ethnic minorities from obtaining proof of citizenship;
 - Commit to and conduct genuine, transparent and fair investigations and trials for crimes committed during the 2007-8 post-election violence in which ethnicity was manipulated for political gain.

I. Background

5. Kenya's CERD violations have impacted two of the most vulnerable and marginalized groups in Kenya: (1) Nubians who have struggled to get documented proof of their Kenyan citizenship, namely national identity cards and passports and (2) victims of mass crimes, targeted due to a perceived link between their ethnicity and political affiliation, who have failed to get access to justice after the 2007 post-election violence. Seen together, they demonstrate the continuum of ethnic discrimination which permeates Kenyan society – from routine administrative decisions at the local level which affects individuals' everyday lives, right through to the structural failure at a national level to address mass violence in which ethnicity was instrumentalized.
6. Although this submission highlights the link between Kenyan citizenship laws and marginalization of the Kenyan Nubians, the analysis and recommendations advanced here address broader, systemic shortcomings in current practices that affect many Kenyan minority groups.¹ These individuals face burdensome, unregulated and often exceedingly lengthy administrative procedures to have their citizenship recognized. Sometimes they are never successful, and in the meantime, they cannot go to school, access healthcare, work, own land or vote. Entire communities are consigned to poverty-stricken slums, unable to extricate themselves from the marginalization they experience in virtually every aspect of life. Kenya must adequately reform its citizenship laws and practices to address violations of CERD Articles 2 and 5.
7. Meanwhile, the post-election violence of 2007-8 was not an isolated incident. Kenyan elites have had a long history of manipulating ethnicity for political gain. In the 1992 and 1997 election campaigns, Kenyan politicians played up ethnic rivalries, stoking hopes of patronage for the victorious and fears of exclusion for the defeated. According to the 2008 Kenyan Commission of Inquiry into the Post-Election Violence (CIPEV), the “deliberate use of violence by politicians to obtain power since the early 1990s, plus the decision not to punish the perpetrators has led to a culture of impunity and a constant escalation of violence” in Kenya.² In 2007, like the elections that preceded it, people were targeted because of a correlation perpetrators made between ethnicity and political affiliation. By the time the 2007 post-election violence abated in March 2008, 1,133 people had been killed, 3,561 injured, and 117,216 private properties and 491 government-owned properties had been destroyed. Over 350,000 Kenyans were displaced in the mayhem.³ In April 2011, the International Criminal Court started proceedings against six high ranking Kenyan officials for their alleged role in crimes against humanity committed during the post-

¹ See Kenyan government, *Initial to fourth periodic reports of the State parties due in 2008* (Kenya) October 27, 2010, UN Doc CERT/C/KEN/1-4, January 31, 2011, available at <http://www2.ohchr.org/english/bodies/cerd/cerds79.htm>, at para. 45 (acknowledging criticism of vetting process as discriminatory against certain minorities) [“Kenya 1-4 periodic report”]; Kenya Human Rights Commission, *Foreigners at Home: The Dilemma of Citizenship in Northern Kenya* (2009) available at *Foreigners at Home: The Dilemma of Citizenship in Northern Kenya*; Kenya National Human Rights Commission, *An identity crisis? A study on the issuance of National Identity Cards* (2007) available at <http://www.knchr.org/dmdocuments/Final%20IDsReport.pdf>.

² *Report of the Commission of Inquiry into Post Election Violence* (CIPEV) (hereafter “CIPEV report”), October 15, 2008, available at www.dialoguekenya.org/docs/PEV%20Report.pdf, p.22.

³ CIPEV Report, see generally Chapter Nine “Extent and Consequences of the Post Election Violence: Deaths, Injuries and Destruction of Property”, above n 2, pp304-344.

election violence.⁴ But the ICC can only prosecute a handful of perpetrators. Kenya has not yet made any serious effort to bring alleged perpetrators of the post-election violence to justice and hence has failed to provide victims with an effective domestic legal remedy, violating CERD Articles 2, 5 and 6.

II. Kenya's Violations of CERD Obligations

Articles 2 and 5

8. Article 2(1)(a) provides that Kenya will engage in “no act or practice of racial discrimination against persons, groups of persons or institutions” and will “ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation. Under Article 2(1)(c), Kenya must also take the affirmative step 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 discrimination wherever it exists.”⁵
9. These basic non-discrimination provisions set out in Article 2 should be seen in conjunction with Article 5, which sets out the range of rights to which the principle of non-discrimination applies. Of particular relevant to this submission are article 5(a), (b), and (c)(iii). Under Article 5(a), Kenya must ensure “the right to equal treatment before the tribunals and all other organs administering justice.” Article 5(c)(iii) obliges states to guarantee the enjoyment of the “right to nationality.” Meanwhile, Article 5(b) protects the “right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.” Violations of these provisions related to citizenship and to the post-election violence will be dealt with in turn.

➤ Discriminatory Access to Citizenship

10. Unlike most Kenyans, Nubians and individuals from certain other ethnic groups are subject to heightened screening procedures in order to obtain Kenyan identity documents, which can entail both furnishing additional proof of citizenship and submitting to questioning before a vetting committee. All Kenyans apply for ID cards at age 18, but those from

⁴ The ICC has started two cases, each involving three alleged perpetrators. The first case is against William Samoei Ruto, Henry Kiprono Kosgey, and Joshua arap Sang. Ruto and Kosgey are both members of the Orange Democratic Movement (ODM), the then opposition party. Arap Sang was a radio broadcaster. The three are charged with committing the crimes against humanity of murder, deportation or forcible transfer, torture, and persecution. For an overview, see the ICC's Case Information Sheet, available at <http://www.icc-cpi.int/iccdocs/PIDS/cis/RutoKosgeySangEng.pdf>. The second case is against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali. Kenyatta is Kenya's deputy prime minister and minister of finance. Muthaura is Kenya's current head of the public service and secretary to the cabinet, Ali was the Police Commissioner. They are alleged to have committed the crimes against humanity of murder, deportation or forcible transfer, rape and other forms of sexual violence, other inhumane acts causing serious injury, and persecution. For more information, see the ICC's Case Information Sheet, available at <http://www.icc-cpi.int/iccdocs/PIDS/cis/MuthauraKenyattaAliEng.pdf>.

⁵ See Gay J. McDougal, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 *How. L.J.* 571, 582-83 (1997) (emphasizing the state's “multiple responsibilities” under ICERD, including both “negative” and “affirmative” duties).

“typically Kenyan” ethnic groups, who do not face additional scrutiny and vetting committees, can expect to secure an ID card without significant delay. By contrast, for some Nubians, the wait is interminable, forestalling any hope of entering the job market, and condemning a generation to a life of poverty and marginalization.

11. Heightened screening procedures apply to selected border groups such as Kenyan Somalis, Borana, Gabra, Maasai, Kuria and Sabaot, but also to non-border groups such as Nubians, Coastal Arabs, Asians, Duruma, Digo, Samburu and a number of other specific ethnic groups.⁶ Like the Nubians, many of these groups are primarily of Muslim faith. Both registration officials and vetting committee members have wide discretion to probe whether a Nubian is “really Kenyan,” including by asking for forms of documentation that have no bearing on citizenship under the law, such as grandparents’ birth certificates, title deeds and sworn affidavits. Thus, even if they are not required to go before a vetting committee, members of select ethnic groups are often asked to furnish documents that may be difficult or impossible to obtain.
12. Section 8 of Kenya’s *Registration of Persons Act* specifies:

A registration officer may require any person who has given any information in pursuance of the Act or rules made thereunder to furnish such documentary or other evidence of the truth of that information as it is within the power of that person to furnish.
13. While registration authorities have relied on this provision to justify heightened scrutiny and the use of vetting committees,⁷ the language itself is neutral and does not contemplate that entire groups would be selected for burdensome procedures at the sole discretion of the registration offices. These practices are not the product of any affirmative language in the Act; the system emerged because the Act is acutely lacking in safeguards against such abuse. Indeed, the Kenya National Commission on Human Rights concluded that vetting is “without any legal or official basis” in Kenya, but rather represents the product of essentially unregulated non-public circulars and internal policies.⁸ Indeed, those who are denied ID cards or who experience protracted delays have no viable recourse, administrative or judicial, to appeal against the actions of local authorities.
14. Vetting and related practices discriminate against members of specific groups on the basis of race in violation of Article 5(d)(iii) in conjunction with Articles 2(1)(a) and (c). These practices are made possible by the Kenyan government’s promotion of an ethnically-based conceptualization of citizenship coupled with the absence of protection against discrimination under existing law. The result of sustained discriminatory practices in access to nationality documents is clear from the fate of the Nubian community: groups singled out for vetting suffer discrimination in employment, access to social benefits, education,

⁶ The implementation of vetting varies by province and locality and some ethnic groups are subject to vetting only in certain places. Nevertheless, it appears to always be on the basis of ethnicity rather than an objective, non-discriminatory criteria.

⁷ See, e.g., *Kenya 1-4 periodic report*, above n. 1, at para. 45 (citing “wide discretion” under Section 8 as the legal basis for heightened scrutiny against certain ethnic minorities).

⁸ See Kenya National Commission on Human Rights, *An Identity Crisis: A Study on the Issuance of National Identity Cards* (2007), above n. 1, p. 22.

causing severe economic disadvantage until the system is dismantled and non-discriminatory guidelines are developed in its place.

15. In its omnibus periodic report for 2002-2008, Kenya notably acknowledged criticism of vetting committees and other burdensome screening practices carried out by registration officials based on the ethnicity of the applicant.⁹ The report implies that these problems have improved in recent years, whereas the Justice Initiative has found that Kenya's practices continue to undermine equal enjoyment of the right to nationality among Nubians and among Kenyan minorities generally. Indeed, as recently as February 2011, a domestic court in Mombasa suspended a secret circular requiring additional "proof" of citizenship (grandparents' birth certificates) for Asians and Arabs only.¹⁰ One month later, in March 2011, the African Committee of Experts on the Rights and Welfare of the Child ("ACERWC") announced its preliminary decision on the Justice Initiative's communication on behalf of Nubian children, brought jointly with the Institute for Human Rights and Development in Africa ("IHRDA"). The ACERWC found Kenya in violation of its obligations under the African Charter on the Rights and Welfare of the Child to grant children nationality from birth and to avoid unlawful discrimination in access to citizenship.¹¹
16. Although Kenya should be commended for positive steps, such as issuing a 2006 nationwide directive calling for easing of administrative burdens,¹² the problems identified in this submission arise at the local level where decision-making is essentially unregulated and the decisions themselves are final. This is precisely why the Committee's recommendations could play a key role in guiding Kenya's legislative reform process: CERD places a special emphasis on the fact that discrimination must be eliminated at every level of state action. Specific recommendations tailored to achieving this important goal are proposed in the final section of this submission.

➤ Limited Redress for Post-Election Violence

17. During the 2007 Kenyan elections, incumbent president Moi Kibaki and his Party of National Unity (PNU), with its power base from the Kikuyu tribe, faced a major challenge from Raila Odinga and his Orange Democratic Movement (ODM), which had its power base among the Luo, Luhya, and Kalenjin tribes. ODM hopes for victory on election day (December 27, 2007) were high, and as the announcement of election results was delayed, tensions mounted. When the election commission declared Kibaki the winner on December 30, 2007, violence erupted.
18. During the period from December 27, 2007 to February 29, 2008, members of the Kikuyu and Kisii communities perceived to be associated with the PNU party were targets of

⁹ See Kenya 1-4 periodic report, above n.1, at para. 45-47.

¹⁰ See *Muslims for Human Rights (MUHURI), et al. v. The Registrar of Persons*, Petition no. 1/2011 (High Court, Mombasa, 18 Feb. 2011) (Ojwang, J.), discussed below, at para. 16.

¹¹ See Draft Report of the 17th Session of the African Committee of Experts on the Rights and Welfare of the Child, March 22-25, 2011, Addis Ababa, Ethiopia, at para. 36 (finding violation of alleged rights; detailed decision and recommendations reserved).

¹² *But see MUHURI, et al. v. Registrar of Persons* (examining a circular issued in 2007 requiring parents' and grandparents' birth certificates as proof of citizenship).

violent attacks in the Rift Valley and the Coast. In Nyanza and Western, the violence was mostly directed towards government facilities such that, although Kikuyus and Kisiis were harmed, the intention appeared to be not to kill them but rather to expel them and destroy their property.¹³ Increasingly over the course of the violence, attacks became more coordinated particularly in the North Rift where Kalenjin youth attacked Kikuyu communities.¹⁴ Alleged crimes committed against Kikuyus under the proceedings at the ICC include the crimes against humanity of murder, forced transfer and political persecution, including around 250 deaths, thousands injured, around 40,000 internally displaced, and the destruction or damage of around 1,475 homes.¹⁵

19. Gangs identifying with the Kikuyu community similarly organized attacks, particularly in Rift Valley and Nairobi. In places like Naivasha, Nakuru and the slum areas of Nairobi, Luos, Luhyas and Kalenjins were attacked and expelled from their homes.¹⁶ Alleged crimes committed against Luos, Luhyas and Kalenjins under the proceedings at the ICC include the crimes against humanity of murder, rape, forced transfer, other inhumane act (through the commission of forced circumcision) and political persecution.¹⁷
20. Article 5(b) covers violence inflicted by government officials and “any individual group or institution.” The CIPEV Report made two relevant findings with respect to Article 5(b). Firstly, while violence erupted spontaneously in some areas in Kenya, in others it was the “result of planning and organization,” often with the “involvement of politicians and business leaders.”¹⁸ Secondly, while police were overwhelmed by the numbers of attackers and coordination of attacks, they also failed to “act on intelligence and other early warning signs” which contributed to the escalation of the violence.¹⁹ These findings underscore both the Kenyan state’s failure to protect people from massive violence -- which was systematic, widespread and continued over a series of months – as well as its active involvement in instigating and perpetuating such ethnically targeted violence, constituting Article 5(b) violations.

Violations of Article 6

21. Article 6 guarantees that every person in Kenya has the right to “an effective remedy against the perpetrators of acts of racial discrimination....whether such acts are committed by private individuals or State officials.” It also provides the right to “seek just and adequate reparation for the damage inflicted.”

¹³ CIPEV Report, above n.2 pp.346-347

¹⁴ Ibid, pp.346-347

¹⁵ International Criminal Court Pre Trial Chamber II, Decision on the Prosecutor’s Application for Summonses to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua arap Sang, ICC Doc ICC-01/09-01/11, March 8, 2011, available at <http://www.icc-cpi.int/NR/exeres/E0EB838E-59AA-4F92-9B6D-E66DD194050E.htm>.

¹⁶ CIPEV Report, above n 2, pp.346-347; Human Rights Watch, *Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Governance*, March 16, 2008, available at www.hrw.org/node/62314 p.45

¹⁷ International Criminal Court Pre Trial Chamber II, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kimiri Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC Doc ICC-01/09-02, March 8, 2011, available at <http://www.icc-cpi.int/NR/exeres/D99DEB2B-E48B-4942-8546-515B792F2297.htm>

¹⁸ CIPEV Report, above n 2, at p. viii.

¹⁹ Ibid, p.ix.

22. Four years after the post-election violence erupted in Kenya, victims are yet to be provided with an effective legal remedy at the domestic level to address the harms suffered. Though the Commission of Inquiry into the Post-Election Violence provided substantial evidence of crimes under Kenyan law (setting aside the issue of whether some of these also amounted to crimes of an international nature), Kenya's Attorney General proved reluctant to pursue prosecutions related to the post-election violence. As of January 2011, prosecutions against only six low-level suspects had made it to trial, resulting in no convictions. Four alleged perpetrators were brought to trial in one case, accused of participating in the notorious burning of an occupied church on New Year's Day 2008 in Eldoret. After a court acquitted the four of murder due to insufficient evidence as a result of shoddy investigations, the attorney general failed to file an appeal within the required 14-day deadline. Meanwhile, the attorney general decided not to proceed with a prosecution against an Eldoret politician on charges of incitement to violence during his campaign rallies supporting Raila Odinga for president. In the case of a police officer filmed in the fatal shooting of a protestor in the Nyanza region, the attorney general did not appeal the officer's acquittal on murder charges. The police were widely suspected of tampering with key evidence in the case. The shooting had been broadcast around the country. The trial outcome and the attorney general's passivity confirmed for many Kenyans that the judicial system could not be trusted.²⁰
23. The Kenyan government has since argued before the International Criminal Court that it is in the process of reforming its criminal justice system and that the country will be ready to pursue national prosecutions for all crimes – including those currently before the ICC -- by September 2011.²¹ The government's March 2011 submission pointed to the country's reforms taking place at the legislative level, as well as structural reforms within the judiciary and law enforcement arena with respect to investigations and prosecutions to back its claims.²²
24. Yet many Kenyans have heard such promises, seen the poorly conducted domestic criminal trials of six alleged post-election violence perpetrators, and remain suspicious. In May 2011, the ICC also rejected the Kenyan government efforts to win back the ICC cases, noting that Kenya had not started domestic investigations into any of the six individuals charged by the ICC prosecutor at the time of its March submission to the court.²³ The Justice Initiative's own research looking at Kenya's ability to prosecute serious international crimes, conducted in 2010, indicates that key concerns need to be addressed before the domestic justice system is capable of delivering fair, genuine and effective trials for the post-election violence crimes. Kenya's current technical capacity to prosecute ordinary criminal cases is poor. Prosecutors, defense lawyers and judges all need specific training in international criminal law and procedures. Meanwhile, concerns still exist about

²⁰ For a more in-depth discussion, see Open Society Justice Initiative, *Putting Complementarity into Practice: Domestic Justice for International Crimes in the Democratic Republic of Congo, Uganda and Kenya*, January 2011, p. 101, available at

http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/complementarity-in-practice-20110119/putting-complementarity-into-practice-20110120.pdf.

²¹ See *Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute*, ICC Doc ICC-01/09-01/11 and ICC-01/09-02/11, March 31, 2011, p. 7, available at <http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf>.

²² *Ibid.*, at p.19-29.

²³ International Criminal Court, Pre Trial Chamber II, *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute*, May 30, 2011, available at <http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf>.

the competence and independence of the justice system – specifically investigators, prosecutors and judges -- to fairly pursue and oversee politically sensitive trials. The problem is exacerbated by the fact that the country has little capacity to protect witnesses and victims²⁴ and Kenya’s courtrooms lack the technology to allow witnesses to testify with their identities obscured from the public. This has discouraged vulnerable witnesses from testifying and hindered prosecution of sensitive cases. Though a new agency was set up earlier this year to address protection issues, it will require time and capacity to be able to deal with the types of challenges presented by post-election violence cases.²⁵

25. Many of these technical and capacity challenges, however, can be overcome. The fundamental concern is the Kenyan government’s political will to genuinely pursue politically sensitive cases dealing with the post-election violence. The lack of movement to pursue efforts to set up a workable mechanism to address such cases until the ICC issued warrants for the six high ranking individuals in December 2010 gave Kenyans a reason to doubt the sincerity of the government’s sudden interest in domestic accountability. Both under its CERD obligations, and the Rome Statute to the ICC (to which Kenya is a state party), Kenya has the primary obligation to provide redress for the crimes committed after the 2007 elections in which ethnicity was instrumentalized. Given the length of time since the violence abated, the failure to ensure meaningful redress for international crimes within the past three years constitutes a violation of Article 6.

III. Conclusions and Recommendations

26. The Committee is assessing Kenya’s compliance with CERD at a key time. In August 2010, Kenya adopted a new constitution, which prohibits discrimination “directly or indirectly against any person on any ground.”²⁶ This constitutional provision can only be given effect through comprehensive legislative reforms that permit its broadest possible application in practice. Kenya is currently in the process of redrafting its citizenship laws to ensure compatibility with the broad principles of the 2010 Constitution. Thus, Kenya is well-positioned to dismantle the discriminatory obstacles to citizenship erected under existing law and practice.
27. However, there is a grave risk that the new laws will repeat the same ethnically-based conceptualization of citizenship that has perpetuated discrimination in the past. The new draft citizenship laws do not include basic protections necessary to eliminate institutionalized discrimination in access to citizenship. Kenya must confront the fundamental failings of its existing citizenship framework and establish, through legislative reform, mechanisms by which all Kenyans can access and enjoy their right to nationality free of discrimination.

²⁴ Notwithstanding the establishment of a Witness Protection Unit, the agency remains fraught with significant challenges including underfunding, lack of adequate technical and human resources and credibility questions over its current composition and location. See Brian Otieno, *Witness Protection Agency Weak*, All Africa.com, July 19, 2011, <http://allafrica.com/stories/201107191320.html>.

²⁵ Open Society Justice Initiative, *Putting Complementarity Into Practice*, above n. 20, see pp. 83-101.

²⁶ *The Constitution of Kenya* (2010), Art. 27, available at <http://www.kenyalaw.org/Downloads/The%20Constitution%20of%20Kenya.pdf>.

28. The Committee is also reviewing Kenya at a time when legal reforms and political shifts have paved the way for serious discussion about the creation of a domestic accountability mechanism for the post-election violence in which ethnicity was manipulated. Kenya is also slated for national elections again in 2012. A genuine accountability mechanism for ethnically-related violence needs to be put in place as a way of both redressing past crimes and potentially deterring repeated ones with the next election cycle, whether that be a fully domestic process, or as the CIPEV Report has suggested, a hybrid court mixing international and Kenyan staff. In doing so, Kenya must remain mindful of Article 5 requirements for “equality before the law” for all Kenyans, regardless of ethnicity, and the “right to equal treatment before the tribunals and all other organs administering justice.” Meanwhile, in the campaigning leading up to the 2012 elections, the Kenyan government must also respect its Article 4(c) obligations which require that Kenya “shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”
29. In order to redress the specific violations set out in this submission, we request that the Committee include in its Concluding Observations recommendations that Kenya should:
- Clarify that a system of citizenship recognition whereby particular groups are selected for more onerous procedures on the basis of ethnicity constitutes a violation of Article 5(d)(iii) in conjunction with Article 2;
 - Emphasize that civil and community groups representing vulnerable minority groups should be meaningfully consulted during the process of law reform;
 - Affirm the principle that the issuance of a national identity card to citizens is a right, not a privilege, irrespective of an individual’s ethnic identity, with administrative burdens falling primarily on the state;
 - Encourage Kenya to expressly recognize the citizenship of certain communities, such as the Nubians, who *prima facie* qualify for citizenship, having continuously resided in Kenya for over 100 years.
30. The Committee is further requested to consider the following specific recommendations to guard against discrimination, at the level of legislative reform:
- Vetting and additional screening on the basis of ethnicity should be abolished;
 - Elaborated processes for the ‘verification’ of citizenship cannot be triggered by ethnic identity; instead, any second-level screening procedure should be administered exclusively on an individualized basis;
 - Individualized procedures of heightened scrutiny can be triggered only by uniformly applied, “objective and reasonable” criteria, such as lack of documentation of birth or lack of evidence of permanent residence; due regard must be given to the fact that individuals from certain regions of Kenya or from certain ethnic groups may have been discriminated against historically in the granting of government-issued documents;
 - To protect against discrimination in the implementation of the law, appeal must be afforded in all cases to an independent body and ultimately to the courts;
 - To avoid effective denial of citizenship in cases of heightened scrutiny, time limits for administrative action on any application must be set and consequences in cases of failure to respect the deadlines must be identified, e.g.:
 - A presumption that the individual concerned is a Kenyan national; or

- Availability of civil suit against the specific officer charged with making the determination, in his/her individual capacity, for failure to adhere to the administrative deadline; or
- An automatic right to acquire a temporary status, permitting enjoyment of citizenship rights until a final determination on citizenship is made.

With respect to providing accountability for crimes committed during the 2007-8 post election violence which manipulated ethnicity:

- commit to, and implement, a genuine, fair and transparent process of accountability for ethnic violence;
- Undertake capacity building programs in the justice sector to support investigations, prosecutions and trials pertaining to the post election violence, with a particular focus on ensuring a non-discriminatory, fair and impartial approach to the investigations and conduct of trials.
- Ensure witnesses are adequately protected without discrimination of any kind, but particularly on the basis of ethnicity; and
- Ensure an adequate reparations program is put in place for victims of post-election violence crimes.

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