



JOINT MEMORANDUM ON THE HUDUMA BILL, NO. 57 2021

SUBMITTED TO:

**THE NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON ADMINISTRATION AND
NATIONAL SECURITY**

BY:

ARTICLE 19 EASTERN AFRICA AND THE KENYA ICT ACTION NETWORK (KICTANET)

25 MAY 2022



25 May, 2022

Mr. Michael R. Sialai,
Clerk of the National Assembly,
P. O. Box 41842 - 00100,
Nairobi.

Dear Sir,

RE: The Huduma Bill (National Assembly Bill No. 57 of 2021)

Greetings from ARTICLE 19 Eastern Africa and KICTANet.

We submit this memorandum on the Huduma Bill No. 57 of 2021 jointly as Kenyan civil society organizations with expertise in issues of identification, civil registration, nationality rights, data protection and privacy, minority rights, children's rights, human rights, and other related issues.

We have attached a matrix presentation that includes our responses to the proposed amendments to the Huduma Namba Bill for your review and consideration. We also wish to reiterate the contents of our earlier Joint Memorandum on the Huduma Bill, 2021.

In addition, we are concerned by the short timeline that was provided for public participation with respect to the Bill. We therefore call upon the Committee to extend the period for at least 21 days to enable all relevant stakeholders to effectively submit and participate in the process.

We would be glad to provide further input and perspectives on the Bill and how best to establish an effective, inclusive, and privacy-respecting identification system in Kenya.

We look forward to your response.

Regards,


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SUMMARY OF KEY CONCERNS ON THE HUDUMA BILL, 2021

The Huduma Bill, 2021 is proposing the largest set of changes to the legal framework governing Kenya's identification system since before independence. If enacted, the Huduma Bill would become the single law anchoring birth and death registration, issuance of identification cards, issuance of passports, and governance of the National Integrated Identity Management System (NIIMS, also referred to as Huduma Namba). As such, the draft legislation, system design, and all other decision points around NIIMS must be considered very carefully, comprehensively, and transparently.

We wish to reiterate the following key concerns with the Huduma Bill, 2021.

- a) **Threats to the Right to Privacy** - The Huduma Bill and the Huduma Namba process poses a threat to the Right to Privacy and Data Protection. The Act provides for the capture of biometric data which in essence reveals intimate information about a person. This necessitates the introduction of additional safeguards towards protection. KICTANet and Article 19 have long expressed concern over the impact of biometric technologies on freedom of expression and the right to privacy. We note that one of the amendments suggested by Hon Peter Mwathi is that the data protection impact assessment should be included as part of the Regulations. We suggest that the data protection impact assessment ought to instead be a part of the Act and the parameters set within the Act as this makes it prescriptive and a mandatory prerequisite as opposed to a regulation.
- b) **Transitional provisions** - The Bill seeks to repeal key Acts dealing with registration of persons, immigration and registration of births and deaths without a transition period. We note with concern the requirement on the government to deal with matters of exclusion prior to enrolment into NIIMS. We therefore recommend that the Bill should provide for a period of transition of approximately 5 years to allow for inclusion of all residents and efficiency in management and administration. We note that one of the amendments suggested by Honorable Cheruiyot Gladwell Jesire is that the Act takes effect after 3 years but we still assert that this is not a sufficient transition period and the period should not be less than 5 years.
- c) **Public Participation:** Given the extensive nature of NIIMS and that it will impact many areas of lives of all Kenyans, this bill and all related legislation and/or regulations require robust public participation across the country through which the government can receive and consider the views and suggestions of Kenyans and other residents of the country and incorporate them into the final version(s). At all steps in the legislative process, the government should provide full information by advertising opportunities to provide input into the Huduma Bill not only on print media and gazette notices, but also through social media, TV stations and radio to give room for more Kenyans to interact with the Bill and share their view. In-person public participation opportunities should be organized by the government in every county - in accessible locations, in vernacular languages, with sufficient notice, and with information (such as the latest copy of the bill) provided in advance to enable Kenyans

to provide informed views. Following all public participation opportunities, including the current collection of memoranda, feedback should be provided to the public on what recommendations were received and how input has been taken into account in amending the bill or plans for NIIMS. The government must invest in building user trust and confidence digital ID, including through meaningful and robust engagement on the anchoring legislation, the system design, and with the governing body for NIIMS.

- d) Risks of Exclusion:** The Government must ensure all Kenyans can access identification documents such as birth certificates and national identity cards prior to moving forward with Huduma Namba. The draft bill does not sufficiently address concerns of exclusion that have been repeatedly raised over the past three years. It is critical to avoid importing issues prevalent in the current system of accessing birth registration, ID cards, and passports into the system proposed in this Bill. Those at risk of exclusion from NIIMS enrollment include Kenyans without identification documents, people with biometric challenges (such as unreadable fingerprints), persons with disabilities, street families and street children, and stateless persons.

The High Court, in January 2020, also imposed a requirement on the government to establish a comprehensive regulatory framework that addresses how Kenyans without identity documents and people with biometric challenges can enroll in NIIMS - issues yet to be addressed in this bill or any existing regulations. Beyond risks of exclusion at the point of enrollment, there are no safeguards in the current draft bill to ensure against denial of services either for persons not enrolled in NIIMS or for those who are enrolled but who face challenges in the authentication or verification process at the point of accessing services or conducting transactions. Without significant changes, this bill will lead to the exclusion of millions of Kenyans and other residents in the country. We welcome the proposed amendments by Honorable Aden Duale delinking the possession of the Huduma Namba/Card to access to key services. We also welcome the proposed amendments by Honorable Owen Yaa Baya to introduce a Stateless Person's Huduma Namba.

- e) Policy Framework:** Civil registration and identification are critical functions in a country as they provide individuals with a unique legal identity throughout their lives. Transitioning to a digital identity system such as Huduma Namba in a country where there exists a fragmented civil registration system is a complicated matter. The success of the Huduma Namba programme will be hinged on addressing the gaps and bottlenecks that have plagued Kenya's civil registration and identification systems. There is a need for a holistic approach that is informed by evidence-based research, a comprehensive national policy on civil registration and identification, a robust strategy and an implementation plan with a clear road-map for the implementation of the Huduma Namba (NIIMS). The Bill, as currently drafted, is not informed by any of these foundational elements, which could portend challenges for the process of transition from paper-based systems, the current national identification card, and the various forms of identification under the numerous registration systems and government service providers.

- f) Institutional Framework for National Identity:** The NIIMS Committee proposed in section 65 is an oversight body and not sufficient to give effect to various rights that individuals have in the Constitution and in this draft bill (i.e., appeal a decision of a NIIMS Officer, update particulars, etc.).

There is a need to establish a National Identification Agency or National Identification Commission to be the competent, robust, and independent institution responsible for the planning, management, administration and implementation of NIIMS and the Huduma Bill. Establishing such an agency would be in line with Sustainable Development Goal 16.6 to develop effective, accountable and transparent institutions, and to ensure legal identity for all.

PROPOSALS ON THE AMENDMENTS TO THE HUDUMA BILL, 2021

Hon Cheruiyot Gladwell Jesire, MP			
Clause	Provision	Proposal	Justification
2	Definitions: Resident Individual Amendment of Resident individual to include stateless Persons	We welcome this amendment	In 2020, UNHCR applauded efforts of the Kenyan government to grant citizenship to 1670 stateless shona and 1300 stateless persons of Rwandan descent who qualify for citizenship under the law. ¹ These efforts by the Government to grant citizenship status and identity documents to stateless communities allows such persons to fully participate in the society and exercise their rights. This amendment will allow other stateless communities to fully realize their right to national identity.
7	Huduma Card Introduces a stateless person Huduma Card to be issued to a stateless person	We welcome this amendment	Currently stateless persons have no access to any form of identification documents such as an ID which is a requirement for enrollment in NIIMS. Hence, stateless persons are excluded from all aspects of the NIIMS system and will be further marginalized due to inability to access any services or rights linked to Huduma Namba. This amendment will solve this challenge
8	Proof of Identity THAT, Clause 8 of the Bill be	We welcome this amendment	Lack of proof of identity should not deny anyone access to services, especially emergency services. In addition, the right to healthcare, education, voting, etc. are universal

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[https://www.unhcr.org/news/press/2020/12/5fd733664/unhcr-applauds-kenyas-decision-resolve-statelessness-shona-other-communities.html#:~:text=Nigeria%20\(English\)-UNHCR%20applauds%20Kenya's%20decision%20to%20resolve%20the,the%20Shona%20and%20other%20communities&text=UNHCR%2C%20the%20UN%20Refugee%20Agency,the%20la w%20as%20Kenyan%20citizens.](https://www.unhcr.org/news/press/2020/12/5fd733664/unhcr-applauds-kenyas-decision-resolve-statelessness-shona-other-communities.html#:~:text=Nigeria%20(English)-UNHCR%20applauds%20Kenya's%20decision%20to%20resolve%20the,the%20Shona%20and%20other%20communities&text=UNHCR%2C%20the%20UN%20Refugee%20Agency,the%20la w%20as%20Kenyan%20citizens.)

	amended by inserting the words “but not mandatory” immediately after the words “shall constitute sufficient”.		rights and thus related public services should not be contingent on a Huduma Namba or Huduma Card. ²
10	<p>Enrollment of Adults</p> <p>Deletes the requirement to provide documentary proof for enrolment of digital ID</p> <p>Requires the principal secretary to make special administrative arrangements for the enrolment of kenyans without identity documents and people with poor biometrics</p>	We welcome this amendment	<p>The High Court of Kenya in Consolidated Petition 56, 58 & 59 of 2019 drew attention to the risk of exclusion under the NIIMS system and stated, “ The challenge is to ensure among other things, that no one is excluded from the NIIMS and the attendant services. This may occur due to <u>lack of identity documents</u>, or lack of or poor biometric data, such as fingerprints. In our view there may be a segment of the population who run the risk of exclusion.”</p> <p>In response, the court stated the need to develop a legal framework that regulates how those without access to identity documents will be enrolled into NIIMS.</p> <p>This provision recognizes the structural and administrative barriers that have for a long time put marginalized populations who lack identity documents required for enrolment into ID systems in Kenya at risk of statelessness. This has been highlighted in previous decisions namely the <i>Children of Nubian Descent in Kenya v Kenya</i>³ and <i>Nubian Community in Kenya v Kenya</i>⁴ where persons of Nubian descent were required to provide more documentation than other citizens to be enrolled into Kenyan ID system.</p>

² <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

³ Children of Nubian descent in Kenya v The Republic of Kenya, The African Committee of Experts on the Rights and Welfare of the Child Communication/002/2009 < <https://www.justiceinitiative.org/uploads/e2fd5fc8-a229-41f8-a881-c10bfc7233ab/ACERWC-nubian-minors-decision-20110322.pdf>>

⁴ Nubian Community in Kenya v The Republic of Kenya, Communication 317/2006, African Commission on Human and People’s Rights < https://www.achpr.org/public/Document/file/English/communication_317.06_eng.pdf>

			This provision allows NIIMS officers to consider alternative non-documentary means of proving identity as was required by the court decision.
13	<p>Issuance of Huduma Card</p> <p>(a) Deleting the issuance of a Huduma Card to a minor</p> <p>(b) Ensuring the initial issue of Huduma Cards is free of charge to everyone including refugees and foreign nationals not only citizens as appears in the current bill.</p>	We welcome this amendment	<p>Given that children will already have a Huduma Namba and birth certificate from birth, the rationale for a Minors' Huduma Card is not clear and should therefore be deleted.</p> <p>As written in the 2021 Bill, the initial issue of the card is only free for citizens – not for foreigners, refugees, or stateless persons – which may put an undue burden on vulnerable populations to be able to obtain a Huduma Card under NIIMS. Initial issuance should be free for all enrollees.</p>
14	<p>Transitioning a minors Huduma Card</p> <p>Clause 14 of the Bill be amended by deleting the words “possessing a Minors' Huduma card shall surrender the card to” and substituting therefor the words “shall appear in person before”.</p>	We welcome this amendment	<p>Given that children will already have a Huduma Namba and birth certificate from birth, the rationale for a Minors' Huduma Card is not clear. This will allow all resident children to get access to national identity documents upon attaining the age of minority.</p>

61	<p>Measure to ensure inclusion</p> <p>Clause 61 of the Bill be amended by inserting a new subclause immediately after subclause (2)—</p> <p>“(3) The term “any group of persons” shall include but not limited to Kenyans who lack identity documents, people with poor biometrics, persons with disabilities, people living in rural and remote areas, and stateless persons.”</p>	We welcome this amendment	<p>As stated the High Court in Consolidated petition 56, 58 and 59 of 2019 stated that: In our view there may be a segment of the population who run the risk of exclusion due to lack of identity documents, or lack of or poor biometric data, such as fingerprints.</p> <p>We therefore found that there is thus a need for a clear regulatory framework that addresses the possibility of exclusion in NIIMS. Such a framework will need to regulate the manner in which those without access to identity documents or with poor biometrics will be enrolled in NIIMS.⁵</p> <p>Section 61 states the Cabinet secretary shall implement administrative measures to address procedural or social barriers to exclusion but fails to discuss further what these administrative barriers include. Further, the Section fails to identify the groups at risk of exclusion.</p> <p>Barriers to inclusion under NIIMS system are a reality for about 5 Million Kenyans. Recently Parliament recommended that the Cabinet Secretary for Interior and Coordination of National Government should initiate the process of recognizing Nubians of Kenyans descent as a tribe in the Republic of Kenya.⁶</p>

⁵ Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 Others (interested Parties) [2020] e KLR < <http://kenyalaw.org/caselaw/cases/view/189189/>>

⁶ Departmental Committee on Administration and National Security, ‘ Report on the Public Petition No. 23 of 2021 Regarding Accessing National Identity Cards by the Nubian Community’ (Republic of Kenya, 23 November 2021)
 <<http://www.parliament.go.ke/sites/default/files/2021-11/Report%20on%20consideration%20of%20public%20petition%20No.023%20regarding%20accessing%20National%20Identity%20cards%20by%20the%20Nubian%20Community%281%29.pdf>>

			The proposed amendment will allow the government to comprehensively address such risks in detail for example dealing with double registered Kenyans ⁷ , alternatives for enrolment for those without complete biometrics or documentary proof of identity
72	<p>Saving and Transitional Provisions</p> <p>Provides a 3 year transition period between date of assent of the Bill and the coming into force of this Act.</p>	<p>We welcome this amendment however the period should be extended to 5 years instead of 3.</p>	<p>The law must provide for a multi-year transitional period between the current Registration of Persons Act and the Huduma Act. This transition period should be used to address initial enrollment into NIIMS, in particular for those without registration documents and for those in the process of obtaining an ID card under existing laws. A transition period in which the focus is expanding coverage of birth registration and ID card issuance, prior to NIIMS enrollment, will help address challenges of those likely to be excluded from the system. A transition period would also allow for taking the public through proper civic education and comprehensive training of all government officials in registration and related agencies that would use NIIMS.</p>

⁷ Haki na Sheria Initiative, 'The Plight of Double Registered Victims in Kenya' (Citizenship Rights in Africa Initiative, 16 December 2020) < <http://citizenshiprightsafrika.org/the-plight-of-double-registered-victims-in-kenya/>>

Hon Aden Duale, MP			
Clause	Provision	Proposal	Justification
8	<p>Section 8 :</p> <p>CLAUSE 8 THAT, clause 8 of the Bill be amended by— (a) renumbering the existing section as subsection (1); and (b) by inserting the following new subsection immediately after the renumbered subsection (1) — “(2) Despite subsection (1), a person shall not be denied access to any public service for failure to produce a Huduma Card issued under this Act.”</p>	We welcome this amendment	<p>Key services should not be linked to the possession of a Huduma Card. This was reiterated by the High Court in Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR where it stated that that there is a need to ensure that no one is excluded from the National Integrated Information Management System(NIIMS) and the attendant services which may occur as a results of a lack of identity documents, or lack of or poor biometric data, such as fingerprints. The Court opined that there is a need for a clear regulatory framework that addresses the possibility of exclusion in NIIMS.</p>

Hon Owen Yaa Baya, MP			
Clause	Provision	Proposal	Justification
2	<p>THAT, Clause 2 of the Bill be amended by deleting the definition of term “resident individual” and substituting therefor the following new definition—</p> <p>“resident individual” means —</p> <p>(a) a citizen of Kenya;</p> <p>(b) a foreign national who has been granted lawful residency in Kenya;</p> <p>(c) a refugee or asylum seeker permitted in Kenya; or</p> <p>(d) a stateless person permitted in Kenya.</p>	We welcome this amendment	<p>This is a positive step towards protecting the rights of stateless persons and is in line with Kenya’s global commitments. In April 2019 during a <u>conference</u> co-hosted by the Kenyan Government and UNHCR, which brought together member States of the ICGLR, and in October 2019, during the High Level Segment at the annual UNHCR Executive-Committee meeting, the Government of Kenya committed to complete legal reforms to address and remedy statelessness in Kenya permanently⁸,</p> <p>The current definition of resident individual excludes stateless persons from NIIMS and the registration processes set out under this Act.</p>
8	<p>CLAUSE 8</p> <p>THAT, Clause 8 of the Bill be amended by inserting the words “but not mandatory” immediately after the words “shall constitute sufficient”.</p>	We welcome this amendment.	<p>It is imperative to delink the possession of the Huduma Card to access to critical services. The High Court in Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR stated that there is a need to ensure no one is excluded from the NIIMS and the attendant services which may occur as a results of a lack of</p>

⁸ <https://www.unhcr.org/ke/stateless-persons>

			identity documents, or lack of or poor biometric data, such as fingerprints. The Court opined that there is a need for a clear regulatory framework that addresses the possibility of exclusion in NIIMS.
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Hon. Peter Mwathi, MP and Chairperson, Committee on Administration and National Security			
Clause	Provision	Proposal	Justification
8	<p>THAT, the Bill be amended by deleting clause 8 and substituting therefor the following new clause—</p> <p>Proof of identity. 8. The presentation of the Huduma card issued under this Act shall be sufficient proof of identity to facilitate access to any public service which may require an official identification.</p>	We oppose this proposed amendment	<p>Access to public services should not be linked to the possession of a Huduma Card. The High Court of Kenya in Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR stated that there is a need to ensure no one is excluded from the NIIMS and the attendant services which may occur as a results of a lack of identity documents, or lack of or poor biometric data, such as fingerprints. The Court opined that there is a need for a clear regulatory framework that addresses the possibility of exclusion in NIIMS.</p>
46	<p>CLAUSE 46</p> <p>THAT, the Bill be amended by deleting clause 46 and substituting therefor the following new clause—</p> <p>Application of No. 24 of 2019.</p> <p>46. The processing of</p>	We welcome this amendment.	<p>It is paramount to ensure there are sufficient data protection safeguards for identity data held by the State. According to the United Nations Strategy for Legal Identity for All developed by the United Nations Legal Identity Expert Group, All United Nations Member States should adopt comprehensive data protection and privacy laws that secure the identity data of individuals held by the State.⁹</p>

⁹ <https://unstats.un.org/legal-identity-agenda/documents/UN-Strategy-for-LIA.pdf>

	personal data shall be carried out in accordance with Data Protection Act, 2019.		
48	<p>THAT, Clause 48 of the Bill be amended—</p> <p>(a) by inserting the following sub clauses immediately after sub clause (4)—</p> <p>“(4A) Any data under this Act may be shared with a private entity after the Service has requested permission of the data subject.</p> <p>(4B) An entity which seeks any data under this Act shall—</p> <p>(a) comply with the provisions of the Data Protection Act; and</p> <p>(b) sign a data sharing agreement.”</p>	We welcome this amendment	<p>According to the decision of the Court in Republic v Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others; Institute & another (Exparte); Immaculate Kasait, Data Commissioner (Interested party) (Judicial Review Application E1138 of 2020) [2021] KEHC 122 (KLR) (Judicial Review) (14 October 2021) (Judgment) the Court ordered that the Government of Kenya should not push Huduma Namba forward in blatant disrespect of the law but instead ensure the creation of an identification system and data protection scheme that protects and gives life to the Bill of Rights as enshrined in our Constitution</p> <p>Parliament should require the Cabinet Secretary in consultation with the Data protection commission to develop regulations to guide such access. The regulation should provide for audits and other reporting mechanisms to protect against the harms of profiling.</p>
Clause 68	<p>CLAUSE 68</p> <p>THAT, Clause 68 of the Bill</p>	We recommend deletion of: “The Cabinet Secretary shall, make	In a High Court decision made in October 2021, ¹⁰ Justice Jairus Ngaah quashed the decision to

¹⁰ <http://kenyalaw.org/caselaw/cases/view/220495/>

	<p>be amended— (a) by deleting sub clause (1) and substituting therefor the following new sub clause— “(1) The Cabinet Secretary shall, make regulations generally for giving effect to this Act, and for prescribing anything required or necessary to be prescribed by or under this Act within twelve months of the commencement of this Act.” (b) by inserting the following paragraphs immediately after paragraph (d)— “(e) other documentary proof for access to enrolment; (f) provision of replacement cards to enable access to critical services; (g) registration and management of stateless persons; (h) the procedure for hearing and determining appeals in the Appeals Committee; (i) mechanisms for registration of births and deaths;</p>	<p>regulations generally for....(x) data protection impact assessments.”</p> <p>A substantive clause on data protection impact assessment ought to be included in the Act making it prescriptive and a mandatory prerequisite as opposed to a regulation.</p> <p>Ensuing regulations under this clause should be made in consultation with the Office of the Data Protection Commissioner</p>	<p>roll-out of the Huduma Cards, and faulted the government for violating section 31 of the Data Protection Act, 2019 by failing to conduct a data protection impact assessment before processing personal data and rolling out the Huduma Cards. The High Court also ordered the government to conduct a data protection impact assessment before processing of data and rolling out the Huduma Cards.</p> <p>We recommend that a comprehensive Data protection impact assessment is conducted prior to the coming into force of this Act to mitigate any risks to human rights. Ideally, during the transition period.</p>
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	<p>(j) enrollment of stateless persons to NIIMS; (k) other specified biometric data for an individual and a child; (l) recognition of specified vital event of an individual and a child; (m) conditions for late registration for births and deaths; (n) procedures for verification and authentication of information from third party entities; (o) accreditation process for institutions who seek to verify and authenticate information; (p) horizontal integration of existing government databases; (q) procedures, circumstances and limitations on the access, use, retention and disclosure of personal information by third parties; (r) framework for the management of existing databases and portals; (s) special administrative</p>		
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	<p>arrangements to ensure registration; (t) procedures for updating particulars in the database and attendant timelines; (u) procedures for capturing birth registration data for stateless persons and foreign nationals not resident in Kenya; (v) access to adoption certificates; (w) process of validation and rectification under NIIMS; and (x) data protection impact assessments.”</p>		
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