



KENYA SECTION | Since 1959



Supporting Access to Justice
for Children and Youth in East
Africa (SAJCEA) Project



Hakijamii



Civil Society Organizations

**Joint Submission for the adoption of the List of Issues in connection
with the combined 2nd to 5th periodic report of Kenya under the ICESCR**

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TABLE OF CONTENTS

INTRODUCTION	3
1. Article 1 ICESCR: The right to self-determination	4
2. Article 2 ICESCR: Progressive realization of rights and non discrimination	5
3. Article 3 ICESCR: The equal right of men and women to the enjoyment of all economic, social and cultural rights	7
4. Article 6 ICESCR: The right to work	7
5. Article 7 ICESCR: The right to just and favourable conditions of work	8
6. Article 9 ICESCR: The right to social security	8
7. Article 10 ICESCR: Protection of the family	9
8. Article 11 ICESCR: The right to adequate standard of living	10
9. Article 12 ICESCR: The right to health	11
10. Article 13 ICESCR: The right to education	13

INTRODUCTION

From 12 to 16 October 2015, the Committee on Economic, Social and Cultural Rights (the Committee) will prepare and adopt a List of Issues ahead of its review of Kenya's combined 2nd to 5th periodic report.

Save The Children Kenya, Supporting Access to Justice for Children and Youth in East Africa (SAJCEA) and the Economic and Social Rights Centre (Hakijamii) led by the Kenyan Section of International Commission of Jurists (ICJ-Kenya) and Human Dignity welcome the opportunity to contribute to the Committee's preparation of the List of Issues. In this submission, our organisations bring to the attention of the Committee questions related to the implementation of articles 1, 2, 3, 6, 7, 9, 10, 11, 12 and 13 of the International Covenant on Economic Social and Cultural Rights (ICESCR) by the State of Kenya.

Kenya has ratified most of the core human rights treaties including the ICESCR. It has however not yet ratified most of the optional protocols despite putting in place a legislative framework for ratification.

In 2010, Kenya promulgated a new Constitution with a Bill of Rights which provides explicit protection in the arenas of economic, social and cultural rights; better protection of vulnerable groups and marginalized groups; and constitutional entrenchment of the Kenya National Commission on Human Rights (KNCHR).

The International Covenant on Economic Social and Cultural Rights and the Constitution of Kenya recognize that economic and social rights are to be realized by the State progressively. However, in achieving progressive realization, the State should prioritize the rights and fundamental freedoms of the vulnerable in society, including women, persons with disabilities and children. The State must show the legislative, policy and other measures, including allocation of resources, it has taken to achieve progressive realization of economic and social rights under the ICESCR.

The judiciary has embarked on a transformative agenda that seeks to address the challenges that impeded access to justice under the old dispensation. Through its blueprint, the Judiciary Transformative Framework 2012 – 2016, it seeks to institutionalize reform process already elaborated in the constitution by among other things promoting public participation through the inclusion of Court Users Committees. While the judiciary has embarked on this transformational agenda, there still remains a lot to be addressed including proper service delivery and the implementation by the executive of key judgments affecting the realization of Economic Social and Cultural Rights (ESCR) in Kenya.

1. Article 1 ICESCR: The right to self-determination

1.1. Internal and external challenges of self-determination

- Provide information on what measures the State has taken to protect its citizens and those within its jurisdiction from external aggression such as those from Al-Shabaab militants and militia communities in Nadome, Kapedo and other areas in North Rift of the country where conflicts affect development and provision of essential services in these areas through disruption of the communities' livelihood systems by restricting economic development.

Conflict encourages the spread of diseases through raiding of infected animals in some cases; this is in addition to loss of livestock that is the main source of livelihood for the pastoralists. Conflict leads to destruction of social amenities already put in place. For example, the education system is affected when teachers are forced to withdraw from conflict stricken areas and the communities re-locate their settlements for fear of being invaded. Education for children and the youth is affected and interrupted both in the short and long run. Conflict also acts as a disincentive to investment by the communities and development agencies, both in the long-term and short-term.

1.2. Addressing Corruption

- Provide information on the concrete measures taken to investigate the high level corruption scandals Goldenberg and Anglo leasing and to put an end to such practices.¹
- Provide information on the number of corruption cases that have been successfully prosecuted during the reporting period, and the sanctions taken against their authors.
- Explain why there have been no arrests or prosecutions of high-level officials who were linked to the corruption scandal involving senior officials at the Independent Boundary Review Commission dubbed 'Chicken Gate' scandal whereas the United Kingdom courts have had convictions after successful prosecutions.
- Provide information on the measures the State has put in place to safeguard the independence of the staff of the Ethics and Anti-Corruption Commission (EACC) especially from intimidation and threats. Give an account of the number of trainings the State has conducted on the police and other law enforcement officers, prosecutors and judges on the strict application of the ethics and anti-corruption laws, and how many awareness-raising campaigns the state has conducted within the reporting period.
- Provide information on the number of trainings the State has conducted on the police and other law enforcement officers, prosecutors and judges on the strict application of the Ethics and anti-corruption Act laws.

¹ See the report of the judicial commission of inquiry into the Goldenberg affair available at <http://bit.ly/1E6feUL>

- What has been the effect of the awareness-raising campaigns the state has conducted within the reporting period ?

2. Article 2 ICESCR: Progressive realization of rights and non discrimination

2.1 The nature of State Party Obligations

- Provide information on the mechanisms, if any, to ensure that there are adequate safeguards to guarantee the enjoyment of economic, social and cultural rights particularly in relation to most disadvantaged and marginalized groups. Specifically, what laws, policies and other measures have been put in place to guarantee the enjoyment of the right to access information by the public?
- Provide information on the steps the State has taken to comply with Court orders in relation to cases below. What is the amount of compensation that the State has been ordered by the Courts to pay to victims of economic and social rights violations, and how much has the State paid so far?

Mitu-Bell Welfare Society versus the Attorney General² is a leading case of evicted squatters who were residence of Mitumba village near Wilson Airport where they had resided for more than 19 years until the Kenya Airports Authority demolished their houses. The squatters sought redress in court arguing that the forced eviction had violated their right to housing, right to property and right to human dignity. Kenya Airport Authority on the other hand argued that the land belonged to them therefore there was no violation.

The Court determined that although the land did not belong to the squatters, they had other personal property on the land which was destroyed during the evictions therefore their right to property³ was violated. The court also highlighted the obligation of the State to promote, protect and fulfil the economic, social and cultural rights, especially the right to adequate and accessible housing. The Court encouraged engagement and dialogue between all the parties to the case and asked the State to develop programmes and policy on housing. The court asked all the parties to agree on how to remedy the squatters' grievances of unlawful eviction.

In the case of **Satrose Ayuma v Kenya Railways Staff Benefits Scheme**⁴, like in the Mitu Bell case discussed above, the Court acknowledged the impact of forced evictions and demolition on the vulnerable and disadvantaged in the society. The Court stated that individuals should not be evicted from their homes nor have their homes demolished, as this is a violation of their fundamental rights⁵ and freedoms.

2.2 Disparities in the enjoyment of economic, social and cultural rights

² See Judgment- High Court Petition No.164 of 2011, available at <http://kenyalaw.org/caselaw/cases/view/80426>

³ See Article 40 of the 2010 Constitution of Kenya – Protection of right to property

⁴ See Judgment -High Court Petition No. 65 of 2010 available at <http://kenyalaw.org/caselaw/cases/view/90359/>

⁵ See Article 43 1 (b) Constitution of Kenya 2010 - Right to housing

2.2.1. Persons living with disabilities (PWDs)

The Constitution categorically provides under Article 54 for persons with disabilities:

- a. To be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
 - b. To access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
 - c. To reasonable access to all places, public transport and information;
 - d. To use Sign language, Braille or other appropriate means of communication; and
 - e. To access materials and devices to overcome constraints arising from the person's disability.
- What policies has the State put in place to ensure persons living with disabilities are recruited to the public service? What policies or legislations have been put in place by County governments to ensure that persons with disabilities do also benefit from County jobs and other opportunities within their respective Counties?
 - Provide information on the measures taken to ensure that the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities (Article 54. 2 of the 2010 Constitution)

2.2.2. Refugees and internally displaced persons

Since the Kenya Defence Forces entered Somalia in October 2011, the registration of refugees and asylum seekers in both urban and camp centres has been discontinuous. More recently, the Government has attempted to enforce encampment and in so doing, has induced *refoulement* in contravention of the signing of a Tripartite Agreement between the Office of the United Nations High Commissioner for Refugees (UNHCR), the Kenyan Government and the Government of Somalia in November 2013. In addition to the inability to access services as a result of non-registration and punitive measures against undocumented persons, recent terror attacks have compounded the already precarious protection environment of refugees with cases of harassment, extortion and discrimination.

- Provide information on why senior officials within the Jubilee government recently made remarks to the effect that they will undertake forceful closure of Dadaab Refugee Camp in Garissa. A remark that is contrary to the principle of non-refoulement considering that Kenya is a signatory of both the 1951 Convention relating to the Status of Refugees and the 1969 African Union Convention governing the Specific Aspects of Refugee Problems in Africa.
- What steps has the State put in place to ensure timely and efficient issuing of work permits to refugees?

- Which health care facilities, including the quality of health facilities are situated near the refugee camps?
- Provide information on when the refugees who returned from Uganda during the 2007-08 post-election violence will be re-settled and why they were made to return to Kenya without structures in place for their immediate re-settlement.
- Provide information as to the amount of money, if any, given to internally displaced persons (IDPs) after the 2007-08 post-election violence to resettle them, the justification of arriving at such an amount, and the number of IDPs who benefited from this.

3. Article 3 ICESCR: The equal right of men and women to the enjoyment of all economic, social and cultural rights

Kenya has made substantial progress in the protection of the right of women. However discrimination against women exists in Kenya in all its facets. Women are given lesser treatment in opportunities as compared to their male counterparts in public and private spaces.

- Provide information on the measures taken to implement the constitutional directive to effect the 2/3 gender rule representation in elective or appointive bodies as provided by Article 27(8) of the Constitution?

4. Article 6 ICESCR: The right to work

The state of unemployment in the country is on the rise. According to the Kenya country report to the 4th World Conference on Youth Employment, Kenya has the highest rate of unemployed youth at 67 per cent.⁶

- Please provide actual data on the number of employment or business opportunities that has been created by the National government per County through initiatives such as Women Enterprise Fund and the youth development fund (funds created by the government to assist the women and youth in promoting entrepreneurship opportunities).
- What or how many campaigns have been conducted by the State targeting women and the youth to create awareness on the initiatives of the State that the women and youth can benefit from?

⁶ See http://www.adeanet.org/min_conf_youth_skills_employment/sites/default/files/u24/Kenya%20Country%20Report_0.pdf

5. Article 7 ICESCR: The right to just and favourable conditions of work

- Provide data on all workers who benefit from the minimum wage package and measures taken by the State to enforce minimum wages with a view of providing workers and their families' adequate and decent standards of living and access to basic services.
- How many labour courts are there in Kenya? What measures are the State putting in place to ensure that judges in labour courts are not so overwhelmed by the cases filed in the courts, with a view of ensuring access to justice?
- What is the State doing to deal with the huge wage gap in the country in relation to the high cost of living? Also explain the disparities in salaries of the same jobs within the public sector.

The recent spate of attackers in the North Eastern part of Kenya allegedly by Al Shabaab against workers has sparked debate as to the continued viability of government employees, teachers, nurses, doctors etc, living and working there with some advocating for their relocation if security is not adequately provided.

- Provide information on the measures the State is taking to provide security for the workers in North Eastern Kenya and other areas where security is lacking.

With the increasing terrorist attacks in Kenya, it is important that the government addresses the appalling working and living conditions of the Kenya Police forces and especially those manning the borders and high security risk areas.

- Please provide information on the steps the government is taking to improve these conditions in order to safeguard the independence, integrity and efficiency of the security forces.

Like many other industries that rely on a large supply of cheap labour, a lot of the jobs involved in the flower industry - such as grading, packing, harvesting, tending beds, watering and so on - require limited skills. Many of the workers employed in the industry are poor and so vulnerable to exploitation. Common abuses of flower workers' rights include low wages and failure by companies to protect them from repetitive strain injuries and toxic pesticides.

- Provide information on the monitoring measures put in place by the State to ensure safe working conditions of wage earners in flower farms, factories and export processing zones.

6. Article 9 ICESCR: The right to social security

6.1. Social protection

In response to a concern for the welfare of Orphans and Vulnerable Children (OVC), particularly AIDS orphans, the Government of Kenya, with technical and financial assistance from the United Nations Children's Emergency Fund (UNICEF), designed and began implementing a pilot cash-transfer (CT) program in 2004. The Kenya CT-OVC is the government's flagship social protection program, reaching over 100,000 households and 230,000 OVC across the country as of June 2010.

- Provide the data on Orphans and Vulnerable Children (OVC) in Kenya against those that are currently benefiting from the Cash Transfer programme for orphans and vulnerable children (CT-OVC), and steps taken to ensure that all OVC benefit from this programme.
- Provide information about the mechanisms the State has put in place to create awareness of the CT-OVC for more OVC to benefit from this initiative, besides making the OVC-CT child sensitive and accessible.

6.2 National hospital insurance fund

In 2014/ 2015 financial year, the State increased its subscription rates to the National hospital Insurance Fund by well over 100 per cent.

- What is the justification of the increased amount of contribution by each individual in relation to the quality and quantity of services provided?
- Please provide the status of the national hospital insurance fund (NHIF) and the national social security fund (NSSF) in Kenya in terms of its accessibility, affordability and inclusiveness of all formal and informal workers.
- In addition, please provide information in relation to Teachers Service Commission as to why the subscription to the NHIF would be included to their current gross salary thus impacting on their minimum wage.

7. Article 10 ICESCR: Protection of the family

7.1 Legislation to protect the family

- Provide information on the status of the Children's Act Amendment Bill, 2014 and the steps the State is taking to ensure enactment and full realization of this legislation.
- Provide information as to the steps taken by the State to improve the attitude of the police when handling sexual and gender based violence cases, including trainings and disciplinary action.

- Please provide information on the lack of P3 forms⁷ at many police stations across the country, to the point that victims coming to the police station to report on sexual and gender based violations have to purchase the form from private shops, strategically situated outside the police stations.
- What steps is the State taking towards revision of the P3 forms to make them more comprehensive and detailed?
- What are the status of the police gender desks and the effectiveness of the same in reporting sexual and gender based violence cases?
- Despite the enactment of the Anti-Female Genital Mutilation laws, many young girls continue to suffer and sometimes die from excessive bleeding related to their excision. Please address the reasons why the law has not been able to afford them the protection.
- Please provide evidences as to the protection of women in private spaces in Kenya even with the enactment of the Domestic Violence Bill of 2015.

7.2 Counter-trafficking measures

- Provide information on what steps the State has taken to protect its citizens and persons within its jurisdiction from the threat of human trafficking.
- Provide information on why the State has placed a moratorium on international adoptions with the belief that it will be a counter measure to trafficking whereas adoption is a legal procedure undertaken through a court process.

7.3 Protection of vulnerable children

- Provide what measures the State has taken to increase the care and protection facilities for vulnerable children who are without families such as abandoned babies or children who are in conflict with the law.

8. Article 11 ICESCR: The right to adequate standard of living

8.1 Right to water and sanitation

- Provide steps that the State has taken to ensure affordable access to adequate water and sanitation in informal settlements and arid or semi-arid rural areas.

⁷ A P3 form is a legal document produced in court as evidence in cases, which involve bodily harm (e.g. rape or assault). It is obtained from a police station and completed by a registered government doctor or clinical officer.

- What measures has the State put in place to control prices charged by private water services and water kiosks⁸?
- Please provide information about the measures taken to implement the water bill 2014.
- Provide information as to the steps the State is undertaking to reduce or eliminate conflicts among communities over natural resources including water points and grazing land especially between pastoralist communities in Turkana with the Pokot and also in Baringo.

8.2 Right to adequate housing

- The government has recently embarked on a process that seeks to reclaim land incursions in the forest areas in Kenya. Provide status of implementation of the eviction guidelines and the mechanisms the State has put in place to ensure compliance with these guidelines. Provide information to show continuous and informed public participation in eviction processes.
- Provide the status of implementation on court orders regarding the right to housing in Kenya
- provide the progress, if any, of State compliance with the orders of the Court in the decision of the Court in *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*.⁹
- Provide information on the State plans to provide adequate housing in informal set ups and rural areas in Kenya especially within the marginalized communities for instance in the Kibra and Mathare slums in Nairobi.
- Explain how the State will ensure that housing policies and programmes targeting the poor will actually benefit the poor and will not be taken advantage by the middle class as it has happened before.
- Provide information on State initiatives on public-private partnership to ensure adequate and affordable housing to its citizenry. Also provide information on steps taken, if any, to give incentives to the private sector that will see the prices of houses go down.

9. Article 12 ICESCR: The right to health

9.1 Legal and policy measures to enhance the realization of the right

⁸ The price for half liter of water ranges between Kshs 30 to Kshs. 100

⁹ See Judgment-High Court Petition 56 of 2010 available at <http://kenyalaw.org/caselaw/cases/view/90359/>

- Provide information on the status of implementation of the Health sector Policy framework 2012-2030 and the measures in place to ensure full implementation of the policy.
- Provide information on the status of the Health Bill, 2014 and the Reproductive Health Care Bill, 2014 and the steps taken by the State to ensure their enactment and implementation.
- What measures is the State taking to work with the County governments to ensure that the right to health is realized at the county level?
- Provide information on the steps the State is taking towards ensuring full implementation of the Prohibition of Female Genital Mutilation Act, 2011, including measures involving community participation. How many cases have been prosecuted since the passing of the Act?

9.2 Measures relating to access

- Though the State has put in place measures to ensure that women achieve socio-economic empowerment, women have raised concerns as to the accessibility. Access to reproductive health rights is still a challenge despite the states directive that women can access these services free of charge.

What measures has the State put in place to ensure that people living in marginalized communities physically and financially access health facilities, especially reproductive health facilities?

- Provide information as to the steps the State is taking to improve the quality of existing health facilities. In particular, provide information on the maintenance and repair of dialysis machines in public hospitals.
- What are the total number of mental institutions in the country and their capacities *vis a vis* the current number of patients they hold?
- Provide information as to the steps the State is taking towards ensuring more mental institutions are established.

9.3 Protection of communities in mining areas

- Please provide the steps government is taking in protecting the Kenyans from private developers and industrialist against exposure to radio active and chemical agents. Specifically, provide information on the measures taken to ensure investigation into the case of lead extractions in Changamwe area of Mombasa County¹⁰ that affected the health of the community around that area, and redress for the victims.

¹⁰ See <https://centerforjgea.com/news/over-3000-changamwe-residents-risk-lead-poisoning>

- Provide information on the preventive measures taken to protect the health and well being of communities living around mining areas, including those working in the mines.
- What social, developmental, and environmental impact analysis does the State conduct prior to giving a mining company a license to operate? What is the level of community participation in this process? What monitoring mechanisms has the State put in place to monitor compliance of human rights of workers and communities living around the mining areas by the mining companies?

10. Article 13 ICESCR: The right to education

Education is the key for empowering the most marginalized and vulnerable individuals in society. Marginalized individuals like the girl-child, pastoralists and persons with disabilities also tend to have the least possibility of acquiring an education.

- Provide data of the number of children of school going age with disabilities and those that are actually in school. What measures have been put in place to ensure that all children with disabilities have access to quality educational institutions?
- Provide information on the mechanisms the State has put in place to monitor the quality of education provided by private entities to ensure that privatization of schools does not water down the quality of education.
- What measures have been put in place to ensure all County governments provide quality pre-primary education across the country?
- Provide information on the number of schools the State has built in the Northeastern part of Kenya within the reporting period? What measures are in place to ensure that adequate and qualified teachers are deployed in these hard to reach areas?
- The impact of HIV and AIDS on school going children is still huge. What measures has the State taken to reduce the burden on these children in order for them to have access to education?