Compendium on Submissions to
Committee on Economic, Social and Cultural Rights
ICESRC 2016
Volume 1

Compendium on Submissions to ICESCR 2016
Committee on Economic, Social and Cultural Rights
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**Committee on the Rights of the Child**

Kenya submitted its initial report to the Committee on 13th January 2000 and the latest report on 19th March 2013; the reports submitted by the state form the basis in which the human rights record of the state in line with the provisions of the Convention is appraised by the committee.

Kenya ratified the Convention on Rights of the Child on 30th July 1990 the convention created obligations on the state to promote, protect and fulfill the rights that are protected and provided for under the convention. It further created an obligation on the part of the state to submit reports to the Committee on Rights of the Child pursuant to the provisions of Article 44 of the Convention.

Kenya submitted its initial report to the Committee on 13th January 2000 and the latest report on 19th March 2013; the reports submitted by the state form the basis in which the human rights record of the state in line with the provisions of the Convention is appraised by the committee.

In seeking to ascertain the true position of the human rights situation in the country under review the committee calls for submissions from other stakeholders such as Community based organisation, Non Governmental organisations and also National Human Rights institution operating in the country under review.

In some cases, like in the case with the Committee on the Rights of the Child, once the committee receives the state report it appraises it and comes up with a list of issues that which they then transmit to the state under review to provide further information. Other stakeholders have a role to play in the development of the List of issues by providing the committee with information that will guide the committee in developing the List of issues. Non state actors working on Children Rights have an opportunity to respond to the list of issues by submitting alternative reports as well as responses to the list of issues; these reports alongside those submitted by the state form a basis for the review of the implementation of the Covenant by the state.

During the review of Kenya by the Committee a total of 9 non state organisations submitted a total of 9 submissions; the state was then reviewed 21st January 2016 with the committee rendering its Concluding recommendations on 21st of March 2016.

During the review of Kenya by the Committee a total of 9 non state organisations submitted a total of 9 submissions; the state was then reviewed 21st January 2016 with the committee rendering its Concluding recommendations on 21st of March 2016.

The state is expected to implement the concluding recommendations in order to fulfill the rights of all as provided for in the Covenant; the state will do this through preparation of an implementation plan while the non state actors have the important role of monitoring the implementation of the Concluding recommendations.
The Submissions made by stakeholders

The submissions made by various stakeholders on all the provisions of the Covenant Economic, Social and Cultural Rights will therefore provide a rich source of information with respect to the current state of ESCR in Kenya.

This Compendium on the Submissions made by stakeholders to the Committee on Economic, Social and Cultural Rights was put together by the Kenya National Commission on Human Rights upon the realization that many stakeholders struggle to find information relating to the enjoyment of Economic, Social and Cultural Rights by all in Kenya as provided for under the United Nations Covenant on Economic, Social and Cultural Rights.

The submissions made by various stakeholders on all the provisions of the Covenant Economic, Social and Cultural Rights will therefore provide a rich source of information with respect to the current state of ESCR in Kenya. The submissions made by the non state actors will therefore be key in providing a complementary to the report submitted by the state, this in itself is key since it is possible to compare the positions of the right from the perspective of the state and that of non state actors who on ECOSOC Rights.

The Compendium has also included a section on the Concluding recommendations made to the state by the United Nations Committee on Economic, Social and Cultural Rights. The Concluding recommendations in our view will form a basis for all the actors to craft a mechanism for implementation and monitoring of the Concluding recommendations.

The Compendium will also be useful as a reference material for the actors who work on ESCR and trends as regards Ecosoc in Kenya.
ACKNOWLEDGEMENTS

The Kenya National Commission on Human Rights

KNCHR acknowledges the role played by the United Nations Committee on Economic, Social and Cultural Rights for the tireless effort made to review the numerous documents submitted by the state.

The Kenya National Commission on Human Rights (KNCHR) acknowledges the role played by various individuals and organisations in submitting their submissions to the Committee on Economic, Social and Cultural Rights. KNCHR particularly acknowledges the submissions made by:

- Centre for Reproductive Rights
- Save the Children
- Amnesty International
- IPAS
- Federation of Kenya Lawyers
- CRADDE
- Kituo cha Sheria
- Landesa
- Cultural Survival
- Kenya National Union of Teachers
- Haki Jamii
- Each Rights
- KELIN
- All other organisations that submitted joint reports
- International Commission of Jurists
- The Office of the Attorney General and The Department of Justice

Further, KNCHR acknowledges the role played by the United Nations Committee on Economic, Social and Cultural Rights for the tireless effort made to review the numerous documents submitted by the state and other stakeholders and eventually issuing concluding recommendations after the review.

On the same breath, the Commission appreciates the role played by the Kenyan Government through the Office of the Attorney General and the department of Justice in ensuring that the report to the United Nations Committee on Economic, Social and Cultural Rights was submitted in a timely manner and for attending the review of Kenya by the UNCESCR.

Lastly, KNCHR acknowledges the support extended to it by the Royal Netherlands Embassy in Nairobi which support made this publication possible.
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<th>Abbreviation</th>
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<td>ACHPR</td>
<td>African Commission on Human and People's Rights</td>
</tr>
<tr>
<td>ADR</td>
<td>Alternative dispute resolution</td>
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<td>AIDS</td>
<td>Acquired Immunodeficiency Syndrome</td>
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<td>ART</td>
<td>Antiretroviral treatment</td>
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<td>ASAL</td>
<td>Arid and Semi-Arid Lands</td>
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<td>ATPU</td>
<td>Anti-terror police unit</td>
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<td>BOR</td>
<td>Bill of rights</td>
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<td>BPU</td>
<td>Border patrol unit</td>
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<td>CAJ</td>
<td>Commission on the Administration of Justice</td>
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<td>CBO</td>
<td>Community Based Organizations</td>
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<td>CDC</td>
<td>Center for disease control</td>
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<td>CDF</td>
<td>Constituency Development Fund</td>
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<td>COK</td>
<td>Constitution of Kenya</td>
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<td>CSOs</td>
<td>Civil Society Organizations</td>
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<tr>
<td>DTAQA</td>
<td>Directorate of Technical Accreditation and Quality Assurance</td>
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<td>DPP</td>
<td>Director of Public Prosecutions</td>
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<td>EAC</td>
<td>East African Community</td>
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<td>EACC</td>
<td>Ethics and Anti-Corruption Commission</td>
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<td>ECDE</td>
<td>Early Childhood Development and Education</td>
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<td>ESP</td>
<td>Economic Stimulus Program</td>
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<td>EU</td>
<td>European Union</td>
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<td>FDSE</td>
<td>Free Day Secondary Education</td>
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<td>FGM</td>
<td>Female Genital Mutilation</td>
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<td>FPE</td>
<td>Free Primary Education</td>
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<td>Faith Based Organizations</td>
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<td>GER</td>
<td>Gross Enrolment Rate</td>
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<td>HIV</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Right</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Commission of Jurists</td>
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<td>IDPs</td>
<td>Internally Displaced Persons</td>
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<td>IDWS</td>
<td>Irrigation, Drainage and Water Storage</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>IPs</td>
<td>Indigenous Peoples</td>
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<td>KAPEA</td>
<td>Kenya Association of Private Employment Agencies</td>
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<td>Kenya Coastal Development Project</td>
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<td>KDF</td>
<td>Kenya defense forces</td>
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<td>KDHS</td>
<td>Kenya Demographic and Health Survey</td>
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<td>KENSUP</td>
<td>Kenya Slum Upgrading Project</td>
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<td>KFSSG</td>
<td>Kenya Food Security Steering Group</td>
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<td>KUPPET</td>
<td>Kenya Union of Post Primary Education Teachers</td>
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<td>KWS</td>
<td>Kenya wildlife service</td>
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<td>LAPSSET</td>
<td>Lamu Port and South Sudan Ethiopia Transport</td>
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<td>LATF</td>
<td>Local Authority Transfer Fund</td>
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<td>LGBTI</td>
<td>Lesbian, Gay, Bisexual, Transgender and Intersex</td>
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<td>MRC</td>
<td>Mombasa Republican Council</td>
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<td>MARP's</td>
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<td>MDGs</td>
<td>Millennium Development Goals</td>
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<td>MOU</td>
<td>Memorandum of Understanding</td>
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<td>NHIF</td>
<td>National Hospital Insurance Fund</td>
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<td>National intelligence service</td>
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<td>NSSF</td>
<td>National Social Security Fund</td>
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<td>National Water Services Strategy</td>
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<td>National Youth Service</td>
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<td>OOP</td>
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<td>OPDP</td>
<td>Ogiek People Development Program</td>
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<td>OVCs</td>
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<td>Rapid deployment unit</td>
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<td>Sexually Transmitted Infections</td>
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<td>TDR</td>
<td>Traditional dispute resolution</td>
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<td>TJRC</td>
<td>Truth Justice and Reconciliation Commission</td>
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<td>TVET</td>
<td>Technical and Vocational Education and Training</td>
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<td>Textbook-Pupils Ratio</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>United Nations</td>
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<td>United Nations children’s education fund</td>
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<td>Women Enterprise Fund</td>
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State Report

Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights

Combined second to fifth periodic reports of States parties due in 2013 Kenya

[1 July 2013]

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I. Introduction

A. Context of implementing the rights under this Covenant

B. Kenya Vision 2030

C. Kenya Population and Housing Census 2009

D. The Constitution of Kenya 2010

II. Reporting on the substantive provisions

Article 1 – Right to self-determination

Article 2 – Progressive realization of rights

Article 3 – Non-discrimination and equality

Article 6 – Right to work

Article 7 – Right to just and favourable conditions of work

Article 8 – Right to form and join trade unions

Article 9 – Right to social security

Article 10 – Protection of the family

Article 11 – Right to adequate standard of living

Article 12 – Right to health

Article 13 – Right to education

Article 15 – Right to take part in cultural life
Committee on Economic, Social and Cultural Rights

Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights

Combined second to fifth periodic reports of States parties due in 2013

Kenya

[1 July 2013]

1* The present document is being issued without formal editing.
i. **Introduction**

1. The Government of the Republic of Kenya has the honour to submit to the Committee on Economic, Social and Cultural Rights, in conformity with Article 16 of the International Covenant on Economic, Social and Cultural Rights (hereinafter “ICESCR” or “the Covenant”), its combined Second-fifth Periodic Reports under the Covenant. This Report has been compiled in accordance with the guidelines available on preparation of a report under ICESCR.

2. This Report was generated by the various Government departments which work on economic, social and cultural issues under the coordination of the Ministry of Justice, National Cohesion and Constitutional Affairs. Civil society organisations which work on economic, social and cultural rights and the country’s national human rights institutions – the Kenya National Commission on Human Rights and the National Gender and Equality Commission also participated during the writing of the report.

A. **Context of implementing the rights under this Covenant**

3. In the last five years, the country has taken epochal strides that have significantly improved the context of implementing human rights. Major structural and policy changes have been undertaken by the State as part of resolving the “deep seated and long-standing divisions” that were exposed by the violence that followed the disputed election results in 2007. A reform agenda programme agreed to by the Grand Coalition Government was given the force of law via the National Accord and Reconciliation Act, (No 4 of 2008), which included a time-bound programme for the delivery of a new Constitution, various institutional reforms including of the Judiciary, the Police, the Civil Service, and addressing the emotive issues of land reform, poverty reduction and regional inequalities.

B. **Kenya Vision 2030**

4. Subsequently, Kenya’s development planning and delivery of public programmes has incorporated these major national priorities under the Kenya Vision 2030. This policy blueprint has as its overall aim as the transformation of Kenya into a newly industrialising “middle income country providing high quality of life for all of its citizens by 2030”. The Vision also aims to “create a cohesive, equitable and just society based on democratic principles grounded in the existing rich and diverse cultures”. As part of its international obligations to respect, protect, promote, ensure and fulfil human rights, the Kenya Vision 2030 also commits to ensuring “economic development across all regions of Kenya, to build a just and cohesive society with social equity in a clean and secure environment” as well as the realisation of a “democratic political system founded on issue-based politics that respects the rule of law and protects the rights and freedoms of every individual…”

5. The Vision, implemented through five-year Medium Term Plans (MTPs) is currently in its second five-year phase. Each year, the Ministry for National Planning and Vision 2030 has issued annual progress reports on the Implementation of the First MTP with each Ministry reporting according to pre-agreed targets reflected in their performance contracts and measured against the National Handbook of Indicators. Tracking progress on public programmes and specifically economic, social and cultural rights has therefore significantly improved and is set to be strengthened in the newly-developed MTP which will cover the period from July 2013-June 2018.

C. **Kenya Population and Housing Census 2009**

6. To generate socio-economic data required for more effective decision-making, in 2009 the Government undertook its most comprehensive population census under the banner of “Counting People for Implementation of Vision 2030. This Census Report provides important statistics helpful in measuring progressive realisation of economic, social and cultural rights. Such statistics include social economic data in the very relevant fields relating to: the country’s 38.6 million population distribution by age and sex; population and household distribution by socio-economic characteristics (Education, labour force, disability, livestock type, household assets, housing condition and amenities, ethnic affiliation, and religion). With the ongoing effort by the Ministry of Planning to develop human rights-sensitive indicators, this data will be invaluable.

D. **The Constitution of Kenya 2010**

7. Complementing the National Accord and Reconciliation driven programmes, the Kenya Vision 2030 and the 2009 Kenya Population and Housing Census, was the finalisation of a new Constitution. In a referendum held on 4 August, 2010, Kenyans voted 66.9% to 30.9% for a new Constitution which was promulgated on 27 August, 2010 giving Kenya a most progressive constitutional framework with a Bill of Rights that provides for economic and social rights (Article 43) and other important measures outlawing all forms of discrimination (Article 27). Moreover, it ensures that the principles of the human rights approach to development, including participation, accountability, non-discrimination and transparency are part of the national values spelt out in Article 10 and throughout the Constitution and binds public and State officers in the delivery of public services. Under provisions relating to implementation of rights and fundamental freedoms, Article 21 requires State organs to “observe, respect, protect, promote and fulfil the rights in the Bill of Rights and requires the State to take progressive legislative, policy and other measures...” to achieve the progressive realisation of the rights guaranteed under Article 43”. The Constitution also specifies that conventions and treaties ratified by Kenya automatically become part of Kenyan law (Article 2 (6)). This provision to a great extent now simplifies post-ratification domestication procedures and makes it easier for right holders to seek remedies for rights violations or denials. In developing the second MTP consideration of these constitutional requirements has been made.
8. Important also for the implementation of human rights is the new devolved governance structure under Article 174 of the Constitution which is established with a view to among other things, promote democratic and accountable governance, recognise the rights of communities to manage their own affairs and to further their development and also ensure equitable sharing of national and local resources throughout Kenya. This new structure has established two levels of government: the National and the County Governments, with the latter being assigned the responsibility of implementing programmes including promotion of primary health care, ambulance services, control of air pollution, cultural activities, and county planning including for housing, water and sanitation services (Fourth Schedule of the Constitution of Kenya, 2010). Service delivery has therefore been taken closer to the point of end use and it is expected that this will significantly improve the realisation of economic, social and cultural rights. Devolution has indeed been hailed as a central promise of Kenya's Constitution, with expectation by Kenyans that County Governments will deliver effective services and that they hold the promise for equal opportunities and will deal with regional inequalities.

9. Coupled with this, is the strengthening of the Judiciary with a High Court with “jurisdiction to determine whether a right in the Bill of Rights has been denied, violated, infringed or threatened” (Article 165 (3) (b)) and which in the Bill of Rights is required to “adopt the interpretation that most favours the enforcement of a right or fundamental freedom” (Article 20 (3) (b)). Article 20 (5) requires that in applying any right under Article 43 (economic and social rights), the State has responsibility to show that resources are not available and that in allocating resources it shall give “priority to ensuring the widest possible enjoyment of the right or fundamental freedom...”

10. The Bill of Rights is undoubtedly going to have major impact on the realisation of economic, social and cultural rights especially because it has also removed restrictions on who can institute court proceedings to enforce a right (Article 22). Further the Constitution provides that “no fee may be charged for commencing such proceedings.”

11. The Constitution has also further strengthened the institutional mechanisms for human rights by providing for the establishment of the Kenya National Human Rights and Equality Commission which has been restructured into three national institutions; the Kenya National Commission on Human Rights (KNCHR), The National Gender and Equality Commission (NGEC), and the Commission on Administrative Justice. The three Commissions are fully operationalized and are providing leadership and oversight in the implementation of the Bill of Rights.

12. At the time of completing this report, Kenya had just concluded its first general election under this Constitution. It is expected that the new administration will continue implementing it through the second MTP.

ii. Reporting on substantive provisions

Article 1. Right to self-determination

13. Kenya is a sovereign republic and a multiparty democratic State. The Constitution affirms fundamental national principles and values of unity, participation of the people, equality, equity, inclusiveness, non-discrimination and protection of the marginalised and vulnerable people. It also protects the cultural foundations and expression of the Kenyan people as an integral part of the right to self-determination. The principle of non-discrimination runs throughout the Constitution as a further affirmation of the country’s commitment to recognise and protect the diversity of the people of Kenya and their right to self-determination as equal members of the Kenyan population. The Government of Kenya promotes respect for all cultures, ethnicities, races, gender, political opinions and religious beliefs.

1. Legislative measures on self-determination

In its concluding remarks, the Committee recommended that the State party include economic, social and cultural rights in its new Constitution, with a view to incorporating the Covenant rights into domestic law and ensuring their direct applicability in the courts.

14. The Constitution of Kenya, 2010, under Article 43 guarantees the right of every person to economic, social and cultural rights, including the right to the highest attainable standard of health, accessible and adequate housing, reasonable standards of sanitation, adequate food of acceptable quality, clean and safe drinking water in adequate quantities, social security and education. The processes of developing specific legislation and policies and implementing programmes to realise these rights are underway through various Ministries and guided by the Kenya Vision 2030.

2. Increased participation in decision-making at local level

15. The Constitution also introduces devolved governance and decision-making that came into operation after the March 2013 elections. This gives Kenyans greater say in determining the development initiatives in their local areas. This is an important development that is strengthened further by the Constitutional requirement of public participation in governance, legislation, policy-making, financial management and other functions. Kenya embraces the right to self-determination that eliminates discrimination in political, legal and administrative institutions while recognising and protecting special group rights.

16. The Constituency Development Fund (CDF) introduced in 2003 has enabled important improvements in local development. Under the new devolved system, the nation is divided into 47 governance units known as Counties and these...
3. Internal and external challenges of self-determination

17. Kenya has faced the challenge of a group called the Mombasa Republican Council (MRC) seeking secession of parts of the Coastal region from the rest of the country. Although they did not have the support of the majority of the residents of Mombasa and other Coastal Counties, the MRC embarked on initiatives aimed at frustrating processes such as voter registration, political party nominations and even elections. Members of MRC have used violence in pursuing their objectives that put many Kenyans at risk. The Government, pursuant to the Prevention of Organised Crimes Act (No. 6 of 2010) banned the MRC via Gazette Notice No. 12585 of 18 October 2010. The MRC challenged the Government’s ban on the group (Randu Nzai Ruwa and 2 Others v. the Internal Security Minister and Another, Misc. Application No. 468 of 2010). Although the High Court reversed the order banning MRC, finding that it was a political group, it also clarified that the Constitution did not contemplate secession and instead asserted the unitary and indivisible sovereignty of Kenya.

18. The Government has appealed the ruling lifting the ban on MRC. This case demonstrates some of the challenges of varied interpretations as well as misinterpretations of the right to self-determination in the country. Kenya remains committed to the definition of self-determination in the Vienna Declaration of 1993 which recognises that the right to self-determination does not authorise or encourage actions that undermine the territorial integrity or political unity of a sovereign and independent State which complies with the principles of equal rights and self-determination of people as Kenya does. It also raises the challenge of upholding the right of self-determination where groups masquerade as political movements while in fact pursuing subversive, criminal and even violent agendas.

19. Externally, Kenya has had to confront increased terror attacks directed by Al Shabaab militants particularly based in Somalia. Kenya had to intervene militarily in Somalia to stop this Al-Shabaab threat. Second, Kenya faces a further challenge to its territorial integrity in relation to a claim made by Uganda over Migingo Island in Lake Victoria which is part of the Kenyan territory. The standoff started when Ugandan authorities began levying an illegal fee on the fishermen living there and intimidating, evicting and brutalizing many of the island inhabitants. Kenya maintains its claim over the Island, but as a member of the East African Community (EAC), it is using amicable means to settle its claim.

4. Protection of communities in mining areas

20. The Government of Kenya is aware of the heightened need to take measures that protect the welfare of communities and of the people as a whole, as Kenya’s mining sector expands, including the discovery of oil in Turkana, titanium in Kwale and coal in Kitui. The Government is keen to ensure that exploration of these minerals promotes the welfare of local economies as well as the national economy of Kenya. The Government is also making efforts to ensure suitable mechanisms are in place and has sought support from the World Bank and the African Development Bank to review the Petroleum (Exploration and Production) Act (Chapter 302 of the laws of Kenya) and other Laws governing the excavating sector, as well as developing terms on the exploration of natural gas terms. These measures will seek to ensure that the rights of local communities in these areas are not undermined as Kenya concludes several bilateral agreements with external partners who will enable exploration of the natural resources.

21. As such, the Government has commenced consultations to put in place sound policy and legislative frameworks that allow for adoption of good practices that ensure local communities are not disadvantaged in terms of revenue sharing, employment, compensation and relocation. For example under the Petroleum Sharing Contracts (PSC) that Kenya is currently entering into, Under the Petroleum Act, a PSC has an implied term that the contractor will give preference to the employment and training of Kenyan nationals in petroleum operations and give preference to the use of products, equipment and services locally available. This is reflected by an express requirement in the Model Form PSC that contractors and subcontractors are required to give preference to Kenyan materials, supplies and services for use in petroleum operations as long as their prices, quantities and timeliness of delivery are comparable with the prices, quality, quantities and timeliness of delivery of non-Kenyan materials and supplies and a requirement to employ and train nationals. A training programme is to be agreed with the Cabinet Secretary responsible for energy matters.

5. Corruption

The Committee recommended that the State party intensifies its efforts to prosecute cases of corruption and review its sentencing policy for corruption-related offences. It also recommended that the State party train the police and other law enforcement officers, prosecutors and judges on the strict application of anti-corruption laws, conduct awareness-raising campaigns, and ensure the transparency of the conduct of public authorities, in law and in practice.

22. The Government continues to put great effort in strengthening systems in order to reduce incidences of corruption in the country. The Anti-Corruption and Economic Crimes Act (No. 4 of 2003) established the Kenya Anti-Corruption Authority (KACC) as a corporate body to prosecute cases of corruption and economic crimes. KACC was in September 2011 replaced by the Ethics and Anti-Corruption Commission (EACC) established by the Constitution and enabled by the Ethics and Anti-Corruption Commission Act (No. 22 of 2011). EACC has the power to prosecute corruption crimes and confiscate money and wealth obtained corruptly.

23. Kenya has made significant strides in prosecuting cases of corruption as well as training police officers and investigators in prosecuting corruption. In the past, the prosecution of corruption was often impeded by the failure to produce probative evidence that could sustain a conviction. The fight against corruption is today led by EACC under the EACC Act and supported by the Leadership and Integrity Act (No. 19 of 2012). The Leadership and Integrity Act requires vetting of public officers before being appointed to office as well as the removal of public officers from office for corruption.

are further devolved into constituencies and wards. The system of devolution provides greater citizen involvement in how development, economic, social and cultural rights as well as political engagements are undertaken.
24. In overall terms, the various anti-corruption bodies have made efforts to prosecute corruption. Since 2002, over 137 corruption cases have been filed and prosecuted in various courts in the country. Although the progress in mounting prosecutions has been significant, lack of evidence to the required standard of proof and the consequent acquittals have been great challenges to the efforts to prosecute corruption suspects. By 2012, there had been over 100 acquittals. The Government is committed to increasing the capacity of officers to identify, investigate and prosecute economic and anti-corruption crimes so that more convictions are sustained.

25. The State continues to utilise its machinery in the fight against corruption. The Constitution has a set of values that all governance institutions must abide by, including the values of good governance, integrity, transparency and accountability (Article 10). The Constitution also lays premium focus on leadership and integrity, including by legislating on the financial probity of leaders as well as their ethical conduct (Chapter 6). The Ethics and Anti-Corruption Commission Act (No. 22 of 2011) establishes a revitalised agency, the Economic and Anti-Corruption Commission, whose functions include investigating acts of corruption and the recovery of corruptly acquired assets.

26. A number of corrupt dealings have been identified and prosecuted during the last few years. For example, Kenya’s free primary education (FPE) efforts were pegged back for a while when a few civil servants participated in acts of corruption within the Ministry of Education. These officials though have been prosecuted and in some instances convicted. Related to this, though, the State is greatly concerned that wherever acts of corruption are alleged against State officials, reactions by international agencies funding the country’s key development efforts have been to unilaterally stop all funding as a consequence of which beneficiary vulnerable groups have continued to suffer. Kenya’s development partners need to nuance their responses against graft claims more smartly to ensure that graft is punished without penalising beneficiaries of development.

27. One final positive note relates to the roles of business in combating corruption. Many Kenyan businesses have now signed up to the Code of Ethics for Business which establishes practical steps to promote and enhance the ethics of business conduct in the country in line with the principles of the UN Global Compact covering human rights, labour standards, environment and anti-corruption.

6. Recognition and protection of diversity

28. Article 7 of the Constitution obliges the State to promote and protect the diversity of language of the people of Kenya. The State is also obliged to promote the development and use of indigenous languages. Article 10 provides that the national values and principles of governance include social justice, inclusiveness, equality and protection of the Marginalised.

29. Article 11 recognizes culture as the foundation of the nation and obliges the State to promote all forms of cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage. The State is also obliged to recognize the role of indigenous technologies in the development of the nation. Not only shall the State promote the intellectual property rights of the people of Kenya, Parliament is also required to enact legislation that will ensure communities receive compensation or royalties for the use of their cultures and cultural heritage, and legislation that will also recognize and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by communities. Under the Bill of Rights, Article 44 gives every person a right to use the language and participate in the cultural life of his/her choice. The 2009 Kenya Population and Housing Census Report (Kenya Census Report 2009) recognises 51 ethnic groups in Kenya and includes minority communities that have been omitted from previous census reports.

30. The Constitution under article 232 provides for the values and principles of public service to include representation of Kenya’s diverse communities and affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women; the members of all ethnic groups and persons with disabilities. This is also reflected in the Laws governing elections and appointment to public offices. Where persons have felt that any public appointment has violated the legal guarantees on diversity, a number of court cases have been filed. Before the end of five years after the promulgation of the Constitution of Kenya, there will be a lot of useful jurisprudence on this issue.
Article 2. Progressive realization of rights

1. Non-discrimination on various grounds

31. The Constitution guarantees all persons the right to equality and non-discrimination. This right is guaranteed to all persons, whether citizens or non-citizens, and it binds the State as well as corporate entities. A person may not be discriminated on grounds including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth (Article 27).

32. The Kenya 2030 Vision has outlined strategies aimed at moving the country towards substantive equality measures to support regions and groups which have been historically disadvantaged on account of region or status. Under the Vision, for example, education centres of excellence are being established in every constituency of the country. Furthermore, the Constitution has introduced the Equalisation Fund which uses a formula based on levels of poverty to provide basic services such as water, roads, health facilities and electricity in the most marginalised parts of Kenya (Article 204). The constitutionally-established Commission for Revenue Allocation is playing key roles towards this end.

33. The Constitution makes specific mention of groups which are liable to be discriminated on account of their vulnerability, including children, women, persons with disabilities and marginalised groups. Regarding this last group, the African Commission on Human and Peoples’ Rights made a ruling against the State in 2010 (Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya). The Endorois community successfully argued before the African Commission that the State had committed a breach of its rights in the way land traditionally owned by it had been appropriated and used. The African Commission recommended that Kenya recognises the rights of ownership and ensure restitution of ancestral land to the Endorois community. Further, the Government was asked to ensure unrestricted access for the community to Lake Bogoria for religious, cultural and grazing purposes, and pay adequate compensation and royalties. The State is committed to the implementation of these recommendations, and will be guided principally by independent agencies such as the newly-created Land Commission alongside various Government departments.

2. Addressing Refugees’ issues

The Committee recommended that the State party issues work permits to all refugees, in accordance with the Refugees Act (2006) and monitor unfair labour practices and exploitation of refugees in the informal sector. It also recommends that the State party relax its reported policy of requiring refugees to live in camps for prolonged periods of time, and provide hospital services at the same rate to them as to nationals.

34. The country hosts over 600,000 refugees from states in the sub-region which in the last few decades have experienced civil strife. These refugees access all the basic human rights and other rights according to the 1951 Convention relating to the Status of Refugees.

35. There has been growing concern that all those crossing the border into Kenya are not true refugee seekers but illegal immigrants to cause chaos and instability in Kenya. Some are linked to the Islamist Al Shabaab insurgents, who have threatened Kenya in the past. Kenya has suffered several terrorist bombings. The challenge the Government is facing is distinguishing genuine Somali asylum seekers from those persons who may be a threat to the security of the country. Kenya has itself in recent times experienced a spate of insecurity, including shootings and grenade attacks, which have occasionally been perpetrated by persons who have slipped from refugee camps or who slipped into Kenya purportedly as refugees. In 2012, the Government required all refugees in the country to return to their designated camps. Figures from the United Nations High Commissioner for Refugees (UNHCR) indicated that at least 33,000 Somali refugees lived within Kenya’s urban settings.

36. While Kenya is unable to retract the policy of requiring refugees to live in the designated camps, as was recommended by the Committee, Kenya, however, ensures that services offered to refugees from urban areas back to the camps. Kenya remains committed to complying with its international obligations relating to refugees and indeed the Refugees Act (No. 13 of 2006) and affirms that every refugee and asylum-seeker will be permitted to remain in the country as long as they comply with the law. In particular, it should be stressed that under the law, refugees’ right to wage earning employment is restricted in a similar manner as non-citizens of Kenya.

37. Further, the Kenya military operation, “Linda Nchi” (Defend the Country) which involved military operations to oust the Al Shabaab terror group in Somalia that continued to threaten Kenyan communities along the border regions as well as abduct Kenyans, tourists and foreign aid workers for ransom, has enhanced the prospects for peace in Somalia with the hope that many of the displaced populations will soon be able to return to their country voluntarily.

38. In order to address other outstanding issues on citizenship, Kenya has reformed legislation on citizenship which alongside constitutional provisions on citizenship have changed the legal and policy environment for ensuring the rights of groups which have hitherto faced challenges of proving citizenship. Legislation has resolved concerns raised by the Nubian community to the effect they were treated as second-class citizens or even as stateless persons. This community was brought to Kenya as part of Britain’s soldier corps when Kenya was a British colony; but following the country’s independence the community was not readily recognised and integrated into the country alongside other communities. The Kenya Citizenship and Immigration Act (No. 12 of 2011) resolves Kenya’s statelessness problem by providing for mechanisms to ensure that persons who for one reason or another did not take up citizenship following the country’s independence may do that now.
3. Progressive realisation of rights

The Committee recommended that the State party addresses disparities in the enjoyment of economic, social and cultural rights, including in access to land, which particularly affect poor people in urban areas and minority and indigenous communities in rural areas, e.g. by adopting the Draft National Land Policy, establishing land inspectors to monitor discriminatory allocation of land, and implementing the recommendations of the Ndung’u Commission of Inquiry into Illegal/Irregular Allocation of Public Land. It also recommended that the State party establish a tribunal on post-election violence to bring perpetrators to justice, as well as a Truth, Justice and Reconciliation Commission to address broader historical injustices, and that it foster dialogue and promote comprehensive reconciliation among its different ethnic groups.

39. The Constitution provides specifically for economic, social and cultural rights. It guarantees every person the rights to: the highest attainable standard of health; accessible and adequate housing; freedom from hunger and having adequate food of acceptable quality; clean and safe water in adequate quantities; social security; and education (Article 43). It requires the State to take legislative, policy and other measures to progressively achieve the realisation of those rights (Article 21). The Constitution also recognises culture as the foundation of the nation in promotion of all forms of national and cultural expression (Article 11) and guarantees everyone the right to language and culture (Article 44).

40. The State has put in place policies and statutes to enable the constitutional provisions covering economic, social and cultural rights. New education laws, including the Basic Education Act (No. 14 of 2013), have been enacted; and a new health law is also being discussed in alignment with the Constitutional guarantees. Maternity fees have been abolished in all public hospitals. A new policy on housing is also under discussion.

41. The justiciability of economic, social and cultural rights in Kenyan courts is assured in terms of specific Constitutional provisions which provide that international human rights treaties and conventions ratified by Kenya form part of the country’s laws (Article 2 (6) of the Constitution of Kenya, 2010).

42. Since August 2010, Kenyan courts have on a number of occasions made positive rulings on economic, social and cultural rights covering matters ranging from the right to housing, the right to education, and the right to housing. In one instance, the High Court gave orders to protect petitioners from being evicted while the substance of their case in terms of the right to housing was being heard – Satrose Ayuma and 11 Others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 Others (2011) Eklr. In another case, the High Court ordered the State to reinstate over 1,000 families back to land from which it had evicted them – Brahim Sangor Osman v. Minister of State for Provincial Administration and Internal Security and 3 Others (2011) Eklr. Finally, regarding the right to health, the High Court declared unconstitutional anticounterfeit legislation which was likely to limit HIV-positive patients from accessing generic and hence cheaper antiretroviral drugs – PAO and 2 others v. Attorney General (2012) Eklr.

4. Access to land

43. Land is a key factor of production in Kenya and the majority of the country’s population continues to eke livelihoods in the countryside as farmers and pastoralists. Land grievances were a key spur to the country’s Mau Mau war for independence from Britain. Inter-communal conflicts have been predicated on the perception that members of certain communities own land which properly should belong to individuals from other communities.

44. The land policy and legislative framework has in the past been managed within multiple laws and regulations. Policy and legal arrangements on land again have shifted dramatically since 2010. The Constitution of Kenya has redefined land ownership under three categories: public land, private land and community land (Chapter 5 of the Constitution). Kenya also has a new land policy, which together with the Constitution forms the bedrock of new land laws that have been passed since 2010. These new laws include: the Land Act (No. 12 of 2012) and the Land Registration Act (No. 3 of 2012). In February 2013, the Land Commission was made operational with key functions such as managing public land, advising on registration of land, investigating present or historical land injustices, and undertaking land tax assessments. Finally, a key aspect of judicial reform involved establishing the Land and Environment Court to focus specifically on land and environmental issues – Environment Land and Court Act (No. 19 of 2011). These initiatives will set the pace for long-term reforms aimed at ensuring equitable access to land for all Kenyans.

5. Efforts towards National unity and reconciliation

(a) The National Cohesion and Integration Act, 2008

45. Recognizing the need to consolidate national cohesion as a prerequisite for national development, the leadership (in the face of the post 2007 presidential election dispute) committed itself to establishing a framework for the promotion of equality of opportunity, good relations, harmony and peaceful co-existence between different ethnic and racial communities of Kenya. This framework was established through the National Cohesion and Integration Act which became operational on March 9, 2009. The main objective of this legislation is to prohibit discriminatory and other conduct that might prejudice harmonious and peaceful co-existence of persons from various ethnic groups in Kenya. In this regard, the Act prohibits discrimination on the grounds of ethnicity, race, colour, religion, nationality or origin in both the private and public spheres of national life and prohibits hate speech and other conduct that may fan ethnic or racial animosity.

46. It was envisaged that the Act would be enforced through three main mechanisms, namely: (i) the criminal justice system; (ii) the complaints and referral system set under the Act; and (iii) the NCIC. The Act brings itself under the purview of the criminal justice system by defining offences and prescribing sanctions for violation. The
police therefore have a central role to play in apprehending and prosecuting those who are suspected to have committed the offences defined in the Act. A complaints and referral system is also established and consequently, a victim of discriminatory practice may lodge a complaint to the Commission for hearing and determination. Where the Commission determines that a complaint has merit, it may either refer the matter to its Secretary for conciliation or altogether hear the matter and issue compliance notices where wrong doing is established. In the hearing and determination of complaints, the Commission has power to summon witnesses and to demand production of information or other material relevant to the proceedings. Under the Act, the Minister responsible for national cohesion may also refer matters of a public nature to the Commission for determination.

47. The Commission is the principal institution for the enforcement of the Act and is established under section 25. Its overall objective is “to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof”.

(b) Establishment of the Truth Justice and Reconciliation Commission (TJRC)

48. The Truth, Justice and Reconciliation Commission is established under the Truth Justice and Reconciliation Commission Act No. 6 of 2008. It is one of the commissions created under Agenda Four of the National Accord signed in 2008 to address the cause and effects of long term historical injustices and gross violations of human rights. The Commission’s work is expected to contribute towards national unity, reconciliation, and healing in addition to driving the transitional justice agenda. The specific mandates of the Commission are:

- Promotion of peace, justice, national unity, healing, reconciliation and dignity among the people of Kenya;
- Inquire into and investigate historical injustices and gross human rights violations, including violations of socio-economic rights that occurred in Kenya between 12 December 1963 and 28 February 2008.

49. The Commission was inaugurated on 3 August 2009 and comprised nine Commissioners. It had an initial two year operational period proceeded by a preparatory period of three months. However, owing to numerous take-of challenges including inadequate financing and internal wrangles, the Commission effectively began its work in November 2010, one year and four months after its inauguration. On 21st May, 2013, the Commission finally submitted its report to H.E. the President pursuant to section 48(1) of the Act.

50. The Commission conducted hearings throughout the Country with a view to recording the personal truths of victims and witnesses. Its work was structured around four key deliverables – Statement taking, hearings, reconciliation initiatives and the writing of the Final Report. In its first phase of hearings which went up to 2012, the Commission conducted 220 individual hearing sessions during which more than 680 individuals testified. It also:

- Recorded a total of 42,098 statements from across the country. This is the largest number of statements ever collected by any truth commission world over;
- Recorded special statements targeting children and women;
- Collected a total of 1,529 memoranda from communities and associations across the country;
- Establishment of an electronic database thus easing storage, preservation and retrieval of vast volumes of information for posterity and future reference;
- Collected thematic-based hearings. In this respect:
  - 81 nation-wide focused-group discussions were held, gathering information on perceptions of economic marginalization and in which 1,192 individuals participated;
  - 10 nation-wide reconciliation meetings in which the Commission fostered intra and inter-community dialogue on national healing and reconciliation;
  - Adversely mentioned persons hearings;
  - Amnesty and reparations hearings.

51. On the basis of the above primary findings, the Commission has made the following recommendations in line with section 48(2) b-f of the Act:

- Public and unconditional apologies to be tendered within six months of this report by the President and the national security agencies for all injustices and gross violations of human rights committed during the mandate period;
- Kenya government to enter into negotiations with the British Government within the next 12 months with a view to securing compensation for victims of atrocities and injustices committed during the colonial period;
- Creation of a national human rights day to promote human rights in Kenya;
- Fast tracking of the establishment of the international crimes division of the court by the Judiciary to try cases recommended for prosecution;
- Fast tracking enactment of human rights related laws as envisaged by the Constitution;
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- Ministry of Justice to fast track the expansion of National Legal Aid and Education Programme (NALEAP) to cover the entire country;
- Prosecution of human rights violators/perpetrators;
- Fresh investigations into past unresolved murders of J.M. Kariuki, Tom Mboya, Chrispine Mbai, Robert Ouko, Pinto, among others;
- Release to the public of reports of past Commissions of Inquiry; and
- Investigations into and recovery of illegally/irregularly acquired land by the National Land Commission.

(c) Dealing with the post 2007 election violence

52. The post-election violence of 2007 raised issues that remain matters of great concern to the people of Kenya. Various State initiatives have been deployed since 2008 to ensure that such violence would never recur. Key institutions were set up to investigate, to identify the deep challenges of the situation and to recommend actions towards healing and cohesion of the whole country. These include, the Commission for Investigating the Post-Election Violence, the Truth, Justice and Reconciliation Commission, the Witness Protection Agency, and the National Cohesion and Integration Commission. The Judiciary has also been reformed and retooled significantly. These reforms include establishment of the Supreme Court, and vetting of judges and magistrates to determine their suitability to continue serving as judicial officers under the Constitution, among other measures. It is largely due to these reforms that Kenya had peaceful general elections on 4 March 2013. Where results were disputed, parties took the issues to court, demonstrating renewed confidence in the Judiciary as an impartial arbiter.

53. Bringing to book perpetrators of the violence in 2007 and 2008 remains a national priority. Kenya has cooperated fully with the ICC in respect of the three individuals standing trial on counts of crimes against humanity before the International Criminal Court. In 2012, the Director of Public Prosecutions (DPP) established a task force to determine the veracity of available evidence so as to proceed with trials against other alleged perpetrators of the 2007 post-election violence in Kenyan courts. The Judiciary has also establishing an International Crimes Division in the High Court.

54. With regard to internally displaced persons, the State established an initiative to finance displaced persons either to return to where they were displaced from or to settle in new areas. In the meantime, the State has established a new policy and legal framework to deal with issues of internally displaced persons. Among other things, the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (No. 56 of 2012) establishes a rights-based response to internal displacement. This law stresses Kenya’s international human rights obligations by explicitly giving effect to the Great Lakes Protocol on the Protection of and Assistance to Internally Displaced Persons, as well as the United Nations Guiding Principles on Internal Displacement.
**Article 3. Non-discrimination and equality**

1. **Steps to eliminate direct and indirect discrimination based on sex**

   The Committee recommended that the State party repeal Article 82 (4) of the Constitution and ensure that the new Constitution guarantees equal rights of women to matrimonial property during marriage and at its dissolution. It also recommended that the State party raise public awareness of the need to abolish laws and customs which discriminate against women and adopt the Marriage, Matrimonial Property and Gender Equality and Affirmative Action Bills.

   - **55.** The Constitution of Kenya, 2010, guarantees equal rights to women and men and outlaws discrimination on the ground of sex. It obligates the State to take legislative and other measures to redress disadvantage suffered by women and other vulnerable and marginalised groups. The Constitution also offers better clarity on matters of personal law such as marriage, divorce and inheritance. Specifically, it provides that: “Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage” (Article 45 (3)). While Parliament may still legislate for marriages in terms of different religious or customary traditions, such marriages have to abide by the provision relating to equal rights.

   - **56.** Protecting the right to equality for both women and men has also been enhanced following the establishment of the NGEC by the National Gender and Equality Commission Act (No. 15 of 2011). This constitutional Commission’s mandate includes ensuring that the State puts in place policies, programmes and measures for gender equality and freedom from discrimination in private and government institution, and further, to audit realisation of the equality and non-discrimination principles.

   - **57.** The State has affected the Committee’s recommendation that it should repeal Section 38 of the Sexual Offenses Act (No. 3 of 2006) which punished victims of sex crimes whose cases were prosecuted unsuccessfully. At the same time, though, a number of gender facilitative bills including the marriage bills, have for years remained unlegislated, it is now expected that since women’s voices will be greater in the new Senate and National Assembly, these bills will be given more premium.

   - **58.** Other actions which the State has taken against discrimination on the ground of sex include:
     - Passage of the Prohibition of Female Genital Mutilation Act (No. 32 of 2011);
     - Establishment of hotlines to report gender based violence;
     - Better recognition of how discrimination intersects within the lives of women with disabilities in terms of the Convention on the Rights of Persons with Disabilities which Kenya ratified in 2008;
     - Ratification of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa;
     - Judicial decisions favourable to the rights of women and men, for example on the continued use of generic antiretroviral drugs – PAO and 2 others v. Attorney General (2012) Eklr;
     - Progress dealing with the reproductive health rights of women, particularly following the Constitution’s provision that abortion may be allowed under certain limited and regulated circumstances (Article 26); and
     - Enacting land laws including the Land Act (No. 12 of 2012) and the Land Registration Act (No. 3 of 2012 which increase women’s access to land ownership and use, through inheritance and through personal acquisition.

   - **59.** A systemic key challenge facing implementation of equal rights for women and men is that, despite any clarity in the law, Kenya’s cultural and societal realities still mean that women are de facto discriminated in fields such as inheritance. Many women still do not enforce their right to inherit alongside their male siblings in deference to the assumed patriarchal cultural norm; and women do remain in demeaning relationships. A further challenge arises owing to recent emphasis on the rights of women as distinct to gender rights. There is increasing concern that adequate focus is not being placed on the rights of men and the boy-child. Far too many young men in some parts of Kenya are living lives of wanton wastage: they dabble in drugs and are devoid of drive to earn income; and they no longer play their social roles in the family and community.

2. **Representation of women**

   The Committee recommended that the State party adopts positive measures, with a view to raising the representation of women in Parliament, the judiciary and senior civil service positions.

   - **60.** Representation of women in political offices is now specifically provided for in the Constitution. The Constitution provides that at least a third of members of the Senate, National Assembly and County Assemblies be of either gender. To fill the women’s minimum quota, the Constitution reserved 47 women seats in the National Assembly and 16 such seats in the Senate.

   - **61.** Implementing the gender parity rule in the Constitution, which directs that not more than two-thirds of any elected body should be made up of more than one gender, has faced some challenges. Kenya’s 10th Parliament was unable to pass legislation to determine how that rule would be realised. When the Attorney General sought an advisory opinion from the Supreme Court, it determined by majority decision that while realisation of the right is progressive, implementation of the two-thirds rule should be resolved by law at the latest by 2015. Advisory Opinions Application 2 of 2012, Supreme Court of Kenya.

   - **62.** Kenya’s reforming Judiciary includes far more women than ever before. Two of the seven Supreme Court judges are women. Finally, more senior civil servants are women holding critical decision-making positions in important bodies such as the National Gender and Equality Commission, the Commission for the Implementation of the Constitution, and the Commission for Revenue Allocation. The data is available from Kenya’s 7th report to CEDAW.
**Article 6. Right to work**

63. The State is extremely conscious of the eminent role that work plays in the lives of Kenyans. Work facilitates a host of other rights – from the right to be free from hunger, the right to housing and the right to education. Ultimate State policies continue to be informed by the fact that a person may not live a dignified life if he or she does not have work. The importance of this right is affirmed by the fact that Kenya has ratified 49 International Labour Organization (ILO) Conventions, including seven of the eight Fundamental Conventions; three of four Governance Conventions (Priority); and 39 of the 177 Technical Conventions. The State is even enforcing the spirit of many of the other ILO Conventions which it has not ratified as discussed further in this report.

1. **Opportunities for employment**

64. Despite not being explicitly provided for in the Constitution, the right to work still features strongly in Kenya’s policy, legal and administrative framework. The right to work, as enunciated in Article 6 of the ICESCR, is directly enforceable by virtue of Article 2 (6) of the Constitution which provides that treaties or conventions ratified by Kenya do form part of the country’s laws. The Constitution itself alludes to the right to work when it affirms every person’s inherent dignity and the right to have that dignity respected and protected (Article 28). Furthermore, migrant workers’ rights are protected in the Employment Act (No. 11 of 2007).

65. The State realises that work opportunities will keep growing if the economy’s competitiveness is enhanced. The country’s long-term development blueprint, the Kenya Vision 2030, identifies work as a critical component of the economic pillar, stressing that social cohesion may not be attained when significant segments of the population remain in abject poverty.

2. **Employment creation**

The Committee recommended that the State party intensifies its efforts, especially in rural and deprived urban areas, to (a) achieve higher levels of employment, e.g. through vocational training and infrastructural measures; (b) regularize the situation of informal sector workers by progressively improving their working conditions and including them in social security schemes; (c) take special measures to increase employment opportunities for women, persons with disabilities, refugees and internally displaced persons and other disadvantaged and marginalized groups; (d) ensure that labour inspectors act as an independent and effective instrument to combat violations of basic labour rights; and (e) establish a data collection system to monitor unemployment and informal sector employment.

66. During the last four years, the State has started implementing initiatives intended to create opportunities for the poor to create wealth. New jobs have been generated both in the formal and informal sectors between 2008 and 2012. In 2008, over 474,700 new jobs were generated. In the 2009/2010 financial year, the number rose to 502,900 and went up further to 503,500 in the 2010/2011 financial year. The formal sector generated 62,600 new jobs in 2010 compared to 56,300 jobs created in 2009 representing 12.4 per cent of the total jobs generated. The informal sector, which represented 80.6 per cent of the total employment, generated an additional 440,900 jobs. The increase in the generation of jobs is attributed to improved economic performance coupled with increased access to cheaper credit from banks, and from the Women Enterprise Fund and the Youth Development Fund.

67. Ultimately, the Kenya 2030 Vision aims to establish a sustained gross domestic product (GDP) rate of 10 per cent to drive wealth-creation. In 2012, the Government expected the economy to grow by 5.1 per cent. Economic growth targets for the next few years are, at 10 per cent. The next Medium Term Plan of the Vision 2030 (MTP 2013-2018) aims to raise the average annual income per person from USD 901 in 2012 to USD 1,200 by 2017; and to reduce national poverty levels from 44 per cent in 2012 to 28 per cent in 2017. See further discussions in the report.

68. The State continues to appreciate the key role that properly targeted training plays in ensuring that a properly skilled and tooled labour-force can fit into available work opportunities as well as innovate new such opportunities. The State has continued to invest heavily in training initiatives during the last four years. See discussion on investments in education.

69. Kenya’s unemployment rate in 2011 was 40 per cent, up from 12.70 per cent in 2006. The State still faces the challenge of not only how to create jobs but how to establish sustainable jobs which comply with minimum labour standards; and how to balance between formal employment and employment within the informal sector. Opportunities for formal sector jobs remain far more limited than opportunities for informal sector jobs. By 2010, formal sector jobs compared to informal sector jobs had shrunk to 18.8 per cent.

70. State agencies strive to ensure that minimum work standards apply within the informal sector. The situation of workers in informal employment is gradually being improved through their inclusion in social protection schemes and health schemes. For example, now, even workers with minimal earnings can become members of the National Hospital Insurance Fund (NHIF).

71. A number of other policies, laws and administrative actions have or are being taken to establish more work opportunities:

- The State instituted the Kazi Kwa Vijana Programme (Jobs for the Youth) in 2009. This initiative aimed to employ 200,000 to 300,000 Kenyan youth in public works initiatives: when it ended, it had employed 298,000 youth. The initiative though created fairly short-term jobs (usually not more than three months) and faced challenges of...
accountability. The State established the Youth Enterprise Development Fund to provide business development loans to young people aged 18 to 35 to enable them to form viable businesses that would create jobs.

- The State also established the Women’s Enterprise Fund with similar aims.
- Enhancing opportunities to work for persons with disabilities has involved encouraging employers to hire at least five per cent employees with disabilities. The reality in this regard though is that extremely few persons with disabilities are hired by the public and private sectors, owing to a mix of factors including prejudice and discrimination and non-availability of qualified persons with disabilities.

Job-creation strategies under the next MTP include:
- Establishing a national poverty centre for mapping and providing policy advice on how to deal with poverty;
- Establishing a national integrated framework for employment-creation and social protection to provide an integrated approach for employment creation and social protection;
- Developing four multi-purpose dams for sustainable utilisation and management of basin based resources;
- The Youth Enterprise Development Fund will establish a Youth Bank;
- Entrepreneurial training will be enhanced since it is a key element in successful financial assistance programmes;
- The Women Enterprise Development Fund will continue to lend funds to women enterprises through financial intermediaries. It will also train women on formation of cooperatives and financial management.

73. Kenya’s on going judicial reforms have also positively impacted the labour sector greatly. Courts have for example intervened to protect the right to work of a police officer who was retired “on medical grounds” when he got a physical disability, the High Court ruling that the employer should rather have reassigned the petitioner and instituted reasonable accommodation measures to enable him continue working as a police officer – Anupa and Kenya Paraplegic Organisation v. Attorney General and Judicial Service Commission, High Court Petition 93 of 2011.

74. The right to work remains extremely tenuous for certain sections of society. Despite provisions in the Constitution of Kenya and the Persons with Disabilities Act (No. 12 of 2003), employment opportunities for persons with disabilities remain extremely limited. Ensuring the right to work for women also remains a challenge; as indeed is ensuring that the right environment exists to enable youth to become gainfully employed.

**Article 7. Right to just and favourable conditions of work**

1. **Just and favourable conditions of work**

75. Ensuring decent work conditions for Kenya’s workers remains an essential part of the country’s policy-making and implementation. The Constitution of Kenya establishes every worker’s rights to: fair remuneration; reasonable working conditions; membership of a trade union; and to strike. The Employment Act (No. 11 of 2007) complements the Constitution by detailing the fundamental rights of employees as well as providing for basic conditions of employment. It forbids forced labour; provides for equality of opportunity in employment; outlaws discrimination; legislates for equal remuneration for work of equal value; and protects against sexual harassment.

2. **Export processing zones**

The Committee recommended that the State party reviews its incentive regime for Export Processing Zones, removes their exemption from Kenyan labour legislation, including the Employment Act, the Occupational Health and Safety Act and minimum wage regulations, strictly enforce labour standards and further increase the number of labour inspections, promote training and promotion opportunities for workers, ensure trade union freedom and combat sexual harassment and racial discrimination in the Export Processing Zones.

76. It is important to state that the export processing zones are not exempt from the application of labour laws. The Employment Act (No. 11 of 2007) as well as the Occupational Health and Safety Act (No. 15 of 2007) apply in export processing zones as much as they apply to employers outside such zones. Only the disciplined forces are excluded from the ambit of the Employment Act; and even in that instance, the Constitution establishes clear minimum requirements to ensure their rights at work. The State however faces the challenge of effective implementation: adequate resources are not available to deploy enough labour inspectors to the numerous cites where workers’ rights do keep being violated.

3. **Statutory minimum wage**

The Committee recommends that the State party increase, annually adjust and enforce minimum wages to ensure that such wages provide workers with an adequate standard of living for themselves and their families, in accordance with article 7 (a) (ii) of the Covenant. It also recommends that the State party adopt targeted measures to ensure that women, especially those living in rural and deprived urban areas, have equal access to the regular labour market as men and that the principle of equal remuneration for work of equal value is implemented in practice.

77. The State undertakes on an annual basis a review of the minimum wage applicable to different cadre of workers. Under the Labour Institutions Act (No. 12) of 2007, the Government constitutes Wages Councils to deal with emerging sectors of the economy. These include: the Protective Security Services Wages Council which was reconstituted in August
2012 to take care of the workers in the private security sector. In addition the Floricultural Wages Council continues to address issues affecting workers in the flower industry. The State has taken concerted actions to ensure that domestic workers who tend to be particularly vulnerable do get a minimum wage.

78. The State recognises the difficulty of balancing demands for an adequate standard of living on one hand and the imperative not to so overburden the economy that would grind production to a halt. To remedy this situation, the State is developing the Incomes and Wages Policy and the Productivity Policy. The Constitution also established the Salaries and Remuneration Commission whose functions include setting and reviewing the remuneration and benefits of all State officers (Article 230 of the Constitution). In January 2013, that Commission proposed realignments in the public service salaries structure including modest reductions to salaries of the best-paid public officers. Under their new scheme, the disparity between the highest and lowest paid officer has reduced from 159 per cent to 87 per cent, against a world standard of 50 per cent.

4. Women

79. By and large, women do continue to work in low-skilled and low-paid jobs. Correcting this situation involves a series of short, medium and long-term interventions. The policy and legislative environment now affirms that women and men working in similar jobs have similar rights to pay and other terms. In the medium and long-term, State initiatives like compulsory free primary education (FPE) will produce a female labour force with skills equivalent to their male peers. The State also encourages employers to recognise the importance of taking into account women’s roles as child-bearers and caretakers by introducing facilities and flexibilities in the work-place that encourage women to continue working even as they nurture young children. Some private corporations have begun to institute facilities such as crèches for children.

80. Representation of women in senior management jobs such as Corporate boards remains negligible. In 2012, only 9 per cent of directorships for companies listed on the Nairobi Stock Exchange were constituted by women. This percentage compared unfavourably with 2007 when there was 12 per cent representation. Kenya’s Capital Markets Authority is considering introducing quotas to ensure women are represented on the boards of companies listed on the Stock Exchange.

5. ILO Convention

81. Kenya has not acceded to ILO Convention 150 concerning Labour Administration. But the country has a strong Labour Inspectorate Department whose operations are limited only on account of the scarcity of resources facing State institutions.

Article 8. Right to form and join trade unions

82. Kenya continues to believe that the principles of tripartite agreements help to drive the country’s socio-economy and provide benefits to workers. Trade unions play essential roles which the State should never undermine.

1. Trade unions and employers’ organisations

83. Significantly, Kenya’s policy and legislative priorities in this area revolve around ensuring amicable and mutually beneficial labour relations. That is why the Constitution establishes every person’s right to fair labour practices. Not only does it provide for workers’ rights, it also provides for employers’ rights, including; forming and joining an employers’ organisation; and participating in the activities and affairs of such organisation. Both employers’ organisations and trade unions have rights to: organise; form or join a federation; and undertake collective bargaining (Article 41). The right to labour relations may only be limited for persons serving in the Kenya Defence Forces or the National Police Service (Article 24).

2. Right to form trade unions

The Committee recommends that the State party take urgent measures to ensure freedom to form and join trade unions, prevent interference in the management and operation of trade unions, and remove excessive restrictions on the right to strike in law and in practice, including in Export Processing Zones. While noting the importance attached to the principles of Tripartism and social dialogue by the State party, the Committee recommends that the State party consider ratifying ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise (1948).

84. The Constitution of Kenya, complemented by the Labour Relations Act (No. 14) of 2007, guarantees workers the right to industrial actions. Since the promulgation of the 2010 Constitution, Kenya’s public and private sectors have increasingly exercised their right to withhold labour. Indeed, employers are increasingly concerned that certain industrial actions, like strikes have proceeded without proper due process. Doctors and nurses have gone on strike in circumstances which have led to the death of hospitalised patients.

85. In addition, since the passage of the Constitution of Kenya, 2010, trade union activities in the country have flourished. Unions representing civil servants, teachers, health workers and the services sector, among others, have engaged their employers robustly to improve the terms and conditions of their members. Trade unions have argued their grievances in court and many times gotten the redress they sought. For example, in Aviation and Airport Services Workers Union v. Kenya Airways Ltd (2012) Eklr, the Industrial Court reinstated 447 workers who Kenya Airways had declared redundant, the Court determining that the retrenchment and redundancy actions by Kenya Airways were substantively without justification and procedurally wrong, amounting to unfair termination of employment. Kenya Airways has appealed the ruling. In addition, the Court ordered that the nurses union be registered by the Trade Unions.
86. Two federations of trade unions now operate in the country: the Central Organisation of Trade Unions and the Confederation of Public Service Trade Unions of Kenya. The Registrar of Trade Unions has, as per law on several occasions declined to register trade unions where the substantial interests of members of the proposed unions were already represented by already existing unions. The State continues to cherish the fact that even where its officials do make decisions not to register a trade union, those decisions can be reviewed in this instance by the Industrial Court where a number of aggrieved applicants have lodged their claims for registration.

87. Kenya has still not ratified ILO Convention 87 concerning Freedom of Association and Protection of the Right to Organise. The State’s view in this regard is that the Constitution and enabling legislation are quite adequate to cover association rights.

Article 9. Right to social security

88. The State recognises how essential it is to ensure vulnerable groups like children, older persons and persons with disabilities do access amenities of life such as food and shelter. Social protection measures continue to be an essential tool for advancing this protection.

1. Social protection

89. The Constitution establishes the right to social security as a socio-economic right to be achieved progressively (Articles 43 and 21). The Constitution in particular identifies persons who are vulnerable as ones that should receive social protection from the State on a priority basis. The National Social Protection Policy has sought to respond to this constitutional imperative through the use of the following instruments to deliver social protection to the poor and vulnerable:

- Cash transfers: The State has to date rolled out cash transfer programmes to cover older persons, orphans and vulnerable children (OVCs), and persons with severe disabilities. During the last four years, money has been allocated on an annually increasing basis to each of these groups to be transferred to individual households across the country. A challenge that has faced the use of this instrument is the scarcity of resources which has meant that deserving households have been left unserved by the strategy. A further challenge has been in the transmission of the cash to the OVC families due to the distance from and lack of access to banks and formal financial institutions. However, to mitigate the challenge and increase access, since 2010 the Government began to transmit the money through the local Post Offices which are closer to the people in rural areas and require less technical details for issuing money.

- Food distribution (either as disaster relief or in-kind transfers): Kenya from time to time has continued to suffer droughts and even famine. Whenever this has happened, the State has itself alongside civil society and the international community mobilised resources to provide food to needy regions.

- Direct feeding programmes: These target those especially vulnerable to malnutrition. The State has used its health bureaucracy to distribute nutrient-rich food supplements such as Unimix to malnourished children and lactating mothers.

- School-based food programmes: School feeding programmes remain an effective tool particularly in Kenya’s vast arid and semiarid areas where a hot meal is provided to pupils in schools. This programme has the effect both of providing nutrients to children as well as getting them to have an education.

- Micro-finance (both credit and savings): As we have already stated, the State has rolled out a number of programmes to motivate development amongst the youth, women and persons with disabilities.

- Price subsidies (food at lower than market rates and subsidies of common utilities like water and electricity): The Price Control (Essential Goods) Act (No. 26 of 2011) was passed with the aim of regulating the prices of essential commodities so as to secure their availability at reasonable prices. It is the case though really that the effects of this law have not begun to be felt by the populace. Kenya’s economic priorities have become so neoliberal that it is difficult for the Government to negotiate commodity price reductions.

- Subsidised agricultural inputs: Essential agricultural inputs like fertilizers and herbicides have on a limited basis been subsidised by the State. This has been beneficial to small-scale farmers, although brokers have abused the system by buying, marking up and selling subsidised inputs.

- Public works programmes: The State from time to time has undertaken work-for-food programmes under which individuals from communities have built local infrastructure such as roads. These not only transfer short-term wages and food, but also enable construction of necessary public infrastructure. As already reported, one such programme instituted by the State was the Kazi Kwa Vijana (jobs for youth) initiative.

- Waivers and exemptions: These enable the vulnerable to access services. Children under five years get free basic health services. Kenyan children continue to enjoy FPE. A certain percentage of the income of persons with disabilities is also tax exempt.
90. The OVCs cash transfer programme began on a pilot basis in three districts; but presently it covers Kenya’s 47 Counties and targets 155,000 households. The budget allocated to the programme in the last few years is as follows:

- 2006-2007: Kshs 48 million;
- 2007-2008: Kshs 56 million;
- 2008-2009: Kshs 169 million;
- 2009-2010: Kshs 579 million;
- 2010-2011: Kshs 816 million;
- 2011-2012: Kshs 3,224,280,000.

91. The Government is supporting over 2.4 million OVCs in over 154,000 households nationally. The added support of FPE has reduced significantly the costs to individual households caring for OVCs and ensured that OVCs have access to primary education at the least. The Government promotes community care over institutionalised care of OVCs in order to promote the overall welfare of the children who are already in difficult circumstances.

2. The National Hospital Insurance Fund (NHIF)

The Committee recommends that the State party progressively extend the scope of the National Hospital Insurance Fund so as to reimburse all hospitalization costs, in particular medical expenses, and to cover all workers, including informal, casual, domestic and part-time workers and the self-employed, as well as persons without employment. As a first step, it recommends that the State party consider removing any penalties imposed on persons who are unable to pay their contributions on time. It also recommends that the State party take immediate steps to introduce a comprehensive compulsory health insurance scheme for everyone, including the unemployed, children, older persons, persons with disabilities and other disadvantaged and marginalized individuals and groups.

92. Measures now have been put in place to turn NHIF into a fully-fledged health insurance scheme which will pay for all health-related costs. The base for the Fund is also being expanded by facilitating members to make more reasonable contributions in return for advanced benefits. It is also tapping new members from the informal sector. Both casual and part-time as well as self-employed persons can now become members of the fund. Penalties for late payment still remain. A comprehensive health scheme for all remains under discussion; but the Government has put in place a health scheme for all public servants as discussed elsewhere in the report.

93. Kenya has not ratified ILO Convention 102 concerning Minimum Standards of Social Security. Sustaining Kenya’s social protection programmes faces challenges arising from the low number of people being taxed relative to the number of people in need of social protection. The State aims to expand its tax base by reaching out to the informal sector so that individuals in that sector too may pay taxes. The private sector too is a key partner in building the tax base to ensure minimum social protection standards.

Article 10. Protection of the Family

94. Kenya continues to make positive strides in legislative and policy measures aimed at protecting the family as the natural and basic unit of society. The Constitution provides legal recognition of the family as the fundamental unit of society and the rights to found families and to enjoy equal rights in entering into a marriage, during the marriage and upon dissolution of the marriage. The Constitution protects the rights of adult persons of opposite sexes to found a family based on free consent of the parties, and defines “adult” as a person who has attained 18 years. This is reaffirmed in the Children’s Act (No. 8 of 2001).

95. Kenya recognises and promotes the family as the fundamental unit of society. The Government is committed to promoting the welfare of the family, which is critical in the realisation of the economic, social and cultural rights for individuals. At the same time, the Government recognises that the overall health of families affects the overall health of the country.

1. Towards legislation to protect the family

The Committee recommended that the State party (a) enact the Domestic Violence (Family Protection) Bill (2000) and other legislation specifically criminalizing domestic violence, including spousal rape, and customary practices that degrade and harm women, including ritual “cleansing” and forced “inheritance” of widows; (b) train the police, prosecutors and judges on the strict application of such criminal law provisions; (c) relax the sanctions for false allegations in Section 38 of the Sexual Offences Act (2006) and preclude its application in cases where acquittals are not necessarily based on the falseness of the complainant’s allegations; (d) raise public awareness, in particular at the community level, about the criminal nature of domestic violence and harmful customary practices; and (e) provide in its second periodic report updated data on the number and nature of reported cases of domestic and sexual violence, convictions and on the sanctions imposed on perpetrators.

96. The Government has drafted three family law bills – the Marriage Bill 2012, the Matrimonial Property Bill 2012 and the Protection Against Domestic Violence Bill 2012 – to give effect to the constitutionally guaranteed rights of the family. The Bills are expected to be enacted into law in the 11th Parliament. The Marriage Bill 2012 has incorporated some of the gains introduced by the Constitution. Specifically, the Bill consolidates the eight existing marriage laws (The Marriage Act, The African Christian Marriage and Divorce Act, The Matrimonial Causes Act, the Subordinate Courts (Separation and Maintenance) Act, The Mohammedan Marriage and Divorce Registration Act, The Mohammedan Marriage, Divorce
and Succession Act and the Hindu Marriage and Divorce Act) under one law. The Bill affirms that parties to a marriage have equal rights at the time of marriage, during the marriage and upon dissolution of the marriage. The inequalities often experienced in marriages concluded under customary law will be minimised by the provision of registration and legal recognition of customary marriages under the Marriage Bill. The Marriage Bill when enacted will also recognise cohabitation marriages or popularly known as come-we-stay marriages, which are otherwise not legally recognized and many women have lost rights within the marriage through these unions.

97. The proposed Matrimonial Property Bill makes significant gains in securing women’s access to matrimonial property during and after the marriage. Married women in Kenya have been at a disadvantage when it comes to matrimonial and family property, due to cultural practices that prioritise men’s claims over land and property over women’s claims. The Matrimonial Property Bill protects property acquired during the existence of a marriage from being disposed of by one party without the consent of the other party. This has been a significant factor in disenfranchising women. However, considering that this proposed law challenges deeply held cultural beliefs and patriarchal attitudes that have not shifted significantly, the proposed law may face significant opposition in Parliament. The Government will continue to push for its enactment including direct intervention with Members of Parliament so that the final Act promotes the equity and equality for women and men.

98. The Government is also pleased to report that the Committee’s concern in the Concluding Observations regarding Section 38 of the Sexual Offences Act (No. 3 of 2006) which introduced sanctions for false allegations, which also affected cases where acquittals resulted from prosecutions, has now been repealed.

2. Combating under age marriage and female genital mutilation (FGM)

The Committee recommended that the State party adopts legislation criminalizing all female genital mutilation of adult women; train the police, prosecutors and judges on the strict application of laws prohibiting female genital mutilation; continue promoting alternative rite of passage ceremonies; educate parents, especially mothers, children and community leaders on the harmful effects of female genital mutilation; and combat traditional beliefs about the usefulness of female genital mutilation for the promotion of marriage prospects of girls.

99. Under age marriage remains a challenge arising mainly due to poverty and lack of economic opportunities for girls especially in rural areas, cultural beliefs and practices as well as religious beliefs. However, the situation has steadily improved since 2003. The 2008/2009 Kenya Demographic and Health Survey indicates that in the population cluster of women aged between 45 and 49 years, about 10 per cent were married when below 18 years while in the current cluster of girls aged between 15 and 19 years, only 2 per cent are married under age 18. Further, the median age for marriage shifted upwards from 19.7 years in 2003 to 20 years by 2008. The introduction of compulsory free primary education in 2003 is among the factors that have decreased the incidence of early marriages. The Basic Education Act (No. 14 of 2013) promotes the extension of compulsory education to secondary school. As the Act is implemented, the country expects to see a further decline in the number of early marriages.

100. Similarly, FGM is on the decline across the country. The 2008/2009 Kenya Demographic and Health Survey indicated that 27 per cent of women between the age of 15 and 49 had undergone FGM. This is down from the 2003 survey, which indicated an incidence rate of 32 per cent, and the 1999 survey that indicated 38 per cent. This decline indicates improved quality of life and health for girls and women. In addition, because FGM is linked to early marriage, the decline in rates indicates that many more girls are avoiding early marriages and completing their primary and even secondary education. Regional disparities are, however, very wide with areas of North Eastern Kenya indicating prevalence as high as 98 per cent.

Table 1

<table>
<thead>
<tr>
<th>Region</th>
<th>Estimated prevalence at 2008/2009 (by % of women population)</th>
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<tbody>
<tr>
<td>Western region</td>
<td>1%</td>
</tr>
<tr>
<td>Eastern region</td>
<td>30-33%</td>
</tr>
<tr>
<td>Nyanza region</td>
<td>30-33%</td>
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<tr>
<td>Rift Valley region</td>
<td>30-33%</td>
</tr>
<tr>
<td>Central region</td>
<td>25%</td>
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<tr>
<td>Nairobi region</td>
<td>10%</td>
</tr>
<tr>
<td>Coastal region</td>
<td>15%</td>
</tr>
<tr>
<td>North Eastern region</td>
<td>98%</td>
</tr>
</tbody>
</table>

101. In 2011, Kenya enacted the Prohibition of Female Genital Mutilation Act (No. 32 of 2011). The FGM Act establishes an Anti-FGM Board, which focuses on education and promoting awareness, designs programmes aimed at eradication, and supports alternative rites of passage. Further, the Constitution prohibits a person from compelling another to perform, observe or undergo any cultural practice or rite (Article 44).

102. The Act makes it an offence to perform FGM on another and also to train as an FGM practitioner. Persons convicted are liable to prison terms not exceeding three years or a fine or both. Where death results from FGM, the convicted person is liable for life imprisonment. While the Act provides deterrent sentencing for offenders, the Government focuses on and emphasises the role of education, awareness and behaviour change to bring an end to the practice. Such an approach not only complements the legal measures that must be put in place, but also creates greater opportunities for behaviour change with positive impacts from generation to generation as communities become more aware of the disadvantages of FGM.

3. Counter trafficking measures

The Committee recommended that the State party (a) enacts the Anti-Trafficking Bill (2007); (b) train police officers, prosecutors judges and health and social workers, on the strict application of the provisions of the Sexual Offences Act (2006) and the Children Act (2001) criminalizing trafficking of persons for the purpose of sexual exploitation and trafficking of children; (c) review its sentencing policy for trafficking-related offences; and (d) provide in its second periodic report updated data on the number and nature of reported cases of trafficking, convictions and on the sanctions imposed on traffickers.

103. In Kenya the problem of trafficking in persons particularly affects the country as a major host for asylum seekers and refugees and a travel hub within the East African region. Women and children are particularly vulnerable to this vice. Trafficking undermines the quality of life of the victims, many of who are already vulnerable or in difficult circumstances and often subjects them to a life of servitude, exploitation, violence and other forms of abuse. The Government is making significant efforts to combat the vice.

104. Kenya has enacted the Counter-Trafficking in Persons Act (No. 8 of 2010). The Act defines trafficking in persons as recruiting, transporting, transferring, harbouring or receiving another person for the purpose of exploitation by means of threat, abduction, force, deception, misrepresentation, abuse, enticement or other fraudulent means, whether the trafficking occurs within Kenya or through the country as a conduit. It also recognises the particular vulnerability of women and children to trafficking. The Act introduces stiff penalties from a minimum of 30 years and/or a fine of 2 million shillings up to a maximum of life imprisonment.

105. The Ministry of Gender, Children and Social Development oversees the anti-trafficking efforts and works with the National Police Service to enforce the Act. Children’s Officers in the Ministry work through Children’s Advisory Committees in partnership with law enforcement agencies to combat trafficking in children and exploitative child labour. The Ministry also focuses on anti-trafficking work in Mombasa where the sex trade and sexual exploitation particularly of girls is high. The Ministry works with local non-governmental organisations (NGOs) to ensure support for victims of trafficking and sexual exploitation, and through such initiatives has established a 24-hour hotline to report child-trafficking cases. There is still a lot of work to be done in training, educating and coordinating efforts of children’s officers, labour inspectors and the police to identify, arrest and mount prosecutions where trafficking in persons occurs. Most convictions have been done under alternative offences in the Children’s Act, Sexual Offences Act or the Employment Act. The Ministry of Gender now has a National Plan of Action on Counter-Trafficking running from 2012 to 2016 to help coordinate and guide national efforts on counter-trafficking.

106. The State has also become concerned that although some Kenyan individuals voluntarily migrate to other countries and particularly Saudi Arabia for domestic work and other economic opportunities, there are increasing reports that many end up being trafficked into domestic slavery, are exploited sexually and or forced into unpaid manual labour. In order to protect its citizens, the Ministry of Foreign Affairs is discouraging Kenyans from such migration and has engaged the Government of the Kingdom of Saudi Arabia over the issues.

4. Protection of vulnerable children

107. The Constitution in Article 53 reaffirms Kenya’s commitment to protect the rights of the child. Every child is guaranteed the right to a name and nationality at birth, basic nutrition, shelter, and healthcare, protection from abuse, neglect and harmful cultural practices, violence, inhuman treatment, and hazardous or exploitative behaviour. Every child also has the right to parental protection and care and the Constitution goes a step further to assure children of this right whether or not the parents live together. The Article makes the principle of the “best interests of the child” applicable as the paramount consideration in matters concerning children.

108. The Government of Kenya recognises that even with the legal protection of children, OVCs often marginally enjoy these rights and specific interventions are necessary to protect them. One of the Government’s initiatives to protect vulnerable children includes the provision of Cash Transfers for OVCs as discussed in the report.
Article 11. Right to adequate standard of living

109. Assuring a high standard of living and quality of life for Kenyans is a priority for the Government. In addition to pursuing national economic development, the State is committed to addressing challenges that undermine the quality of life for individuals. Through laws, policies, targeted programmes and financial investments, Kenya is making significant strides in improving the standard of living, alleviating poverty, ensuring access to basic services for all, as well as enhancing access to services and development for marginalised groups.

1. Right to continuous improvement of living conditions

110. Kenya's growth and development plan is anchored in and guided by the Kenya Vision 2030. The country aspires to be “a globally competitive and prosperous country with high quality of life for its citizens by the year 2030.” The development blueprint is founded on three key pillars: economic, social and political. The economic pillar seeks to ensure the prosperity of all Kenyans through economic development programmes in key sectors aimed at achieving an average GDP growth rate of 10 per cent per annum up to 2030; the social pillar aims at building a just and cohesive society with social equity in a clean and secure environment; and the political pillar focuses on a democratic political system founded on issue-based politics that respect the rule of law, and protects the rights and freedoms of every individual in the Kenyan society.

2. Tackling poverty

The Committee recommended that the State party allocates sufficient funds for the effective implementation of its National Poverty Eradication Plan and poverty reduction strategy, ensure the full integration of economic, social and cultural rights, and specifically address the needs of persons living in rural and deprived urban areas, the landless, women, children, female-headed households, families affected by HIV/AIDS, persons with disabilities, refugees, internally displaced persons and other disadvantaged and marginalized groups in that plan and strategy. In this regard, the State party is referred to the Committee's Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights (E/C.12/2001/10).

111. Poverty is one of the most significant challenges facing Kenya today. It is most evident in a significant percentage of the population experiencing difficulty in accessing health care, facing food shortages, high levels of unemployment and underemployment, lack of access to education, land, water and housing. The section of the population hardest hit by poverty comprises women, unemployed youth, orphans and people with living disabilities. The Government has pointedly addressed the question of policy through several measures aimed at addressing livelihoods including introduction of alternative livelihood initiatives, access to services, profitability of agriculture, and ensuring access to most basic services by marginalised and vulnerable groups. The measures that have been taken are detailed below.

112. The contributing factors to high poverty levels in Kenya include poor physical infrastructure and poor access to markets, unemployment, lack of access to affordable credit due to high interest rates levied by commercial banks and other financial institutions, high cost of farm inputs and use of poor quality seeds resulting to low returns from agriculture. In some areas of the country such as West Pokot, Tana River, Wajir and Garissa, insecurity has contributed significantly towards rising levels of poverty.

113. The HIV/AIDS pandemic, malaria and tuberculosis are some indirect causes of poverty in the country. Gender inequality due to cultural and traditional values that prevent women especially from achieving their full potential, such as owning assets, land or even livestock, are a significant factor in the extent of poverty in the country. By 2012 over 44 per cent of the population still lives under the poverty line.

3. Legal and policy measures

114. The Constitution has introduced significant legislative changes and provided stronger impetus for programming towards the realisation of economic, social and cultural rights. It recognises the right of every person to the highest attainable standards of health, accessible and adequate housing, adequate food of an acceptable quality, clean and safe drinking water, social security and education.

115. In addition, the State is expected to provide “appropriate social security to persons who are unable to support themselves and their dependents.” The realisation of these rights is progressive and the Government of Kenya continues to put in place policies, programmes and administrative measures to facilitate realisation of these rights and to improve the basic living conditions of Kenyans.

116. The focus of the first MTP (2008-2012) was to increase the levels of savings and investments to facilitate envisaged growth and development by 2012, faster job creation, poverty reduction, improved income distribution and regional balance and gender equity. These were complemented by policy, legal and institutional reforms necessary for realisation of the priorities identified.
4. Measures to improve standards of living

117. Over 80 per cent of the Kenyan population depend on agriculture for their livelihoods, and as such, the Government continues to prioritise the creation of an enabling environment for the development of agriculture to improve living standards as well as to fuel economic growth and development.

118. Job creation in both the formal and informal sectors is a key measure in improving living conditions. Over 500,000 jobs were generated in the 2010/2011 financial year in both the formal and informal sectors. This was an improvement from the previous two years but still fell short of the targeted rates.

119. The CDF initiative has improved development projects and services at local levels, including increasing access to clean water through piped water or borehole water, improving education facilities, supporting community cattle rearing and pastoralist livelihoods, among others. With devolution of governance and services under the Constitution, it is expected that citizens will have greater involvement in setting community development priorities, pursuing community projects and monitoring accountability in the use of funds.

120. In the second MTP (2013 to 2018), the Government targets raising the average annual income per person from USD 901 in 2012 to USD 1,200 by 2017, reducing national poverty levels from 44 per cent in 2012 to 28 per cent in 2017, raising the level of Human Development Index for Kenya from 0.522 in 2012 to 0.65 by 2017, reducing both rural and urban inequality by 10 per cent by 2017 and providing appropriate social protection interventions for at least 50 per cent of those requiring it.

5. Right to adequate food

121. Food is a basic necessity without which, other development indicators are severely undermined. In addition to working towards the realisation of food security in Kenya, the Government is also seriously addressing the issue of adequate nutrition. The National Food and Nutrition Security Policy of 2011 provides an overarching framework covering the multiple dimensions of food security and nutrition improvement. The Government is pursuing food and nutrition security which allows all people, at all times, to have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.

122. The Constitution provides that every person has the right to be free from hunger and to have adequate food of acceptable quality. The Government of Kenya is working progressively to ensure every Kenyan can realise this right. This is through several strategies and programmes that include focusing on marginalised and most vulnerable areas and also enhancing the capabilities of high potential areas in food production. Kenya also has a National Food and Nutritional Policy that not only focuses on increasing access to food but also to accessing nutritious food that promotes health.

123. As recommended by the Committee, the Government has undertaken specific intervention measures that improve access to food and promote food security in the arid and semi-arid lands (ASALs) and other marginalised areas.

124. Over 80 per cent of the population relies on agriculture for their livelihoods. Under Kenya Vision 2030, the Government has injected increased financial investments in the agricultural sector in order to improve opportunities for the poor to enhance their self-sufficiency and access to food and to enhance the country’s overall economic development.

6. Support to small scale farmers

125. Small-scale farmers constitute 70 per cent of Kenya’s food producers. Agricultural production in Kenya has been hampered by high costs of inputs such as fertilizer. Global fertilizer prices have been on the rise, which has adversely affected Kenyan farmers who already face significant constraints, thus negatively affecting crop yields. The Government has intervened through bulk procurement of 40 per cent of conventional food crop fertilizer requirements and then selling it to farmers at subsidised prices. The intervention is aimed at contributing to cheap fertilizer in the market and increasing farmers’ access to much-needed fertilizer at reduced costs. Since the intervention was commenced, the Government has imported 4,500 metric tonnes in the 2007/2008 financial year, rising to 99,116 metric tonnes in 2011/2012. In an effort to make fertilizer more affordable, Kenya began putting in place a plan in 2012 to manufacture fertilizer locally.

126. In order to create an enabling environment for the development of agriculture, in the financial year 2010/2011, the Government intensified implementation of policies initiated to spur growth in the agricultural sector, including, the National Seed Policy, Pyrethrum Sessional Paper, Sugar Sessional Paper, Soil Fertility Policy, Seeds Policy, Nuts Crops Development Policy, National Agribusiness Policy, National Cotton Policy and Roots and Tuber Crops Policy. Through field activities, 3,012 hectares of arid and semi-arid land was reclaimed which the Government expects to result in increased food productivity, improved water storage and reduced environmental degradation, among other benefits.

7. Irrigation for improved food production

127. The country’s food security has been adversely affected by the increasing frequency and severity of droughts and floods. The Ministry of Agriculture has been implementing a Water Harvesting for Food Security Project (WHFSP) to boost food security at national, county and household levels while reducing overreliance on rain-fed agriculture. This project involves harnessing surface runoff water for irrigation. Crop yields in irrigated areas demonstrate increases of 100 to 400 per cent, which helps to reduce current pressures on land and the destruction of forests.

128. Water for irrigation programmes has enabled growth of irrigated land under cultivation from 105,000 hectares in 2008 to 135,347 hectares in 2011. Having faced severe food shortages due to the impact of global warming and climate variation in 2009 to 2010, irrigation was elevated as a priority sector for fast tracking in the realisation of the right to food.
8. Agriculture in ASALs

129. Within the WHFSP project, ASAL regions have been provided with funds to construct water pans that provide the communities with water to supplement irrigation and to establish tree nurseries. Since its inception in 2006, more than 306 community water pans and earth dams have been constructed in ASAL areas. The Ministry of Agriculture has earmarked Kshs 285 million for the financial year 2012/2013 to construct a further 110 water pans in the rest of the country.

130. Not only are the water pan projects helping communities to increase irrigation and food production, they are also providing alternative livelihoods for communities in ASAL regions, increasing food production and better access to food locally, conserving the environment and reducing land degradation.

9. Diversifying beyond staple crop

131. Kenya has depended on maize as its staple food crop, at national policy levels and at household consumption levels. However, due to irregular weather patterns, population growth and increasing urbanisation, production of maize does not meet demand. The Ministry of Agriculture has introduced the Traditional High Value Crops Programme in 2006/2007 to promote production and consumption of alternative cereal and non-cereal crops, ensuring diversification of eating habits, food availability and food price stability, to improve food security through provision of drought tolerant and early maturing seed varieties and ensuring farmers get higher incomes through sale of excess produce and seeds.

132. Since inception the project has distributed a total of 5,096 metric tonnes of assorted drought tolerant food crop seeds, 13,515,379 sweet potato vines, and 14,512,110 cassava cuttings, all valued at Kshs 1.35 billion and reaching and improving the lives of at least 2,410,416 beneficiaries.

10. Pro-poor food security

133. Under the Njaa Marufuku Kenya (call to eradicate hunger) Programme, the Government has disbursed Kshs 2.2 billion to 17,545 groups with a membership of 106,950 farmers. The programme has also disbursed Kshs 123 million to 71 primary schools for the feeding programme. The programme supports community driven agricultural development initiatives targeting the most poor and vulnerable groups in society. Interventions are geared towards increased agricultural productivity, food utilisation, agro-processing and value-addition, health and nutrition improvement, water harvesting and conservation of the natural resource base to ensure sustainability of the current production systems. In this way, the Government is enabling more and more of the population to improve their access to food. Children who otherwise would not be attending school due to food unavailability are able to do so due the school feeding programmes.

134. Kenya’s National Accelerated Agricultural Inputs Access Programme (NAAIAP) is a pro-poor food security and poverty alleviation Government initiative, providing agricultural inputs subsidy to smallholder resource poor farmers and guaranteeing credit for maize and rice crops. The programme aims to contribute towards improved maize and rice production by 2.5 million small-scale farmers who own or use one hectare or less of land. The project promotes access to and use of farm inputs, and provision of support services to enhance production. Kshs 3.873 billion has been expended through this initiative to reach over 500,000 farmers. Further, Kshs 2.7 billion in credit facilities has been extended to 52,968 farmers and agro-dealers through the Kilimo Biashara credit scheme operated by the Equity Bank.

11. Fish farming

135. The National Aquaculture Policy of 2011 promotes a vibrant aquaculture industry and a strategy for marketing support towards increasing individual income and overall food security. The Government of Kenya spent over Kshs 6 billion on increasing fish farming in 2009/10-2011/12 as part of the Economic Stimulus Plan which included the construction of over 48,000 fish ponds and 160 water pans constructed in 160 constituencies. As a result, over 1.5 million Kenyan youth were employed on short-term basis while one million people were indirectly employed and 100,000 directly employed on a permanent basis under aquaculture value chain.

136. In addition to increasing fish production and household incomes, the aquaculture initiatives are aimed at improving nutrition. Fish production increased from 4,220 metric tonnes in 2008 to 19,337 metric tonnes in 2012, the area under aquaculture production increased from 722 hectares to 14,400 hectares, and the per capita fish consumption increased from 3.25kg per person to 3.75kg per person.

137. Under the Kenya Vision 2030, the country aims to increase national fish production by at least 10 per cent per annum from the current 150,000 metric tonnes to 450,000 metric tonnes by 2030. This includes a focus on reducing post-harvest losses from 33 per cent in 2012 to 5 per cent by 2030, diversifying the use of fish and fisheries by-products and increasing employment opportunities in the fisheries sector. Towards this end, four mini fish processing plants are under construction (at a total of Kshs 240 million) and are expected to be operational by end of June 2013. Kenya has made fish production one of the flagship projects under Kenya Vision 2030. The Government intends to mobilise Kshs 40 billion over the next five years through Government funding as well as from development partners, the private sector, NGOs and other non-state actors for this purpose.

138. In addition to developing fisheries in non-traditional areas, Kenya is also implementing a World Bank funded project, the Kenya Coastal Development Project (KCDP), which will improve management of Kenya’s Coastal and marine resources while strengthening conservation and sustainability of biodiversity. This will include support for alternative livelihoods among the Coastal fishing populations as well as sustainable management of fishing and fisheries.
139. Lake Victoria Environmental Management Project II running from July 2009 to June 2017 aims to achieve the EAC’s Lake Victoria Basin Development vision of “a prosperous population living in a healthy and sustainably managed environment providing equitable opportunities and benefits.” Through this project, Kenya aims to improve collaborative management of the trans-boundary natural resources of Lake Victoria Basin for the shared benefit of the EAC Partner States and to reduce environmental stress in targeted pollution hotspots and selected degraded sub-catchments in order to improve the livelihoods of communities dependent on the natural resources of the Lake Victoria Basin. The project has supported community development groups along the lake region and through the projects funds have been disbursed for livelihood improvement.

140. The Government of Kenya lobbied for recognition and upgrading of Lake Victoria fish landing stations to increase trade in the catch from the Lake. As a result, six fish landing sites on the Kenyan side of Lake Victoria were upgraded to international standards with support from the European Union and Kenya now enjoys enhanced access of Kenyan fish especially the Nile Perch to EU markets and a resulting reduction in post-harvest losses.

12. Right to water

The Committee recommended that the State party take immediate measures to ensure affordable access to adequate water and sanitation in informal settlements and arid or semi-arid rural areas, in line with the Committee’s General Comment No. 15 on the right to water (2002), by, inter alia, reducing waiting times for collecting water, adequately controlling prices charged by private water services and water kiosks, and connecting Kibera to the Nairobi city sewage system. It also recommends that the State party ensure that slum upgrading projects give priority to the construction of social housing which is affordable by private water services and water kiosks, and connecting Kibera to the Nairobi city sewage system. It also recommends that the State party ensure that slum upgrading projects give priority to the construction of social housing which is affordable by private water services and water kiosks, and connecting Kibera to the Nairobi city sewage system.

141. Water is the most important natural resource. The right to water is central to the growth and development aspirations of the country. The Government leads its efforts to enhance access to clean water and adequate sanitation through the Ministry of Water and Irrigation. Kenya aspires to safe, adequate, sufficient and affordable water and sanitation for all.

142. Kenya is limited by an annual renewable fresh water supply of only 647 cubic metres against a global benchmark of 1,000 cubic metres and is therefore classified as a water scarce country. The 2009 Kenya Population and Housing Census indicates that about 35 per cent of the Kenyan population rely on water from springs, wells and boreholes while another 30 per cent have access to piped water. The water sanitation situation indicates that in 2009/2010, only 57 per cent of urban populations had access to a safe source of drinking water.

143. To improve on the water security in the country, the Government is undertaking several water projects both in the urban and rural areas so as to increase access to safe drinking water.

13. Improving supply and access

144. Kenya has about 4,000 small dams and 17 large dams with a storage capacity of 180 million cubic metres. This is equivalent to a per capita storage capacity of 4.6 cubic metres, for a population of nearly 40 million people, which is among the lowest ratios in the world. Some significant initiatives to improve access particularly in arid areas and areas with great lack include, completion of the Maruba Dam in Machakos with water storage capacity of 2.4 million cubic metres and treatment capacity of 5,000 million cubic metres, serving a population of 100,000 people. In Nairobi, Sasumua Dam has been rehabilitated, restoring 16 million cubic metres of water and substantially reducing the water shortage in Nairobi. In Nakuru, Olbanita Water project has been completed, reducing stress associated with the search for water among the residents of Nakuru and its surroundings. Kisumu Water Supply Project to double the supply of water to Kisumu residents is complete and will soon be commissioned. In addition, 900 small dams and water pans have been constructed mainly in ASAL areas, resulting in additional water storage of 17 million cubic metres.

145. More than 100 boreholes were drilled and equipped in 2010, enabling 300,000 more people to access clean water in various parts of the country. Four medium sized multi-purpose dams – Kiserian in Kajiado, Umma in Kitui, Chemasusu in Koibatek and Badassa in Marsabit are under construction and expected to be completed before the end of this year. Construction of a further 16 medium sized dams is planned under the MTP with a storage capacity of 405 million cubic metres. Four other large dams are also planned for under the long term to be completed by 2015. This will have an additional capacity of 2.8 million cubic metres.

14. Legal and policy measures

146. The Government is committed to ensuring every Kenyan has access to water within a reasonable distance by 2015. For managing access to water, the Government has separated water resource management and water supply functions, resulting in greater efficiency in water management, enhanced public-private partnerships and greater and more affordable access particularly for those in informal settlements and in rural areas.

147. The legal and policy framework that guides Kenya’s water management includes the Water Act No. 136 of 2002 and the Water Policy of 1999, both of which are currently under review to align them to the Constitution. Other proposed policies include the Draft National Irrigation Policy 2012, Draft Water Storage Policy, Draft Trans-boundary Water Policy and the Draft Land Reclamation Policy 2012.
15. **Pro-poor water management**

148. Infrastructural development aims to achieve a target of at least 90 per cent of urban areas and 70 per cent of the rural areas have water coverage by the year 2015. Setting up of water tariffs with graduated payments for different economic capabilities and uses ensures greater access for the rural and urban poor at more affordable rates. In informal settlements in urban areas, water kiosks supply water at reasonable rates of approximately Kshs two to Kshs five for 20 litres. In ASAL areas, where provision of water through piping or bore holes has not yet been achieved, the communities get free water transported to various localities by water bowser.

149. In the 2010/2011 financial year, 400 hydrometric stations were rehabilitated out of the targeted 600 in the Kenya Vision 2030 flagship projects. The Urban Project Cycle and the Community Project Cycle projects, as well as rehabilitation works and other directly-funded Water Service Boards projects resulted in an additional 1.6 million people living in urban areas gaining access to water supplies. An additional 854,212 urban residents were added to those with access to sanitation/sewerage services. For the rural population, about 1.3 million additional people had access to a nearby water supply and about 965,807 people gained access to sanitation services. The table below illustrates further:

<table>
<thead>
<tr>
<th>WSB</th>
<th>Additional people served 2009/10</th>
<th>Additional people served 2010/11</th>
</tr>
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<tbody>
<tr>
<td>Athi</td>
<td>334,700</td>
<td>439,200</td>
</tr>
<tr>
<td>Coast</td>
<td>16,839</td>
<td>128,500</td>
</tr>
<tr>
<td>Lake Victoria North</td>
<td>115,196</td>
<td>392,292</td>
</tr>
<tr>
<td>Lake Victoria South</td>
<td>330,000</td>
<td>480,000</td>
</tr>
<tr>
<td>Northern</td>
<td>17,456</td>
<td>---</td>
</tr>
<tr>
<td>Rift Valley</td>
<td>304,480</td>
<td>43,200</td>
</tr>
<tr>
<td>Tana</td>
<td>152,893</td>
<td>35,742</td>
</tr>
<tr>
<td>Tanathi</td>
<td>30,000</td>
<td>82,250</td>
</tr>
<tr>
<td>Total</td>
<td>1,301,564</td>
<td>1,601,184</td>
</tr>
</tbody>
</table>

**Source:** Ministry of Water and Irrigation.

150. The access to water initiatives both for domestic use and for irrigation have increased the number of families that have improved water for various activities, improved health status, improved housing especially in rural areas, improved economic base of areas with irrigation schemes, increased food availability and lower incidence of malnutrition and water borne related ailments.

16. **Increase in financial investments in the water sector**

151. Financial investments in the water sector have increased steadily since 2002. Budgetary allocations to the water sector have increased by more than 200 per cent in the last five years (2006/07 to 2010/11), with the development allocation increasing by 252 per cent, while the recurrent expenditure budget has maintained a lower growth rate of 93 per cent.

152. In the Water Services sub-sector, the Government has spent over Kshs 60 billion between 2008 and 2012 to upgrade water and sanitation services infrastructure countrywide, thereby bringing improved and reliable water and sanitation services to nearly seven million additional people. In the 2010/2011 fiscal year, the sector received Kshs 28.6 billion which was up by 16 per cent from the previous year. Within this allocation, the development budget was increased by 41 per cent which then took up 85 per cent of the funds allocated to the sector. Recurrent expenditure increased by 28.5 per cent. Of the funds earmarked for water management and services, the Government disbursed 94 per cent of its allocated funds while development partners disbursed 57 per cent of their earmarked funds. For the period 2011/2012 financial year, a total of Kshs 30.3 billion was spent on water development.

153. The table below indicates actual funds received in the water sector.

<table>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Recurrent</td>
<td>2,667,000,000</td>
<td>3,298,000,000</td>
<td>3,506,000,000</td>
<td>4,012,100,000</td>
<td>5,399,500,000</td>
</tr>
<tr>
<td>Development</td>
<td>6,201,000,000</td>
<td>9,432,000,000</td>
<td>15,045,000,000</td>
<td>20,652,00,000</td>
<td>23,200,000,000</td>
</tr>
<tr>
<td>Total</td>
<td>8,868,000,000</td>
<td>12,730,000,000</td>
<td>18,551,000,000</td>
<td>24,664,100,000</td>
<td>28,599,500,000</td>
</tr>
</tbody>
</table>

**Source:** Ministry of Water and Irrigation.
154. This meant that most of the money allocated to the water sector went into development initiatives as opposed to funding recurrent costs. By extension, more Kenyans were able to benefit from local initiatives that improved the access and quality of water.

17. Right to adequate housing

The Committee recommended that the State party consider including a provision in its new draft Constitution to ensure that evictions are only used as a last resort, adopt legislation or guidelines strictly defining the circumstances and safeguards under which evictions must take place, in accordance with the Committee’s General Comment No. 7 on forced evictions (1997), and ensure that each victim of forced evictions is provided with adequate alternative housing or compensation and that he or she has access to an effective remedy.

155. Article 43 (1) (b) of the Constitution recognizes every person’s right to accessible and adequate housing. This is an essential component in reaching the country’s full development potential. Despite Government efforts, demand still outstrips supply thereby making housing expensive.

156. The rural population accounts for 67.7 per cent of the total population with and the urban population at 32.3 per cent. The homeless are estimated to be 0.05 per cent nationally, comprising 85 per cent male and 15 per cent female. The population living in informal settlements in Nairobi is 36.5 per cent (54 per cent male and 46 per cent female). In Mombasa, 23 per cent of the population lives in informal settlements. In Kisumu, the number is higher with 56 per cent living in informal settlements, 51 per cent of which is male and 49 per cent female.

157. While the vast majority of the population lives in rural areas, Kenya is experiencing a rapid urbanisation which currently stands at about 4 per cent per annum. This is generating greater pressure for affordable and adequate housing than the market can supply.

158. The Government is reviewing the National Housing Policy in order to align it with the Constitution. To accelerate the realisation of the right to housing, the Policy seeks to entrench social housing, emergency housing and cooperative housing as a specific measure to aid in financing low-income housing as well as ensuring sustainable research on housing matters. Data collection for the National Housing Survey 2012 has been completed develop to guide sector policies, regulations and development.

18. Protection from eviction

159. Prior to 2002, a leading cause of homelessness and informal settlements was corrupt allocation of land and forceful eviction of residents without notice and without compensation. The 2010 Constitution, in recognition of Kenya’s historical challenges with land ownership, use and access, guarantees the right to own property or to use it in good faith even without title; and where compulsory acquisition occurs, the State must give just and full compensation. Furthermore, the Government of Kenya has drafted the Eviction and Resettlement Bill 2012 which provides guidelines on how evictions are to be done and the responsibility for resettling the evicted population.

160. The Judiciary recently established a precedent in protection of the right to property even against Government eviction in the 2011 case of Ibrahim Sangor Osman v. Minister of State for Internal Security and Provincial Administration and Others. The Court determined that administration officers had violated the rights of residents whom they informed that the land they were occupying would be compulsorily acquired as a road reserve and 21 days later demolished their houses. The court ordered reinstatement of the complainants onto their land and restitution for the demolished houses, and clearly stated that eviction must be preceded with adequate notice and opportunity for potential victims to go to court.

19. Pro-poor housing initiatives

161. The Kenya Informal Settlement Improvement Programme (KISIP) 2011-2016 has been introduced through a partnership between the Kenya Government and the World Bank to undertake tenure regularisation and installation of social and physical infrastructure in selected informal settlements and planning for urban growth in 15 municipalities.

162. The Ministry of Housing is now reviewing the Housing Policy to include social housing. Other legislative measures under progress include include the Housing Bill, the Built Environment Bill, the Evictions and Resettlement Procedures Bill, the Landlord and Tenant Bill, the Metropolitan Areas Bill, the Spatial Planning Bill to repeal the Physical Planning Act, the Community Land Bill and the Public Private Partnerships Bill 2012. The National Slum Upgrading and Prevention Policy is also being developed to guide the slum upgrading and prevention work.

163. Under the National Slum Upgrading and Prevention initiative, 600 housing units were constructed in Kibera decanting site (initial relocation site before actual slum upgrading) with a trunk sewer line, 1,800 households from Soweto East Zone A, part of Kibera informal settlement were relocated. In addition, a 0.5 km access road was completed within Kibera while 200 acres of land was opened for housing development through provision of housing infrastructure facilities. Construction of 915 housing units in Soweto East Zone A with associated physical and social infrastructure was launched on 6th March 2012 by the President and is expected to be completed by August 2014. Once the project is complete it will benefit 1,500 households directly.

164. The Government is also implementing construction of 2,592 housing units using appropriate building technology in Turkana County for internally displaced persons. The units are scheduled for completion in 2013.
Growing at a rate of 3 per cent annually, the population will continue to place a huge demand for health services. This requires greater responsibility for healthcare delivery to be placed on hospitals, health centres and dispensaries. However, with Kenya’s population increasing, the government has put in place several measures including placing greater emphasis on preventive healthcare and devolving healthcare funding and management to the lowest levels of government to enable provision of quality, efficient and affordable health care at the highest affordable standards to her citizens. The Government has therefore put in place several measures including placing greater emphasis on preventive healthcare and devolving healthcare funding and management to those institutions that are closer to the population. The focus of the Policy is to “provide equitable, affordable and quality health and related services at the highest attainable standards to all Kenyans. It is designed to take the country beyond the traditional health services approach towards focus on health using a primary health care approach which remains the most efficient and cost-effective way to organise a health system. The focus of the Policy applies a human rights based approach, a strategy that will enable rights holders enjoy the highest possible level of health and consequently achieve the right to health.”

Consequently, the Ministries of Medical Services and Public Health in putting together the new Kenya Health Policy, new National Health Sector Strategic Plan, and the Second Health Sector Plan of the Kenya Vision 2030 have considered how to interpret this right vis-à-vis their services and particularly under the devolved structure of government. In particular, the Kenya Health Policy (2012-2030) aims at “attaining the highest possible health standards in a manner responsive to the population needs”. The Policy seeks to achieve this goal through supporting provision of equitable, affordable and quality health and related services at the highest attainable standards to all Kenyans. It is designed to take the country beyond the traditional health services approach towards focus on health using a primary health care approach which remains the most efficient and cost-effective way to organise a health system. The focus of the Policy applies a human rights based approach, a strategy that will enable rights holders enjoy the highest possible level of health and consequently ensuring that they are able to participate in development activities maximally as envisaged in Kenya Vision 2030. Six policy objectives are defined:

• Eliminating communicable conditions;
• Halting and reversing the rising burden of non-communicable conditions;
• Reducing the burden of violence and injuries;
• Providing essential health care;
• Minimising exposure to health risk factors; and
• Strengthening collaboration with health related sectors.

In addition, Kenya has introduced the Health Bill which is intended to: consolidate the laws relating to health; provide for regulation of health care service and health care service providers; provide for establishment of national regulatory institutions; coordinate the inter relationship between the national and county health institutions; establish a coordinating agency of professionals within the health industry; and provide for attainment of the basic right to health which remains the most efficient and cost-effective way to organise a health system. The focus of the Policy applies a human rights based approach, a strategy that will enable rights holders enjoy the highest possible level of health and consequently ensuring that they are able to participate in development activities maximally as envisaged in Kenya Vision 2030. Six policy objectives are defined:

• Providing essential health care;
• Minimising exposure to health risk factors; and
• Strengthening collaboration with health related sectors.

Furthermore, the adoption of the Sector Wide Approach to health has provided a framework for structured engagement for all health sector stakeholders. Notable developments in this regard include the adoption of joint annual
implementation planning and annual review of sector performance. Through these processes, it has increasingly become possible to determine the level of donor and partner resources available for health through either budgetary support or off budget, which is important for determining the sector’s resource envelope. Other advances include the development of a national health infrastructure plan to guide investments in health; the restructuring of the National Medical Supplies Agency to facilitate timely procurement and distribution of medical supplies; a human resource strategy linking demand and supply for human resources; encouragement to manufacturers to produce drugs and related commodities locally to reduce the cost of healthcare; and strengthening of the referral system through provision of autonomy for district and provincial hospitals.

175. Other notable legal developments impacting the health sector include the entry into force of the HIV and AIDS Prevention and Control Act (No. 14 of 2006) on 30th March 2009 as had been recommended by the Committee in its Concluding observations. There is now in place a legal framework for the prevention, management and control of HIV and AIDS.

176. The Cancer Prevention and Control Act (No 15 of 2012) has also been enacted. This is particularly important because cancer has become a major killer in Kenya and only one public hospital, Kenyatta National Hospital, offers cancer treatment. The new law commits to “promote access to quality and affordable diagnostic and treatment services for persons with cancer”. Resources to back this up are expected to be allocated in the MTP currently under development.

177. For persons with disabilities, Section 20 of the Persons with Disabilities Act (No. 14 of 2003) mandates the National Council for Persons with Disabilities to monitor the provision of health care to persons with disabilities so as to ensure that the services are devoid of any form of discrimination. It also is supposed to ensure that the programmes of the Ministry of Health are geared towards prevention of disability; early identification of disability; early rehabilitation of persons with disabilities; enabling persons with disabilities to receive affordable rehabilitation and medical services in public and privately owned health institutions; availing essential health services to persons with disabilities at an affordable cost; and availing field medical personnel to local health institutions for the benefit of persons with disabilities. The Government’s commitment can also be found in several policies. Indeed, the National Reproductive Health Policy, 2008 recognises that women with disabilities are also entitled to access reproductive health services. It has identified the need to improve the sexual and reproductive health of youth with disabilities.

2. Measures relating to access

178. Accessibility to health facilities in Kenya is estimated at 52 per cent based on the 5km radius norm although there are variations across the country especially in the Northern part of Kenya. To address the situation, during the reporting period, the health related flagship projects on improving health infrastructure network in the country made useful access related gains with inputs from the CDF that has aided facility infrastructure development/upgrading and from the Economic Stimulus Package for hiring of staff for rural health facilities which has seen a total of 3,866 nurses recruited under the Economic Stimulus Package and posted to health centres and dispensaries within constituencies countrywide. This is in comparison with the flagship project of recruiting 20 nurses per constituency starting September 2009.

179. There has been an increase in the number of hospitals from 167 in 2008 to 275 in 2012. Moreover, funding to the health sector has also been increasing. Enhanced resource allocation to the Ministries of Health which is also partly attributable to a rise in development funding by development partners, has seen an increase (in absolute numbers) from Kshs Million 34, 845 in 2008/09 to 47,011.5 in 2009/10; 55,155.5 in 2010/11 to 64,019 in 2011/12; and 86,968.3 in 2012/13. However, this allocation remains inadequate as the overall allocations have remained at 6 per cent of the overall Government budget for the last three years.

The Committee, in its Concluding Observations, in Paragraph 32 expressed its concern over the high maternal, infant and under-five mortality rates and made a number of recommendations to address the situation.

180. Investments during the reporting period and policy measures such as free access to healthcare in public hospitals for children under five years including for children with disabilities have resulted in remarkable achievements in the reduction of under five mortality from 115 per 1,000 live births in 2003 to 74 per 1,000 live births in 2008/9 and infant mortality from 77 per 1,000 live births to 52 per 1,000 live births in the same period. The proportion of children fully immunised against communicable diseases increased from 64 per cent in 2005/06 to 77 per cent in 2009. However, the declining maternal health indicators are worrying. Maternal mortality ratio has deteriorated from 414 in 2003 to 488 deaths per 100,000 live births in 2008-09; only 43 per cent of children are delivered in a health facility. Births attended by skilled health personnel declined from 51 per cent in 2007 to 43 per cent in 2010/11.

3. Measures relating to affordability and equity

181. In the past five years, through its Health Services Sector Fund, funds pooled from both Government and private sector actors have been disbursed directly to health centres across the country with the aim of increasing access to health services, addressing equity in health service delivery and improving quality and responsiveness of health systems and services to the needs of the population. It also aims to increase efficiency and effectiveness in the management of financial resources by empowering the Facility Management Committees, reducing bureaucracies in the disbursement of financial resources to levels I-III facilities. Level I refers to community level interventions, level II refers to dispensaries and Level III to health centers. This has strengthened the intended focus on health care. Between November 2010 and 30th June 2011, a total of Kshs 353,352,000 had been disbursed to 653 Health Centres.

4. Reproductive health

The Committee recommended that the State party ensure affordable access for everyone, including adolescents, to comprehensive family planning services, contraceptives and safe abortion services, especially in rural and deprived urban areas. These services should be affordable and accessible to all, including adolescents, with a strong focus on rural and deprived urban areas. The Committee also recommended that the State party ensure that reproductive health services are provided in a non-discriminatory manner and that services are available to persons with disabilities. It has identified the need to improve the sexual and reproductive health of youth with disabilities.
areas, by eliminating formal and informal user fees for public and private family planning services, adequately funding the free distribution of contraceptives, raising public awareness and strengthening school education on sexual and reproductive health, and decriminalizing abortion in certain situations, including rape and incest.

182. During the reporting period the Government has established the innovative Output-Based Aid Voucher system intended to contribute to reduction in both maternal and infant mortality rates by improving access to and utilisation of reproductive health services by economically disadvantaged populations. The programme was piloted in three rural districts (Kisumu, Kiambu and Kitui) and in two urban sites in Nairobi (Viwandani and Korogocho). Plans are under way to scale-up the initiative to new counties. Since its inception, the programme has reached 51 per cent of poor pregnant women in the pilot sites, an indication that the programme has registered success in increasing the proportion of institutional deliveries with a skilled birth attendant. The challenge though with this initiative is its heavy reliance on external funding. In 2013, the Government introduced a waiver of maternity fees in all public hospitals.

183. A Community strategy is also being implemented through establishment of community units and the training of community health workers to provide basic community-based services through enhancing communities’ awareness of health preventive and promotional strategies so that they adopt positive health seeking behaviour.

184. Access to affordable and essential drugs and medication is a pre-requisite for the realisation of the right to health and licensing the use of generic drugs is one way to ensure affordability. However this should be balanced with the reality that ridding the market of counterfeit drugs also contributes towards this goal. In a move to fight counterfeit drugs, Kenya enacted the Anti-Counterfeit Act (No. 13 of 2008) to prohibit trade in counterfeit goods including drugs. But in April 2012, the High Court declared the Anti-Counterfeit Act a violation of the right to the highest attainable standard of health in as far as it limited access to generic medicines and drugs. In 2011, the State launched the National Hospital Insurance Fund (NHIF). The NHIF has been the main vehicle for this effort and since 2006 it has increased its membership of formal and informal sectors alike and unlike private insurance companies provides in-patient cover to the elderly.

185. While universal health coverage remains a key challenge in Kenya the Government remains committed to its provision. In 2004 and again in 2011, there have been serious but unsuccessful efforts to enact laws providing for universal health coverage principally due to the strong diversity of quality care provided by existing actors and weak purchasing power due to high levels of poverty. However efforts to move towards universal coverage continue to be implemented progressively. The NHIF has been the main vehicle for this effort and since 2006 it has increased its membership of formal and informal sectors alike and unlike private insurance companies provides in-patient cover to the elderly.

186. One of the most ambitious and laudable first steps that has been undertaken by the Government through NHIF is the roll out of a medical cover for civil servants which began in 2012. It is a comprehensive medical insurance cover for its employees and their eligible dependants. The programme offers out-patient and in-patient services to teachers, civil servants and members of disciplined forces in a cover worth Kshs 4.5 billion annually. However, accountability issues in the Fund remain a challenge in the achievement of universal health coverage.

187. As the country readies itself for government restructuring following the first general elections since the promulgation of the Constitution, the health sector has had several reviews of performance, addressing challenges and aligning its targets to the Constitution as well as rationalising role sharing between the National and County Governments. Among key challenges identified are the institutional deliveries which are at a low of 43 per cent, inadequate universal health coverage, inadequate budgetary allocation and improper resource use. It is expected that the new MTP will set new targets for addressing these challenges progressively.

Article 13. Right to education

188. The State does realise that education is the key for empowering the most marginalised and vulnerable individuals in society. Marginalised individuals like the girl-child, pastoralists and persons with disabilities also tend to have the least possibility of acquiring an education; and the State continues to make conscious and concerted efforts on an affirmative basis to enable these individuals to best exploit their life-chances alongside their other Kenyan peers through primary, secondary and tertiary education.

189. Investment in FPE and Free Day Secondary Education (FDSE) has remained a key flagship programme, coming among the top five recipients of public expenditure in the last five years. Since the introduction of FPE enrolment has improved dramatically and a combination of other measures have been undertaken to enhance progressive realisation of this right.
1. Measures taken to fulfill the right

190. The Constitution in Article 43 (1) (f) provides that every person has the right to education. This right is reiterated in Article 53 (1) (b) which provides that children have the right to basic and compulsory education; Article 54 (1) (b) provides that persons with disabilities have the right to access educational institutions; Article 55 (a) provides that the State shall ensure that youth have access to relevant education and training; and Article 56 (b) provides that the State shall provide minorities and marginalised groups with special opportunities in education. The Children’s Act also acknowledges and protects every child’s right to education.

2. Legal and policy reforms

191. To give effect to the Constitution, the Basic Education Act (No 14 of 2013) has been passed into law to regulate the provision of basic education and adult basic education in the country. The law also clarifies the roles of the National and County Governments as regards education as provided for in the Fourth Schedule of the Constitution. Under this Schedule, the National Government shall be responsible for setting educational policy, standards, curricula, examinations and the granting of university charters, tertiary education, institutions of research and higher learning, primary and secondary schools as well as special education. The County Governments on the other hand are in charge of pre-primary education, village polytechnics, home craft centres and child care facilities.

192. Two key policy documents have been formulated. The finalisation of the Sessional Paper on Education titled Aligning Education and Training to the Constitution of Kenya and Kenya Vision 2030 (May 2012) has presented guidance on the areas of reforms and institutional strengthening. The Paper proposes reforms that cut across the entire education sector and include policies and strategies for addressing institutional reforms, management and financing of education, the curriculum, teacher education, teacher development and management, and strategies for bringing digital technology within the reach of every Kenyan child.

193. The Sessional Paper on Science, Technology and Innovation aims at providing the national policy framework to acquire, develop and promote science, technology and innovation for national transformation to a knowledge economy. It aims to mainstream application of science, technology and innovation for national transformation to a knowledge economy. It aims to mainstream application of science, technology and innovation in all sectors and processes of the economy to ensure that Kenyans benefit from acquisition and utilisation of available capacities and capabilities to achieve the objectives of Kenya Vision 2030. However, Kenya acknowledges the challenge of lack of integration of culture in the formal education system which impedes cultural creativity and expression.

3. Enhancing access

194. The Government recognises the significant social and economic payoffs derived from investment in Early Childhood Development and Education (ECDE) including overcoming children educational disadvantages for poor children, supporting parents and increasing female employment because of the level of care needed at this level of education. Previously investment in this area has been left mostly to the household, private sector and religious organisations. In 2012, however, public investment began and the processing of capitation grants to support ECDE with a budget of Kshs 1.6 billion to about 19,000 public ECDE centres with 1.4 million children commenced.

195. Enrolment in the ECDE increased from 1.914 million (967,544 boys and 946,678 girls) in 2009 to 2.13 million (1,100,890 boys and 1,092,181 girls) in 2010. The Gross Enrolment Rate (GER) increased from 60.2 per cent (61.6 for boys and 58.7 for girls) in 2009 to 60.9 per cent (60.3 for boys and 61.4 for girls) in 2010. The Net Enrolment Rates (NER) increased from 40.4 per cent (40.8 per cent for boys and 40.0 per cent for girls) in 2009 to 60.9 per cent (60.3 for boys and 61.4 for girls) in 2010. The gender disparity in enrolment has been improving in favour of girls.

196. Likewise at the primary education level the GER increased from 108.9 per cent (118 and 106 per cent for boys and girls respectively) in 2007 to 110.0 per cent (112.8 per cent and 107.2 per cent for boys and girls, respectively) in 2009, and dropped slightly to 109.8 per cent (109.8 per cent and 109.9 per cent for boys and girls, respectively) in 2010. The NER increased from 91.6 per cent (94.1 per cent and 89.0 per cent for boys and girls, respectively) in 2007 to 92.9 per cent (93.6 per cent and 92.1 per cent for boys and girls, respectively) in 2009 and then dropped marginally to 91.4 per cent (90.6 and 92.3 per cent for boys and girls, respectively) in 2010. The gender disparity in enrolment has been improving in favour of girls. The gender parity index at primary level was 0.97 in 2007, then 0.98 in 2009 while in 2010 it was 1.02.

197. To improve availability of opportunities for education, the Government has supported the construction and rehabilitation of existing facilities and for pastoralist areas, provision of boarding and mobile schools. In what the MTP called the flagship projects in the education sector for 2009/2010, two model schools per constituency (making 420) were supported with Kshs 3.5 million per school to expand opportunities for the increased number of enrolled pupils. Subsequently, for example, the NER for North Eastern Province (now Garissa, Wajir and Mandera Counties) was 40.3 per cent (41.5 per cent male, 38.9 per cent female) against an MTP NER target of 38.6 per cent for 2010 under Kenya Vision 2030. This shows that the target was achieved and this was attributed to continued implementation of FPE as well as sensitisation of parents/communities.

4. Equity and participation measures

198. The Committee recommended that the State party (a) increases the funds allocated to bursaries and textbook subsidies for children from poor families, as well as to school transportation and mid-day meals in remote rural and deprived urban areas; (b) facilitates the readmission of girls who dropped out of school due to pregnancy by supporting them in finding adequate arrangements for the care of their babies; (c) ensure adequate access for nomadic children to...
mobile schools, including in the North Eastern Province; and (d) cater for the special needs of children with disabilities and integrate refugee children and internally displaced children in the regular school system.

199. During the reporting period, and in response to the Committee’s recommendation, special measures have been taken to strengthen the school feeding programme which continued to provide mid-day meals to approximately 1.2 million pre-primary and primary school children in 64 arid and semi-arid districts and informal settlements of Nairobi.

200. The Government recognises that gender mainstreaming is a social justice issue and has therefore continued to seek ways of identifying ways of responding to the needs of women so as to advance gender equity in education. In 2007, the Government developed the National Gender Policy in Education with the aim of ensuring gender responsive education. During the reporting period, under this Policy, there have been initiatives aimed at providing grants for the construction of laboratories and supply of equipment to girls’ schools as a way of improving girls’ performance in science and technology. The policy of allowing girls to join higher institutions with lower grades than boys continues to operate. Girls are also being provided with sanitary towels to enable them to participate in the learning process without missing school attendance during menstruation.

201. Another measure that has been taken and which is in line with the Committees recommendations relates to increasing bursaries and textbook subsidies for children from poor families. During the reporting period, the textbook-pupils ratio (TPR) for lower primary school has improved from one textbook for more than 10 pupils before 2003 to 1:3 in 2007, 1:2 in 2008, remaining at 1:2 in 2009 and 1:1 in 2010. For upper primary TPR has improved from 1:2 in 2007 to 1:1 in 2008 and 1:1 in 2009 and 2010, thus improving the quality of education.

202. However there is still an on-going challenge with regard to the teacher pupil ratio despite the fact that the Government has recruited 29,060 teachers in the last five years. Shortage of teachers means that many schools have a pupil to teacher ratio above 40:1, with as high as 85:1 ratio in the high potential and urban areas. On the average, the pupils to teacher ratio at primary level moved from 44:1 in 2007 to 45:1 in 2008, 2009 and 2010.

5. Catering for special needs of children

203. The Committee’s recommendation that the Government takes measures to cater for special needs of children with disabilities, and integrate refugee children and internally displaced children in the regular school stem has been happening progressively. Measures have been taken to enhance education in the informal settlements, with the Government providing capitation grants to 474 non-formal schools. However, this was below the MTP target of 700.

204. With regard to children with disabilities, the Government has progressively established programmes in various institutions to cater for these learners. There are presently 1,882 primary and secondary schools in Kenya that provide education for learners with special needs. These schools have 50,744 enrolled learners with disabilities. 24,000 of these learners are in special schools while the rest are in regular schools. This increase has been realised as a result of the efforts made to include learners with disabilities in regular schools through FPE. There are also 15 special secondary schools and integrated programmes.

205. With regard to internally displaced children, the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act places the primary responsibility for the provision of economic and social rights which include education on the Government.

206. Refugee children are provided with educational opportunities within their areas of residence as part of the international assistance that Kenya receives. They are provided with primary, secondary, technical as well as vocational education and there are also university scholarships through UNHCR. The schools within the refugee settings follow the Kenyan curricula which enable refugees to acquire academic certificates that they can use once they return home or proceed to be resettled abroad.

6. Secondary education: enhancing availability of opportunities

207. During the reporting period, the flagship projects for 2008/12 aimed at constructing and fully equipping 560 secondary schools and rehabilitating existing ones. In the first year alone of the MTP, funds covering 200 such schools had been disbursed. Another Government initiative that has complemented this effort is the CDF that has also facilitated construction of many district schools thereby increasing access.

208. Indeed the number of secondary schools has increased from a total of 6,485 secondary schools in 2007 to 6,971 in 2009 and 7,308 in 2010. Enrolment grew from 118 million students in 2007 (639,393 boys and 540,874 girls) to 1.5 million (804,119 boys and 695,896 girls) students in 2009 and, further, to 1.7 million (916,302 boys and 792,818 girls) students in 2010.

209. The GER for secondary increased from 38.0 per cent (41.4 per cent for boys and 34.6 per cent for girls) in 2007 to 45.3 per cent (49.0 for boys and 41.8 for girls) in 2009. In 2010, the GER increased to 47.8 per cent (50.9 per cent for boys and 46.3 per cent for girls. The NER recorded an increase from 28.9 per cent (29.8 per cent for boys and 27.9 per cent for girls) in 2007 to 35.8 per cent (36.3 per cent for boys and 35.1 per cent for girls) in 2009. In 2010, the NER dropped to 32.0 per cent (32.4 per cent for boys and 32.9 per cent for girls).

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7. Measures relating to affordability of secondary education

210. In 2008, the Government put in place and started implementing FDSE which provides financing to take care of tuition with a view to making secondary school education affordable. There is also a secondary bursary scheme meant for vulnerable groups including orphans, girls and children from poor families in informal settlements, poverty-stricken families in high potential areas, and families in ASAL districts. Although the Government has introduced FDSE, the programme went on to assist the poor to meet other secondary education expenses not catered for by the Government during the period under review and a total of Kshs 2.7 billion was awarded to 357,276 students in all the 210 constituencies. The Government continues to implement FDSE towards progressive realisation of free secondary education across the country. Further, the development of “Return to School Guidelines” are ensuring that schools are able to readmit girls who may have dropped out due to pregnancy or other factors.

8. Providing opportunities for further education and training

211. One of the key goals of the Kenya Vision 2030 is to ensure that every Kenyan has decent and gainful employment. It is therefore imperative that education is relevant and prepares learners for the job market. To move towards this goal, the Government initiated the construction of 13 new public Technical and Vocational Education and Training (TVET) institutions across the country to expand access to TVET. In addition, in order to provide quality and relevant skilled human resources in the post-secondary school level cadre, the Ministry of Education established a Centre of Excellence Programme where technical training institutions were provided with modern equipment as well as the upgrading of teaching staff, with a view to producing the best graduates for the market. Under the Economic Stimulus Package of 2009/10 a total of Kshs 2.1 billion was utilised for the construction of new laboratories and workshops in all TVET Institutions under the Ministry. The number of registered public and private TVET institutions has since increased to a total of 813 TVET institutions of which 493 have full registration status as at June 30th 2012.

212. Other measures in this sector include the introduction of a bursary scheme; establishment of standards; and the development of curricula. In regard to standards, the Directorate of Technical Accreditation and Quality Assurance (DTAQAA) was established in May, 2008 to discharge the quality assurance and standards functions. This has enabled the Ministry of Education to coordinate and develop technical training through facilitation and supervision of TVET institutions, their registration and approval of programmes. Additionally, a TVET Accreditation Handbook with criteria for assessment of TVET institutions has been developed to protect the quality of education provided in these institutions.

213. With regard to curricula, in 2010/2011 the Ministry prepared a “TVET Curriculum Development Standard” with a view to ensuring that any curricula developed is relevant to the job market thereby making it easier for graduating students to be absorbed in the world of work after graduation.

214. To secure and enhance these gains, the Technical and Vocational Education and Training Bill, 2012 was introduced at the close of the 10th Parliament. It is expected that the 11th Parliament will enact this into law.

9. Reducing cost barriers to enhance access to higher education

215. Attainment of higher education unleashes huge public benefits that are critical to a developing economy like Kenya. The State recognises the importance of higher education and has made enormous legislative, policy and institutional investments in the sector so that as many students as qualify to enrol in universities have the opportunity to do so. The Universities Act (No 42 of 2012) has set the framework for higher education reforms which includes the incorporation of private universities into the selection body that will in future pick State-funded students to both public and private universities. Further, Adult and Continuing Education are now included in the Basic Education Act (No. 14 of 2013).

216. Consequently the Government has created the necessary supportive environment for private sector investment in higher education and also invested in public universities growth. The sector has witnessed tremendous growth in terms of enrolment and the numbers of universities and university constituent colleges. The number of private universities has increased from 13 in 2003 to 26 in 2012, while the number of public universities and university constituent colleges increased by 340 per cent, rising from six universities and one university constituent college in 2003, to seven fully fledged public universities and 24 university constituent colleges in 2012. The total number of universities in the country now stands at 60 institutions and all the 24 university colleges may apply for accreditation into fully fledged national public universities under the provisions of the Universities Act. While this increase will somewhat ease Kenya’s crisis of admissions, more still needs to be done to accommodate all qualifying students. Currently, only about half get places in public universities.3

217. The increase in enrolment at higher learning institutions has been accelerated by the introduction of FPE and FDSE programmes in 2003 and 2008 respectively, which trend is expected to continue. As at June 2012, the number of university students was estimated at 218,862 spread across the seven public universities.

218. During the reporting period, the Higher Education Loans Board continued to give financial support to university students. During the fiscal year 2011/2012, a total of Kshs 4,810,876,250 was disbursed to 106, 136 Kenyan students pursuing undergraduate and post graduate university education locally and within the EAC.

219. This growth has however generated issues relating to the quality of education being offered in these institutions which is the single most challenging issue that the Government is faced with but which the newly enacted Universities Act has sight of.

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Article 15. Right to take part in cultural life

220. Cultural expression and respect for the diverse cultural practices in Kenya has historically had the requisite space for existence though the institutional infrastructure important for growth and development has been inadequate. However, with the passage of the Constitution, culture has received renewed prominence and is now recognised in the Constitution under Article 11 which terms it as “the foundation of the nation and the cumulative civilisation of the Kenyan people and nation”. Article 44 provides for the right of every person to use the language of the person’s choice and to participate in their cultural life.

221. In 2008 culture and related issues were moved to a dedicated Ministry, the Ministry for National Heritage and Culture. In the new Ministry, is a dedicated Department of Culture mandated with the responsibility of coordination and promotion of all cultural activities in the country and internationally.

Measures taken to fulfill the right

The Committee recommended that the State party recognizes the Nubians and the Ogiek as distinct ethnic communities, as well as their right to the preservation, protection and development of their cultural heritage and identity.

222. In Kenya, recognition of the distinct ethnic groups is an important part of any people’s cultural determination. The Government recognises this and during the 2009 Census which was made operational under the banner of “Nipo! Natambulika!” (Loosely translated as “I am here, I am recognised”), provided for individuals to determine and state their preferred identification of ethnic affiliation. Previously unidentified small ethnic groups including the Yaaku, Nubians, Ilchamus and Sakuye communities were captured in the census as such. The choice to self-identification also included a category of individuals who were opposed to being identified as affiliated to any ethnic group. These were given the option of being captured as just “Kenyan”.

223. At the policy level, the National Policy on Culture and Heritage has been developed. The Policy operationalizes the constitutional recognition of Kiwahili as an official language. Kiswahili has been a national language and its recognition as an official language will significantly enhance access to official documents and therefore access to information to Kenyans who would otherwise have been excluded. Further, under Article 7, the State is enjoined to promote the diversity and the languages of the people of Kenya, including use of Kenya Sign language, Braille and other communication formats.

224. The Constitution in Schedule 4 also requires county governments to recognize and promote the role of culture in governance and development in the counties. The Government through the Kenya Copyright Board is developing a bill to protect traditional knowledge and traditional cultural expression and the question of copyright and scientific research. The Department of Culture has undertaken several programmatic initiatives including the following:

- The construction of 16 community cultural centres is on-going with a budgetary allocation of Kshs 294,355,000 over five years since 2009. When fully operational, these centres are expected to provide full and sustained support for the development of the diverse cultural expressions in the country;
- Supporting Arts exhibitions for non-educational institutions and for cultural practitioners including exchange programmes for poor rural schools;
- Coordination of about 50 Community Cultural Festivals annually in various regions of the country in partnership with local communities including the marginalised and people with disabilities. These programmes act as avenues for promoting and preserving the rich cultural heritage as well as facilitating participants in enjoying their cultural life and building national cohesion and integration.

225. After ratifying the 2003 and 2005 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the Convention on the Protection and Promotion of Diversity of Cultural Expressions, the Department has initiated community projects on safeguarding of the traditions and practices associated with several communities. The traditions of the Miji Kenda community, the Isikhuti Dance among the Luhya, the rites of passage among the Maasai and the skills of the Wamunyu wood carvers among the Kamba are some of the unique cultures which will be safeguarded under UNESCO funding.

226. Kenya has a big challenge in the area of culture due to lack of cultural data and statistics to support its development for planning purposes, as it falls in the informal sector. Due to its informal status, the level of technical and financial support is minimal leading to inadequate infrastructure, research, and lack of lobbying skills for approval of cultural legislative frameworks. As a result, the sector which has a lot of potential has not had a major impact in addressing pertinent cultural practices and traditions affecting gender, FGM, negative ethnicity, health, tourism, employment and children rights even though the UN recognises culture as the fourth pillar.

227. However, the Government is committed to ensuring data for the cultural sector is developed. In 2012, Kenya partnered with the EAC Partner States in conducting a national mapping study on creative cultural industries. Already a pilot study has been successfully carried out and a road map for the full national study has been finalised. This will result in development and enjoyment of the cultural creative industries sector and enhanced linkages between culture and mainstream tourism sector to ensure exploitation of cultural heritage is beneficial to every Kenyan. Further, research, utilisation and development of indigenous knowledge and appropriate technology will be an essential ingredient for encouraging innovations and finding community-based solutions to challenges facing the nation as well as setting the foundation for sustainable development. Other benefits of developing the culture sector will be empowering the communities to safeguard and promote the environment by tapping on indigenous knowledge systems on environmental management and integrating culture to the education system which leads to creativity and scientific innovation.
LIST OF ISSUES

List of issues in relation to the combined second to fifth periodic reports of Kenya
Committee on Economic, Social and Cultural Rights

List of issues in relation to the combined second to fifth periodic reports of Kenya

1* Adopted by the pre-sessional working group at its fifty-sixth session (12-16 October 2015).
i. General information

1. Please provide information on the number of cases in which the rights contained in the Covenant were directly applied in domestic courts, and on the nature of those rights and the extent to which they were applied.

2. Please provide information on the measures taken to strengthen free legal aid schemes to support individuals in bringing their cases to the competent court when their economic, social and cultural rights are violated, including information on budget allocations to free legal aid schemes and the adoption of the Legal Aid Bill of 2013.

3. Please provide information on the concrete steps taken to guarantee affected communities the protection and promotion of their economic, social and cultural rights when entering into contracts with natural resource extraction companies.

4. Please provide information on the impact that the free trade agreements that the State party has concluded, including the economic partnership agreement with the European Union, the Investment Agreement under the Common Market for Eastern and Southern Africa and bilateral trade and investment agreements, have had on the livelihood of small-scale farmers, the employment of workers, labour rights, the right to food and the right to health.

5. Please provide updated and compiled statistical data on:
   (a) Annual public spending in the areas of social protection, housing, water and sanitation, health and education, in terms of amount and percentage of national budget;
   (b) The percentage of women in Parliament, the judiciary and senior civil service positions;
   (c) Unemployment rates, disaggregated by sex, age and disability, and on employment rates in the formal and informal economy;
   (d) Ratios of households with access to improved water resources and sanitation in urban and rural areas as well as in informal settlements and arid and semi-arid land areas;
   (e) Health indicators, including infant mortality, under-5 mortality, maternal mortality and immunization rates, and the number of medical professionals by county;
   (f) Net enrolment rates in primary schools, including among children with disabilities, children in informal settlements and children in rural areas, transfer rates from primary school to secondary school and the number of children out of school, disaggregated by sex.

ii. Issues relating to general provisions of the Covenant (arts. 1-5)

Article 1. (2) – Free disposal of natural wealth and resources

6. Please provide information on the implementation of the ruling of the African Commission on Human and Peoples’ Rights in the case of Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya and the participation of the Endorois people in the implementation process.

7. Please provide information on the case of forced eviction of Masai from a settlement in Narasha, which was brought before court in July 2013. Please explain what steps the State party has taken to ensure that the contractors of large-scale development projects, such as the Lamu Port-Southern Sudan-Ethiopia Transport Corridor project, obtain the free, prior and informed consent from the indigenous peoples affected and adequately compensate those peoples for loss of traditional land and livelihood opportunities.

Article 2. (1) – Maximum available resources

8. Please provide information on the corruption cases filed with the Ethics and Anti-Corruption Commission, including statistical data, by year, on the number of cases filed and investigated and that led to prosecutions, as well as on sentences passed on the perpetrators. Please state whether complaints have been filed against ministers or senior civil servants and, if so, provide information on the number of such cases and the sentences passed on those found guilty. Please provide information on the measures taken to strengthen the mandate, and the human and financial capacity, of the Commission and other related anti-corruption bodies. Please explain the measures taken to provide protection against reprisals for victims of corruption and their lawyers, anti-corruption activists, whistle-blowers and witnesses.

Article 2. (2) – Non-discrimination

9. Please provide information on the measures taken to provide durable solutions for persons who were displaced internally as a result of the post-election inter-ethnic violence in 2008 and who remain in camps for internally displaced persons. In this context, please also provide information on the implementation of the recommendations made by the Truth, Justice and
Reconciliation Commission and of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act of 2012.

10. Please provide information on the measures taken or envisaged to ensure physical accessibility for persons with disabilities. Please provide updated information on the status of the draft national action plan on accessibility and the persons with disabilities amendment bill of 2014.

11. Please provide information on the measures taken to implement the High Court judgement of July 2013, in which the freedom of movement of refugees and asylum seekers and their economic, social and cultural rights were upheld.

12. Please provide information on the measures taken to raise awareness of, prevent and combat discrimination based on sexual orientation and gender identity. Please also provide information on the measures contemplated to decriminalize same-sex relations between consenting adults.

Article 3. Equal rights of men and women

13. Please provide information on the measures taken or envisaged to enforce the recently adopted laws, including the Marriage Act of 2014 and the Matrimonial Property Act of 2013.

iii. Issues relating to the specific provisions of the Covenant (arts. 6-15)

Article 6. The right to work

14. Please provide information on the measures taken or envisaged to increase employment opportunities, particularly in the formal economy, for youth, women and persons with disabilities.

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

15. Please provide information on the level of the current minimum wage and clarify whether it is sufficient for a decent living for workers and their families. Please also clarify whether the minimum wage is applicable to all workers.

16. Please provide information on the implementation of the Occupational Safety and Health Act of 2007 and the national policy on occupational safety and health, including on resource allocation to the inspection mechanisms. Please also provide information on the inspections carried out by those mechanisms, including key areas of concern identified through inspections in the past four years, particularly in the informal economy and in the export processing zones.

Article 9. The right to social security

17. Please provide information on the national budget allocation to the implementation of the Kenya Social Protection Policy of 2011 and on the measures taken or envisaged to secure sufficient funding for social protection programmes under the Policy.

18. Please clarify whether the National Social Security Fund includes non-contributory schemes of social assistance. Please provide information on the scope and coverage of the Fund and the level of benefits people receive from the Fund.

19. Please provide information on the steps taken or envisaged to re-establish the National Hospital Insurance Fund as a fully fledged comprehensive national health insurance scheme.

Article 10. Protection of the family, mothers and children

20. Please provide information on the measures taken to enforce the provisions of the Protection Against Domestic Violence Act 2015.

21. Please provide information on the concrete measures taken to combat female genital mutilation, polygamy and early marriage.

22. Please provide information on the measures taken to prohibit child labour and sexual exploitation of children, including the enforcement of the Children Act and the Sexual Offences Act and the enactment of the Children Act amendment bill of 2014, awareness-raising campaigns, the adoption and implementation of national policy on child labour and the provision of assistance for children engaged in labour.
**Article 11. The right to an adequate standard of living**

23. Please provide information on the impact of the National Poverty Eradication Plan for 1999-2015, particularly relating to youth, women and people living in arid and semi-arid lands and the current levels of poverty, disaggregated by region. Please also provide information on the progress made to address the shortage of food and pervasive chronic malnutrition.

24. Please explain what concrete measures the State party has taken to address the disproportionately limited access to safe drinking water sources and sanitation in rural areas and informal settlements and to ensure that the price of water, including at water kiosks, is regulated in accordance with the tariff guidelines adopted by the State party.

25. Please explain what measures the State party has taken to increase the provision of affordable social housing. Please provide information on the implementation of the Kenya informal settlement improvement programme for 2011-2016 and the National Slum Upgrading and Prevention Policy, including the achievements made and challenges faced.

26. Please provide information on the legal and procedural safeguards put in place to ensure that evictions are carried out lawfully and in accordance with international standards, and on the measures taken to ensure effective remedy and adequate alternative housing or compensation for those affected by evictions. In this context, please explain what steps the State party has taken to comply with court rulings on forced eviction cases, including those of Mitu-Bell Welfare Society v. the Attorney General and Satrose Ayuma and others v. Registered Trustees of the Kenya Railways Staff Benefits Scheme and others.

**Article 12. The right to physical and mental health**

27. Please explain why the maternal mortality rate has increased. Please provide information on the measures taken to reverse this alarming trend and on the impact of those measures.

28. Please provide information on the incidence of illegal abortions and the measures contemplated to address the resulting problems. Please also provide information on the progress made in improving access to sexual and reproductive health services, particularly for women and girls living in rural areas.

29. Please provide information on the measures taken to ensure comprehensive knowledge, particularly among adolescents and young adults, about HIV/AIDS and safe sex. Please explain what efforts have been made to combat negative perceptions towards people living with HIV/AIDS, particularly among health-care professionals. Please also explain why the uptake of antiretroviral treatment among children with HIV/AIDS is markedly lower than that for adults with HIV/AIDS and indicate what steps are being taken to address the low uptake of such treatment among those children.

**Article 13. and 14. The right to education**

30. Please provide information on the measures taken to increase the number of public primary schools and enhance the quality of public schools, particularly in informal settlements and remote rural areas, since the introduction of the free primary education policy. Please explain how the State party has regulated and monitored informal private schools, or low-cost private schools, to ensure quality education.

31. Please provide information on the effectiveness of measures the State party has taken to bring back to school the large number of children dropping out of school, including girls dropping out of school owing to pregnancy.

**Article 15. Cultural rights**

32. Please provide information on the steps taken to protect intellectual property rights arising from traditional knowledge and forms of traditional cultural expression, as well as traditional farmers’ rights.
List of issues in relation to the combined second to fifth periodic reports of Kenya
Committee on Economic, Social and Cultural Rights

Fifty-seventh session
22 February-4 March 2016
Item 6 (a) of the provisional agenda
Consideration of reports: reports submitted by States parties in accordance with articles 16 and 17 of the Covenant

List of issues in relation to the combined second to fifth periodic reports of Kenya

Addendum

Replies of Kenya to the list of issues,*

[Date received: 11 January 2016]
i. General information

1. Information on the number of cases, the nature and extent to which the rights contained in the Covenant were directly applied in domestic courts

1.1. Article 2(6) of the Constitution of Kenya provides for the incorporation of international human rights law in ratified treaties into the Kenyan domestic legal system. The Constitution, to a large extent, mirrors all the economic, social and cultural rights found in the Covenant. The Kenyan Courts apply the provisions of the Covenant and the Constitution when adjudicating on matters concerning economic, social and cultural rights (ESCRs). A list of some of the cases is attached in annexure 1. Following is a synopsis of a few of the cases, to indicate the nature and the extent to which the rights contained in the Covenant were directly applied in domestic courts.

1.1.1. The right to housing

2. In William Musembi & 13 Others v. Moi Education Centre Co. Ltd & 3 Others [2014] eKLR, the court was guided by Article 11 of the ICESCR and found that the respondents had violated the petitioners’ right to housing but further noted that encompassed in a person’s dwelling is their family life, their ability to take care of their children, their ability to live a secure and dignified life.

1.1.2. The right to education

3. In Michael Mutinda Mutemi v. Permanent Secretary Ministry of Education and 2 Others Nairobi HCCP No. 133 of 2013 the court held that while economic and social rights were justiciable, states are required to apply as much practicability as possible in the realization of these rights and within available resources and allocation thereof.

1.1.3. Right to health

4. In Matthew Okwanda v. Ministry of Health and Medical Services & 3 Others (2013) the court referred to General Comment no. 14 on the Right to health which defines health as a fundamental right indispensable for the exercise of other human rights.

1.1.4. Right to clean and safe water in adequate quantities

5. In Okiya Omtatah Okoiti & 3 Others v. Nairobi City County & 5 Others (2014) eKLR, the Judge quoted Article 11 of the ICESCR and General Comment No. 15 of the CESCR noting that the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.

2. Measures taken to strengthen free legal aid schemes in Kenya

6. The National Legal Aid and Awareness Programme (NALEAP) was established in 2007 to improve access to justice for all in the country. The National Steering Committee, which provides policy oversight over the Programme, has overseen and managed the provision of free legal aid in six counties in Kenya on a pilot basis. The Committee has developed the National Legal Aid Bill 2015 and the National Policy on Legal Aid to facilitate the rolling out of the scheme countrywide and to strengthen the institutional and legislative framework for the provision of legal services in Kenya especially for the poor and marginalized. The Bill is undergoing a second reading in Parliament.

7. In the financial year, 2014/2015, NALEAP had a budgetary allocation of Kshs. 51 million.

3. Protection of affected communities

8. The Constitution has provided for the sound management of natural resources and the protection of marginalized communities. The Government has taken a number of steps to protect affected communities when entering into contracts with natural resources extraction companies:

9. The following relevant laws have been reviewed in order to align them with the constitution:

   a). The Mining Bill, 2014. The bill amends the Mining Act, Cap 306;
   b). The Energy Bill, 2014;
   c). The Petroleum Exploration and Production Bill, 2015;
   d). Environmental Management and Coordination Act (Amendment Bill), 2014;

10. The Natural Minerals and Mining Policy sets out principles which guide the Government in reforming the mining sector, regulation and promotion of mineral investment and thus enhance the contribution of mineral resources to the economy.

11. The Mining Bill, 2014 is currently before Parliament. It amends the Mining Act, Cap 306. The Bill places obligations on the holder of a mining license to undertake training and offer employment to the local communities,
It further emphasizes local equity participation and preference to local products. All mining agreements shall be made accessible to the public in accordance with Article 35 of the Constitution which provides for the right to information as a basic human right.

12. In terms of royalties, the Bill proposes that communities who live where miners are operating are entitled to receive 10% of the income, 20% to the County Government, while the National Government will receive 70%. The National Government should split its royalty revenue between an infrastructure development fund and a sovereign wealth fund.

13. The Government has embarked on law reform to ensure that the extractive sector provides an opportunity to significantly contribute to poverty eradication and improve the wellbeing of not only the endowed regions but the country as a whole.

4. Impact of Economic Partnership Agreements (EPA)

14. The East Africa Community/ European Union’s Economic Partnership Agreement (EPA) negotiations was concluded and the EPA Text initialized on 14th October 2014 to signify conclusion of negotiations. The internal due processes are ongoing before signing and ratification. All the East African Community Partner states are required to ratify the concluded EPA before October 2016. The EPA once fully ratified will have significant benefits to Kenya as well as other EAC countries:

4.1. Market Access Offered by the EU to EAC

a). The EU offered the EAC Partner States duty free quota free market access for all products. Further, the EU offered an automatic derogation for 2,000 tons of tuna loins per year to take care of seasons when the raw materials/tuna loins are scarce in the EAC Territorial waters. The aim is to ensure the concerned industries were not closed during low seasons. These intervention ensured employment and income to the workers in those industries and related businesses;

b). EAC offered the EU less than 100% i.e. the EAC offered to liberalize 82.6% of the EAC market for the EU imports within a period 25 years, with a seven years moratorium, period before liberalization commenced;

c). EAC excluded from liberalization sensitive products which account for 17.4% of total trade with the EU;

d). Final products offered for liberalization constitute about 2.6% of the EAC market for the EU imports. The phase down of these products will commence depending on the entry into force of EPA.

4.2. Customs and Trade Facilitation

15. The Parties agreed to reinforce cooperation in the Customs and Trade facilitation area particularly to simplify movement of export products in order to enhance export trade and clearing of raw materials for industries in Kenya/EAC.

4.3. Trade Defence Measures

16. The agreement provides for Trade defence measures, such as Safeguards, Antidumping and Countervailing duties to take care of import surges and subsidised imports. This is an important tool which has resulted into the protection of the domestic industry and agriculture sector, including small scale farmers from for products which are not excluded from liberalisation.

4.4. Fisheries

17. The agreement covers marine and inland fisheries. It provides a framework of cooperation in conservation, management and exploitation of marine fisheries resources. The framework also provides a chance where Kenya can conclude a bilateral fisheries agreement with the EAC on fisheries, as a strategy towards exploitation of the marine fisheries resources. Exploiting the inland and marine resources has enhanced exports of these products hence creating employment including the small scale fish farmers (aquaculture), and food, livelihood and health security.

4.5. Agriculture

18. The Parties agreed on cooperation in the agriculture development and how to deal with subsidised agricultural products destined for the EAC market. The EU committed not to import into the EAC subsidised products on duty free basis.

4.6. Limited market opening for EU products

19. Only 17.2% of EU products are being liberalized over a period of 18 years from the date the agreement enters into force. About 54% of these products are intermediate goods where reduction of tariffs to zero will contribute towards competitiveness and thus stimulate industrial and economic development. This implies minimal revenue loss, which will be mitigated by economic benefits arising from economic growth that will be stimulated by EPAs. Economic growth is expected from sectors such as cotton and textile where the EU market has been opened through relaxation of the rules of origin, and removal of high tariffs and tariff escalation for agro processed products.

20. Under EAC Customs Union process, before EPAs, already 65.4% of EU exports into Kenya and EAC countries were coming in duty free under the EAC Customs Union. This is a demonstration that bulk of EU’s exports into Kenya and the EAC region are mainly raw material and capital goods.
4.7. Exclusion of sensitive products accounting for 17.4% of total trade with the EU (25% in terms of the total tariff lines)

21. Excluding products from liberalization under EPAs was aimed at safeguarding agriculture, industry and Kenya’s market interest in the region. Therefore, exclusion list is the means by which the Government is addressing the welfare loss and threats posed by EPAs on Agriculture and Industry. The products in the exclusion list include agricultural and industrial products. Largely agricultural products are shielded by excluding them from liberalization. This position was motivated by need to address food security and rural livelihood. Imports of agricultural produce from the EU under EPA will be facing same import duty as imports coming from all other countries.

22. Negotiated asymmetrical and simplified rules of origin which are supportive of agricultural and industrial development, laying emphasis on value addition for agricultural products. The agreed rules would achieve what the Lome and Cotonou Covenants failed to, i.e. promote industrial development in the EAC region.

4.8. Impact of Investment Agreement under Common Market For Eastern and Southern African (COMESA)

23. Heads of State and Government adopted the Common Investment Area (CCIA) in 2007. The aim of the CCIA is to increase of flow of investment particularly industries for manufacturing. This has translated into job creation and welfare of the people. Agro-related investments have had positive impact on the small scale farmers through not only employment but also creation of markets for their produce. It applies to other workers even those not in the agriculture sector. Producers in the country benefit from increased market size. Consumers benefit from lower food prices in the markets especially during times of food shortages in the country as food can be able to move from areas of food surplus in the region into the country. Through the common market protocol the country mobilizes food imports from regional countries with surpluses during times of shortage.

5. Statistical data on annual public spending

5.1. Water and sanitation

24. Investments in urban water and sanitation amounted to Kshs. 12 billion in 2013/14 compared to an investment need of around Kshs 75 billion annually (Kshs 33 billion for water and Kshs 42 billion for sanitation).

25. Though investments through Water Service Boards (WSB) and the Water Services Trust Fund (WSTF) increased almost four fold in the period 2007/8 and 2013/14, they covered not more than 12% of the needs stated in the “Strategic Investment Plan for the Water and Sanitation Sector in Kenya 2014. (See Annexure2 on Tables 1 and 2).

5.2. Housing

26. See Table 3 on approved budget for housing.

5.3. Health

27. The approved estimates for the Ministry of Health was at Kshs 54 billion in 2014/15. The actual expenditure for the same period was Kshs 37 billion.

5.4. Social Protection

28. The Government set up the Cash Transfer to Orphans and Vulnerable Children (CTOVC) Programme, the Older Persons Cash Transfer (OPCT) Programme and Persons with Severe Disabilities Cash Transfer (PWSD-CT) programme under the umbrella National Safety Net Programme, which is aimed at consolidating all government cash transfer programmes and hence streamlining their implementation. In the 2013/14 Financial Year, the total expenditure on the above social protection programmes was Kshs 10.5 Billion against the national budget of Kshs 1,641 Billion. (Annual public spending on social protection, since 2013, is illustrated in Table 4).

5.5. Education

29. Annual public spending in education by the Ministry of Education, Science and Technology and the county government since 2013 is captured in Table 5.

5.6. Percentage of women in senior positions

30. The percentage of women in Parliament, County Government, senior executive positions and the judiciary. This information is illustrated in Table 6 in the annexure.

5.7. Unemployment rates

31. Unemployment rates, in the Formal and Informal Economy: Based on the 2013 figures, the unemployment rate for male was 0.282 (or 28.2%), for female was 0.346 (or 34.6%) and for youth was 0.085 (or 8.5%). It should be noted that the absorption rate for the youth is quite high (at 91.5%) and hence the low unemployment rate for this particular group. According to the Economic Survey 2015, the number of persons employed outside small scale agriculture and pastoralists activities rose from 13,517 thousand in 2013 to 14,316.7 thousand, in 2014 representing a 5.9 per cent growth. This means the economy generated 799.7 thousand new jobs in 2014. In total, new jobs created in the modern sector declined from 134.2 thousands in 2013 to 106.3 thousand in 2014. Based on the Economic Survey of 2015, the formal economy created 2,473,200 jobs in 2014 while the informal economy created 11,843,500 jobs during the same period. This data is summarized in tables 7-10 in the annexure.
5.8. Ratios of households

32. Access to improved water resources and sanitation: Water service provision in urban areas is regulated by licensed utilities. For the year 2013/14 there were 91 utilities covering a population of 10.5 million out of a population of 20.5 million in their designated area of service served through 1.6 million connections;

5.9. Health indicators: infant and child mortality

33. Health indicators: The level of under-five mortality is 52 deaths per 1,000 births during the five-year period before the survey, implying that at least 1 in every 19 children born in Kenya during this period died before reaching their fifth birthday. The infant mortality rate is 39 deaths per 1,000 live births. (See Table 11);

34. Maternal Health: Maternal mortality rate has not increased. It stood at 488 per 100,000 populations in the last financial period. However analysis on maternal mortality rating by KDHS is yet to be released. Free maternity services introduced by the government have helped to reduce the number of unskilled deliveries which in many ways have been the biggest contributor of the maternal deaths;

5.10. Enrolment rates

35. Net enrolment rates in primary schools (including enrolment rates among children with disabilities, children in informal settlements and children in rural areas), transfer rates from primary school to secondary school and the number of children out of school, disaggregated by sex (See Table 12).

ii. Interrelating to general provisions of the Covenant (arts. 1-5)

Article 1 (2) Free disposal of natural wealth and resources

6. Implementation of the decision of the African Commission on the Endorois Community

36. The Government set up the Taskforce on the implementation of the decision of the African Commission on 26th September 2014. This provided an identifiable structure with which the relevant stakeholders would engage. The taskforce is made up of members from relevant Government departments which have a role in the implementation of the decision, the Kenya National Human Rights Commission and the Concerned County Government.

37. Meetings have been held with the some of the Endorois representatives, the relevant county government, the local administration and other experts for a deeper situational analysis and understanding.

7. Information on the case of forced eviction of Maasai from a settlement in Narasha, which was brought before court in July 2013

38. Article 40(3) of the Constitution allows the State to acquire land compulsorily, if the land is required for a public purpose or public interest, on condition that there is fair, just and prompt payment in full of just compensation.

39. Narasha, Olkaria and Kedong are areas within the Rift Valley in Nakuru County Kenya. The areas are well endowed with great geothermal potential. The Government with the finance backing of the World Bank earmarked this region for green energy generation. The energy was to be generated and transmitted by state organs.

40. Upon conducting the feasibility study, the Government started the resettlement of the Maasai Community living around this region. The community living in Narasha was to be resettled at Kedong Ranch in exchange for their land measuring 15,000 acres to pave way for geothermal production. However, the Government faced resistance to this resettlement from two fronts. Firstly, the Narasha community resisted resettlement because they felt they had not been adequately consulted and compensated. They further claimed that developing the geothermal energy on their land, would greatly diminish their grazing fields. Secondly, the Government faced resistance from the Maasai Community living within Kedong Ranch who felt that land where the Narasha evictees were to be settled amounted to encroachment of their ancestral land which process was being undertaken neither without involvement of the Maasai living in Kedong Ranch nor without plans to compensate them.

41. As a result, the two groups instituted two constitutional petitions (ELC No. 21 of 2010 and ELC No. 54 of 2014) at the High Court in Nakuru. In the first petition, the Kedong Group claimed that they owned the suit land I.R. No. 11977 by adverse possession since they had lived on this land since time immemorial. However, this suit was dismissed by the Court and held that the Petitioners had no good claim for adverse possession. Further, the court held that the 1st Respondent (Kedong Ranch Limited) has a good title and that the suit property is neither public nor community land. It is purely private land and that the registered owner needed not consult the Petitioners on how to utilize the land.

42. In the second petition, the Petitioners pleaded that they and the persons they represent, have a personal stake in the suit land, which is said to be their ancestral land, having been in actual occupation of it since birth. They alleged that the Government was in the process of resettling people from Olkaria and Narasha on the suit land, a process which was claimed to violate the rights of the petitioners, and the Maasai community that resides on the suit land. They alleged that
the process was being undertaken without involvement of the Maasai community living in Kedong Ranch and there were no plans to compensate them.

43. The Court held that while the Petitioners had the capacity to institute a representative suit, their claim that the suit property is either community land acquired through ancestry or trust land held by Kedong Ranch Limited in trust for Maasai community cannot stand. The Court further stated that since there was no allegation of a sale or lease or other right over the land which the Kedong Ranch Limited had donated, or promised to the petitioners, for which they can hinge any other sort of trust their claim of trust, cannot stand. The petitioners were merely strangers in so far as it concerns the suit property and the respondents do not need to consult them before they can deal with the property or before they can exploit it. The Petition was dismissed.

7.1. Lamu Port Southern Sudan-Ethiopia Transport Corridor (LAPSSET) project

44. Kenya has a comprehensive legal framework for protection of the indigenous communities affected by the project. Art. 40 and 40(3) of the Constitution offer the requisite protection with regard to the acquisition of land or other property in Kenya. Other Constitutional safeguards are found in Article 56, which deals with protection of minorities and marginalized groups, Article 60(1) (f) which eliminates gender discrimination in law, custom and practices relating to land.


46. Kenya has taken steps to ensure that affected indigenous communities are facilitated to give free, prior and informed consent. Impact on the Indigenous Communities

47. Every time there is a large scale development project the Government acquires land for the project through compulsory acquisition. To reduce resistance against implementation of the projects, the Government has adopted a number of measures, which include:

7.2. Public Participation

48. The Government ensures that there is active involvement of the public and affected communities on issues of location, funding, compensation of land and property and resettlement of the displaced persons.

7.3. Compensation

49. The Government is ensuring that compensation is adequate by conducting a Government Valuation in which the public participates. The list of persons to be compensation is prepared by the people’s leadership at the ground and vetted by the County Government concerned. The National Land Commission and the Ministries concerned with the implementation of the relevant project undertake payment of the compensation. Compensation is guided by two core tenets of timeliness and participatory and consultative.

8. Information on corruption cases

50. Tables 14-19 show details of quarterly reports forwarded to the DPP.

51. Between 2011 and 2014, the Ethics and Anti-Corruption Commission recovered illegally acquired public assets valued at over Kshs. 2.5 billion, (approximately USD 30 million) and further averted a loss of public assets valued at Kshs. 62 billion (approximately USD 730 million) through disruptive investigations and interventions. The penalties for of corruption related offences include:

- Fines
- Imprisonment
- Freezing of accounts

8.1. Information on the measures taken to strengthen the mandate of as well as human and financial capacity of the EACC and other related anti-corruption bodies

52. With regard to this:

- Increase in budgetary allocations to the commission. In 2013 the allocation was 1,812,748,800
- Increase in human resources. Staff at the commission has risen from 236 to 264. The Commission trained staff locally and abroad in investigation, prevention, good governance, financial management and other competencies
- Opening of regional offices
- Creation of an Anti-corruption division in the High Court. This is in addition to the Special Magistrates Courts that have been hearing anticorruption and economic crimes
8.2. Measures taken to provide protection against reprisals for victims of corruption and their lawyers, anti-corruption activists, whistle-blowers and witnesses

53. Kenya has in place the Witness Protection Act No. 16 of 2006. The Act establishes the Witness Protection Agency at Section 3A.

54. Part II of the Act provides for the Witness Protection Programme and in particular mandates the Agency at Section 4(1) to establish and maintain a witness protection programme and to take such action as may be necessary and reasonable to protect the safety and welfare of the protected persons.

55. The measures that may be taken under Section 4(2) of the Act to protect witnesses include:

- Physical and armed protection
- Relocation
- Change of identity
- Any measure necessary to ensure the safety of a protected person

56. Other measures may also be taken in the judicial process to support the programme as protection measures in court proceedings and these include:

- Holding in camera or closed sessions
- The use of pseudonyms
- The reduction of identifying information
- The use of video link
- Employing measures to obscure/distort the identity of the witness

57. Under section 13 of the Act, the Director of the Agency under Section 4 may apply for documents necessary to:

- Allow a witness to establish a new identity
- Otherwise protect the witness
- To restore a former participants former identity

58. There is the Public Interest Disclosures Bill 2014 that is at an advanced stage of preparation and is aimed at better protection of whistle blowers. The Anti-corruption and Economic Crimes Act, provides for protection of informers at Section 65.

Article 2 (2) – Non-discrimination

9. Information on the measures taken to provide durable solutions for the internally displaced persons (IDPs), recommendations of the TJRC and the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012

59. Following the disputed Presidential Elections of December 2007, 245,416 IDPs households (made up of 663,921 individuals) were profiled as IDPs by the deadline of 31st December 2008.

60. Given that IDPs were faced with different situations and needs, various interventions were adopted that included:

- Rudi Nyumbani operation where IDPs were persuaded to voluntarily return to their farms
- Resettlement in Government procured land
- Cash transfers/payments

61. These interventions are at various stages of completion as outlined in Tables 2020.5.

10. Information on the measures taken or envisaged to ensure physical accessibility for persons with disabilities and the status of the draft National Action Plan on accessibility and the Persons with Disabilities Amendment Bill 2014

10.1. Measures to ensure physical accessibility

62. The Right to Access is a Constitutional and statutory right in Kenya. The realization of this right has been achieved through:

a). Entrenchment of Access Right as provided for in the Constitution 2010 and the Persons with Disabilities Act No. 14 of 2003;

b). Developing and implementing the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009;

c). Ensuring compliance of KS ISO 2154 standards on Accessibility and

d). Usability to Build Environment by stakeholders in the building industry;

e). Publishing of the Public Notice on Adjustment Order in the Kenya Gazette on the 30th April, 2015. The Notice gave forty five days to owners of public buildings to adjust their buildings in accordance with the provisions of the Persons with Disabilities Act or face closure;
f). Guidelines being implemented for accessibility which include; ensuring accessibility to the physical environment, transportation, information and communications, and facilities and services that are open to the public;

g). Constitution of a Consultative Committee to develop Adjustment Orders.

63. Kenya has established and appointed a Technical Working Committee to implement concluding observations and recommendations arising from the Committee of Experts on Disability on Convention on the Rights of Persons with Disabilities (CRPD) on Kenya’s Initial Report on the implementation of the Convention.

10.2. Status of the national action plan on accessibility and disability rights in Kenya

National Action Plan on Accessibility

64. The National Action Plan describes the current situation in the awareness rising, mainstreaming, employment, education, health, transport, Information Communication & Technology, Sports, and Access to Justice and data collection fields. The National Action Plan formulates strategic objectives and contains activities, output, indicators, actors with corresponding timelines and responsibilities. The National Action Plan on Disability is intended to represent the guiding principles of Kenya disability mainstreaming on short, medium and long term basis and to cover the objectives and specific measures in the field of disabilities.

65. The benefits of the National Action Plan include; promoting focused commitment to human rights of PWDs objectives; integrate human rights promotion throughout government administration and it involves acceptance that it is appropriate to allocate significant resources to PWDs activities. This National Action Plan is a companion to the Kenya’s Blue Print Vision 2030 and supports its implementation. The National Action Plan on accessibility for PWD is implemented by the National and County governments.

Status of the Persons with Disabilities Bill, 2015

66. The bill, which is before Parliament seeks to enhance the equalization of opportunities for Persons with Disabilities by strengthening areas such as employment, family and marriage and legal capacity. The bill is currently before parliament.

11. Please provide information on the measures taken to implement the High Court judgment of July 2013, which upheld the freedom of movement of refugees and asylum-seekers and their economic, social and cultural rights

67. The government opened registration centres countrywide to allow refugees to continue registering.

68. Through Kenya Gazette notice Vol. CXVI No. 39 of 28th March 2014 Kakuma and Dadaab Refugee Camps were officially designated as areas where refugees reside.

69. The government has been conducting relocation of refugees to camps from urban areas together with UNHCR. Refugees with situations that warrant exemption to reside in the two designated camps such as cases of education, medication and resettlement have been allowed to reside in urban areas.

12. Measures taken to raise awareness of, prevent and combat discrimination based on sexual orientation and gender identity and measures contemplated to decriminalize same sex relations between consenting adults

70. The courts have proclaimed themselves in several cases concerning sexual orientation and gender identity. With regard to intersex persons, in Constitutional Petition No. 266 of 2013, the issues raised were whether intersex persons exist in Kenya, whether they belong to the Covenantal male and female genders or they should be categorized as a third gender. The orders given by the courts were that laws should be enacted by Parliament governing the recognition of intersex persons.

71. With regards to transgender rights, the court in Republic v. Kenya National Examinations Council & Another ex parte Audrey Mbugua Ithibu (2014) eKLR gave the Kenya National Examinations Council 45 days to comply with an order to change the name on the petitioner’s high school exam certificate, without marking her gender.

72. Government policy for now is against the decriminalization of same sex relations between consenting adults.

Article 3 – Equal rights of men and women

13. Information on the measures taken and/or envisaged to enforce the recently adopted laws, including the Marriage Act 2014, the Matrimonial Property Act 2013

73. The Marriage Act 2014, the Matrimonial Property Act 2013 makes significant gains in securing women’s access to matrimonial property during and after the marriage.

74. The Matrimonial Property Act protects property acquired during the existence of a marriage from being disposed of by one party without the consent of the other party.

75. Simpler versions of the two marriage acts have been disseminated.

76. The courts on the other hand are also enforcing the provisions of these two acts. For instance in RPM v. PKM Divorce
Cause No. 154 of 2008, the Petitioner sought dissolution of the marriage and maintenance of the 2 issues and herself. The court acknowledged the Constitutional provisions of the equal rights of men and women and further on the Marriage Act’s provisions on maintenance and held that Respondent had to pay maintenance to the Petitioner and further provide the petitioner with a house to ensure the same lifestyle that the petitioner was accustomed to during the marriage is maintained.

iii. Issues relating to the specific provisions of the Covenant (arts. 6-15)

Article 6 – The right to work

14. Information on the measures taken and/or envisaged to increase employment opportunities, particularly in the formal economy, for youth, women and persons with disabilities


77. The National Employment Policy and Strategy of Kenya was approved by Parliament in July, 2015. The aim of the policy is to mainstream employment creation in social and economic activities and promote productive and freely chosen employment as a priority for national development.

14.2. Training of Female Engineering Learners Programme

78. The National Industrial Training Authority sponsors twenty five (25) qualified and needy girls from poor families in Arid and Semi Arid Lands (ASAL) regions in Kenya annually to pursue training in the area of engineering. This is part of affirmative action aimed at improving the training of girls in this area. Seventy five (75) girls are on-going with the programme. Most of the girls who have completed the programme have secured employment in various sectors of the economy. A tracer study established that 80 per cent managed to secure jobs after the training.

14.3. Establishment of the Labour Market Information System (LMIS)

79. A Labour Market Information System (LMIS) for Kenya is being developed to facilitate storage, access, retrieval, and interrogation of data on various facets of the country’s labour market. One of the modules of the LMIS will facilitate interaction between jobseekers and potential employers through a web-based platform. This module is critical in increasing access to labour market information by both job seekers and employers thus increasing chances of employment for the former. The system seeks to address the challenge of unemployment caused by lack of information on where job vacancies exist. It will be critical in addressing the country’s perennial challenge of mismatch between the skills required by the labour market and those possessed by graduates from training institutions. An interactive web-based Labour Market Information (LMIS) portal to facilitate interaction between training institutions, job seekers and employers has been developed. There is an operational system to monitor job opportunities in the labour market.

14.4. Placement of Job Seeker in Employment

80. The government provides Public Employment Services to job seekers, employers and members of the public through a network of 30 County Employment Offices. During the 2013/14 to 2014/15 period, the Ministry placed 51,805 job seekers in employment through the Public Employment Services.

14.5. Increasing employment opportunity for Persons With Disabilities

81. The National Council for Persons with Disabilities (NCPWD) has put in place various measures that ensure that Persons with Disabilities access formal employment:

a). Developing a disability mainstreaming Handbook that provides for guidelines in promoting the employment of Persons with Disabilities (PWDs). This is in an effort towards achieving the constitutional provision of at least 5% reservations of employment opportunities for PWDs;

b). The inclusion in the 2015/16 Performance Contracts of a target on ensuring that at least 5% of the total the staff establishment within every Government Ministry, Department and Agency (MDA) are Persons With Disabilities (PWDs). Under this target the MDAs are supposed to:

• Develop and submit disaggregated data on employment of Persons with Disabilities using a format provided by the NCPWD
• Carry out inclusive advertisement for job vacancies
• Provide long listing of the applicants to indicate how they have included Persons With Disabilities
• Provide inclusive short listing and interviews
The MDAs are required to report to the Council every after every quarter of the Financial Year on progress in implementation of this targets.

c). The Council has established a Mainstreaming Department which sensitizes employers on the constitutional requirement of 5% reservations of employment opportunities for Persons with Disabilities. The Mainstreaming Department has created a data base with curriculum vitae of Persons With Disabilities which has enabled them to link them to prospective employers for employment;

d). The Council provides education grants to students with disabilities in educational institutions at all levels as a way of facilitating Persons With Disabilities to acquire skills and knowledge necessary for the job market;

e). The Council provides assistive devices to Persons with Disabilities to enable them to enable independent lives by enhancing their mobility and functioning within the work environment.

Article 7 – The right to just and favourable conditions of work

15. Information on the level of the current minimum wage

82. The current basic minimum wage is Kshs. 10,954.70 per month. The house allowance is 15% of the basic wage thus bringing the total wages to Kshs. 12,598 per month for those working in Nairobi, Kisumu and Mombasa cities. The basic minimum wage for all other municipalities, including Mavoko, Ruur and Limuru town Councils as per column three while the basic minimum wages for all other areas is provided under column four of the Schedule of Minimum Wages cited as Regulations of Wages (General) (Amendment) order 2015

83. This wage covers cleaners, sweepers, gardeners, children’s ayah, house servant, day watchman, and messenger. This category comprises unskilled and semi-skilled workers who are vulnerable to exploitation. The wage covers the basic needs of a family of three persons including a couple and one child. It is applicable to workers who are not unionisable and are therefore vulnerable. The rest of the workers negotiate individually or enter into Collective Bargaining Agreements (CBA’s) through trade unions or one covered by sector specific wages regulation orders. (See Table 22 for the schedule of basic minimum monthly wage.)

16. Information on the implementation of the Occupational Safety and Health Act 2007 and a national policy on occupational safety health, including resource allocation to the inspection mechanisms

84. The Occupational Safety and Health Act, 2007 provides for the inspection of all workplaces including those in the informal sector and Export Processing Zones (EPZs). In the 2011/12 Financial Year, the Ministry carried out 4,316 inspections, 4,541 inspections in 2012/13, 4,194 inspections in 2013/14 and 5,297 inspections in 2014/15. This is illustrated in Table 23. The inspections are aimed at ensuring that the workplaces adhere to the standards in the Act.

85. Some of the major areas of concern identified from these inspections are: unsafe plant, equipment and machinery; unsafe work practices in construction sites; exposure to chemicals in the agricultural sector; and lack of Occupational safety and Health Management systems in the informal sector.

16.1. Resource Allocation To The Inspection Mechanism

86. Human Resources: Inspection of workplaces for compliance with the Occupational Safety and Health Act, 2007 is carried out by Officers from the Directorate of Occupational Safety and Health Services (DOSHS). The Directorate currently has a total of 65 technical staff against a staff complement of 264. In addition, the Directorate is represented in only 29 of the 47 despite the mandate for inspections being a national government function. This is mainly due to inadequate staffing levels.

87. Financial Resources: In the 2013/14 Financial Year, the expenditure on Occupational Safety and Health inspections was Kshs. 84,045,046. This increased marginally to Kshs. 84,956,553 in the next Financial Year and further to Kshs. 99,683,365 in the current Financial Year (2015/16). This expenditure trend is illustrated in Table 23.

16.2. Implementation of The National Policy On Occupational Safety And Health

88. The National Policy on Occupational Safety and Health was approved by the Cabinet in the 2011/12 Financial Year. The Policy provides a framework for the integration of occupational safety and health issues within management systems in both private and public sectors of the country. Several milestones have been realized since the commencement of implementation of the Policy:

a). Establishment of an Occupational Safety and Health institute to be completed in the 2015/2016 financial year;

b). Establishment of the Occupational Safety and Health Fund;

c). Establishment of an Authority to oversee compensation and rehabilitation for Occupational Diseases and Accidents. This is proposed in the Occupational Safety and Health Bill, 2015. The bill has been submitted to the Commission for Implementation of the Constitution (CIC) for review;

d). Establishment of an Occupational Disease and Injury Compensation Fund as provided for in the Work Injury Compensation Bill, 2015;
e). Development of an Occupational Safety and Health (OSH) data management system;

f). Formation of a professional body for Occupational Safety and Health (OSH) practitioners. An Occupational Safety and Health Practitioners Bill, 2015 has been drafted;

g). Establishment of Occupational Safety and Health (OSH) award and sanction system launched from 2014;

h). Mainstreaming Occupational Safety and Health (OSH) into the education system and employee in-service training. A proposal on mainstreaming Occupational Safety and Health (OSH) into the education system and employee in-service training was prepared and submitted to the Kenya Institute of Curriculum Development (KiCD);

i). Awareness creation and capacity building on Occupational Safety and Health (OSH). Special awareness creation programmes have been implemented in the informal sector to address the occupational safety and health deficits identified in the sector. Capacity building of workplace Safety and Health Committees charged with managing safety and health systems at the workplace.

**Article 9 – The right to social security**

17. **Budget allocation to the implementation of the Kenya Social Protection Policy (2011) and measures to secure funding for social protection programmes under the Policy**

The National Social Protection Policy’s aim is to ensure that all Kenyans live in dignity and exploit their human capabilities for their own social and economic development. Under social assistance, the Ministry was allocated 10.5 Billion shillings in 2013/14 and 15.0 Billion shillings in 2014/15, an increase of 43.16 per cent over the period. In the 2015/16 Financial Year, the Ministry has been allocated 19.0 Billion shillings, an increase of 26.60 per cent over the previous Financial Year.

**Measures taken for securing funding for social protection programmes under the Social Protection Policy**

89. Under the National Social Protection Policy, the Government support is envisaged to include multi-year budget commitments based on periodic social budgeting and ring-fenced funding to finance cross-sectorial and coordinated programmes. The Government is required to provide resources from the national budget to support the National Social Protection Policy according to need and based on the affordability of new social protection programmes.

90. The Government has carried out the following in order to secure funding for social protection programmes:

a). An Expansion Plan of the cash transfer programmes has been developed and provides for the gradual increment of beneficiaries of four cash transfer programmes;

b). Improvement of the targeting of social protection beneficiaries. This is aimed at ensuring that only the right persons (based on set eligibility criteria) are receiving cash transfers;

c). Reduction in the administrative costs associated with paying benefits and collecting contributions;

d). Use of a Single Registry for the four cash transfers to minimize double dipping whereby a beneficiary is able to benefit from more than one cash transfer programme.

18. **The National Social Security Fund**

91. The National Social Security Fund (NSSF) is established by the NSSF Act No. 45 of 2013 as a defined contributory Scheme. It does not include non-contributory schemes. Under the Act, the Fund covers workers in the formal sector, informal sector and the selfemployed. Tier I contributions to the Fund are mandatory for all workers in the formal sector. Employers may contract out their Tier II contributions if these meet the contractingout requirements as set out by the Act. Contributions from the self-employed are voluntary. The Fund covers three main benefits as provided for by Convention 102 of ILO i.e. old age, invalidity and survivor benefits. The benefits provided for by the Act seek to provide an income replacement of about 42-45 per cent upon retirement at 60 years.

**Article 10 – Protection of the family, mothers and children**

19. **Measures taken to enforce the provisions of the Protection against Domestic Violence Act 2015**

92. The following measures have been taken:

a). Holding monthly National Gender Based Violence (GBV) Working Group Sub Cluster Meetings;

b). Having an online GBV Forum (http://forum.ngeckeny.org/);

c). Community sensitization and training of police and chiefs on the implementation of the Act;

d). Dissemination of a simplified version of the Protection against Domestic Violence Act (PADV) to create awareness;

93. However, the government acknowledges that there is still a lot that needs to be done as the enforcement of this act is still very slow.

20. **Concrete measures taken to combat female genital mutilation, polygamy and early marriage**
94. The Prohibition of Female Genital Mutilation Act, Cap 62 B, Laws of Kenya has set the anti FGM board that is operational and carrying its mandate in the eradication of FGM.

95. The Act makes it an offence to perform FGM on another and also to train as an FGM practitioner. Persons convicted are liable to prison terms not exceeding three years or a fine or both. Where death results from FGM, the convicted person is liable for life imprisonment. As of August 2015, five cases had been concluded and the perpetrators convicted. 47 cases are ongoing.

96. While the Act provides deterrent sentencing for offenders, the Government also focuses on and emphasizes on the role of education, awareness and behaviour change to bring an end to the practice.

97. FGM is on the decline across the country. The 2014 Kenya Demographic and Health Survey indicated that 21 per cent of women between the age of 15 and 49 had undergone FGM. This is down from the 2009 survey, which indicated an incidence rate of 27 per cent, and the 2003 survey that indicated 32 per cent. This decline indicates improved quality of life and health for girls and women. In addition, because FGM is linked to early marriage, the decline in rates indicates that many more girls are avoiding early marriages and completing their primary and even secondary education. Regional disparities are, however, very wide with areas of North Eastern Kenya indicating prevalence as high as 98 per cent. (See Table 24)

98. Under age marriage remains a challenge arising mainly due to poverty and lack of economic opportunities for girls especially in rural areas, cultural beliefs and practices as well as religious beliefs.

99. The introduction of compulsory free primary education in 2003 is among the factors that have decreased the incidence of early marriages. The Basic Education Act (No. 14 of 2013) promotes the extension of compulsory education to secondary school. As the Act is implemented, the country expects to see a further decline in the number of early marriages. The government also introduced a back to school directive for young girls who become pregnant as a deliberate move to curb early marriages.

100. The government through the National Gender and Equality Commission has been conducting a public inquiry on child pregnancy. This inquiry is expected to contribute towards enhancing protective environment for young girls, through the documentation of drivers of unintended and unwanted child pregnancies; identification of legal and policy implementation gaps as well as identification of mitigating factors to the same.

21. Child labour and sexual exploitation of children

101. The government has made great stride in coming up with measures and programmes to prohibit child labour such as:
   a). The National Policy on Elimination of Child Labour was approved by the Cabinet. The policy has forwarded to Parliament for adoption as Sessional Paper No. 1 of 2015;
   b). The gazettlement in 2014 of the list of hazardous work and light work for children as one of the regulations of the employment Act;
   c). Community sensitization through celebration on the World Day against Child Labour, meetings, public barazas, print and electronic media;
   d). The declaration of over 80 beaches as child labour free zones in Usenge and Bondo sub-counties of Siaya County;
   e). The implementation of a programme of skills and livelihood training of adolescent children between the ages of 16-17 years. A total of 410 were trained and all of them have secured employment. The minimum age of entry into employment under the laws of Kenya is 16 years;
   f). The withdrawal of 1125 children engaged in child labour in Turkana County in 2015. Majority of these children were involved in fishing at Lake Turkana or generally loitering in the streets;
   g). The Employment Act 2007 and Labour Institutions Act 2007 has been reviewed to conform to the Constitution. The reviews are contained under the Employment Act (Amendment) Bill 2014 and Labour Institutions (Amendment) Bill 2014. The amendments contain provisions for establishment of the National Steering Committee and the County Child Labour Committees, functions and membership of the two Institutions;
   h). A total of 2011 labour complaints were reported by children at various County Labour offices;
   i). A total of 262 child labour inspections were carried at the County Labour Offices. As a result of the inspections, a total of 319 children were withdrawn from child labour;
   j). In 2014, The Federation of Kenyan Employers (FKE) is implementing a program on Exploring Corporate Social Responsibility as option for improving schools and retaining children. This has been successfully done in Machakos whereby 150 children have been retained in school through development of school facilities.

102. Children’s Officers in the department of Children Services through the Children’s Advisory Committees work in partnership with law enforcement agencies to combat trafficking in children and exploitative child labour. The department also focuses on antitrafficking work in Mombasa where the sex trade and sexual exploitation particularly of girls is high.

103. In regards to the sexual exploitation of children, The National Council for Children’s Services developed the National Plan of Action against Sexual exploitation in Kenya 20132017. The Plan gives detailed information on awareness creation among others. It also has a matrix on the planned actions.
104. The Council also developed the National Plan of Action for Children in Kenya 2015-2022. It outlines issues of child labour and commercial sex exploitation in terms of prevention. It also focuses on the need to push for implementation of the Sexual Offences Act as part of strengthening the legal and policy framework.

105. Due to the fact that the amendments to the Children Amendment Bill 2014 were too numerous the development of a new statute is underway.

Article 11 – The right to an adequate standard of living


106. The government came up with a strategy to reduce poverty incidence in rural and urban areas by 50% by the year 2015 and also strengthen the capabilities of the poor to earn income. The aim of NPEP was to provide a national policy and institutional framework for action against poverty. The Plan has been marginally successful.

23. Recognition of the right to water in the national legislation

107. The Constitution of Kenya recognizes the right to water and sanitation. To ensure that this right is fully implemented the Government has put in place the following frameworks:

   a). The Water Bill 2014 provides for regulation, management of water resources, water and sewerage services to advance the reforms under the current Water Act 2002;
   b). The existence of a National Independent Regulator (Water and Sanitation Regulation Board-WASREB) to regulate the provision of water and provide consumer protection and interest through provision of good quality, reliable and sustainable services;
   c). National Water Master Plan (2030): The development and launch of the National Master Plan in 2014 to guide the physical and financial planning of the Water and Sanitation Services (WSS) sector in Kenya up to the year 2030;
   d). Service to the underserved/LIA: The Water Services Trust Fund has been established as a poverty fund to assist in the financing of the provision of water and sanitation services to disadvantaged groups/un served areas. Service areas for utilities are being mapped to ensure services are provided efficiently and sustainably including the LIAs. The regulator is developing indicators to track progress in these areas;
   e). Review of Tariffs: Water tariffs for utilities continue to be reviewed to ensure that utilities operate on cost-reflective tariffs. As part of pro-poor initiative, the tariff on water kiosks is now regulated and subsidized (WASREB) is now adjusting the retail price at water kiosks from Kshs 2 to Kshs 1 for a 20 litre container). Increasing block tariffs are also adopted as a water management tool except at the water kiosk. The tariffs approval process comes with conditions for service improvement and expansions;
   f). Enhancement of consumer Engagement: Public participation in service provision is a key consideration in the provision of water and sanitation services. The Water Action Groups mechanism has been scaled up to facilitate public participation in water issues and utilities are required to take full responsibility for convening public engagement forums as per the Consumer Engagement Guideline issued by WASREB;
   g). Development of Investment Planning Guidelines: Prudent spending and a reduction on donor dependence in preference for funding mechanisms like tariff adjustment are central to the realization of targets for water and sanitation under vision 2030. WASREB has developed the Investment Planning Guidelines to guide the deployment of resources by asset developers. This is anticipated to guide the strategic planning of these entities and improve the manner in which the vision of the sector is cascaded from policy to implementation.

24. Measures taken to increase the provision of affordable social housing

108. The National Slum Upgrading and Prevention Policy was developed to provide a framework for the promotion, and protection of the lives and livelihoods of vulnerable people living and working in the slums and informal settlements by strategically integrating them into social, political and economic framework in line with the Constitution of Kenya. The draft policy has been submitted to the Cabinet for approval.

109. The Ministry of Lands, Housing and Urban Development has initiated various programs aimed at increasing the number of affordable housing in Kenya. These include Slum upgrading, creation of an enabling environment for private sector participation in housing delivery process particularly for lower middle and low-income groups, provision of alternative and low cost building technologies and the establishment of the civil servants housing scheme.

110. The Kenya Informal Settlements Improvement Project aims at improving conditions in informal settlements. Activities include enhancing tenure security and improving off-site infrastructure. Its first component focuses on strengthening institutions and program management through capacity building of relevant ministries, and the selected municipalities.

111. The National Housing Policy Sessional Paper 3 of 2004 is aimed at encouraging encourage research and popularize the use of appropriate building materials and technologies. The Housing policy is currently under review to align it with the Constitution and ensure adherence to Article 40(3) (d).
112. Achievements to date are as follows:

- 822 housing units completed in Kibera Zone A
- 462 Housing units in Mavoko under sustainable Neighborhood Programme (SNP) at 74% completed level
- Implemented Kenya Informal Settlement Improvement projects in 6 counties including which project has so far achieved the following:
  - Civil works are under implementation in 18 settlements in six urban centers
  - e.g. Lang'ata Public housing sites, Market stalls in Manyatta Kisumu, Classrooms at Kakamega Amalemba Slums and development of Housing in Mavoko
  - 31 kilometers of roads and footpaths have been upgraded and another
  - 42 kilometers are nearing completion e.g Access roads at Kibera slums
  - 10 kilometers of drainage systems have been completed
  - 22 high-mast security lights have been installed and are operating
  - Water supply systems are being constructed in three settlements and new or rehabilitated sewerage lines are underway in four settlements
  - 1,226 National Government Housing Units refurbished

113. Challenges remaining include:

- Availability of Finances: e.g Project finances and end-user finances. It is difficult to secure finances/ debts by both developers and end-users
- Delays caused by:
  - Land classification (i.e. converting from agricultural to residential) and approvals
  - Timely disbursals of project finance
  - Infrastructure promised/planned by the government for example, if the government is planning a major road that will pass your property, your project must be viable with or without it.
  - Supply chain/Materials supply shortages
- Volatile economic environment; Rapid inflation has caused large increases in the cost of materials and land
- Materials Bias; Kenyans have been slow to adopt alternative building technologies and have a strong bias towards traditional materials and techniques

25. Evictions

114. The Constitution of Kenya (2010) recognizes the inherent dignity and the right to have that dignity respected and protected. It also makes provision for the right to life and protection of groups and people who are vulnerable such as women, children, the elderly and persons with disabilities.

115. There are proposed amendments to the Land Laws through the Land Laws (Amendment) Bill, 2015 to incorporate elaborate provisions on forced evictions. The Bill has proposed to insert a new provision in the Land Act which provides that unlawful occupiers of public, Private or community land cannot be evicted there from, except in accordance with the Act. The bill introduces sections 152A to152H, all new provisions on evictions. For instance, in regard to evictions from public land, the National Land Commission must give a three months’ notice to all affected persons in writing in the Kenya Gazette.

116. The Government has also established a Land settlement fund which is administered by the National Land Commission under section 135 of the Land Act. The fund shall be applied to the following purposes:

a). Provision of access to land to squatters, displaced persons, for development projects, for conservation or such other causes that may lead to movement and displacement of persons;

b). Purchase of private land for settlement programs;

c). Establishment and management of refugee camps;

d). Provision of shelter and a livelihood to persons in need of settlement programmers.

117. Section 153 of the Land Act sets establishes a Land Compensation Fund. The objects and purpose of the fund is to provide compensation to any person who, as a result of the implementation of the provisions this Act by the National Government, urban area or city or any public, suffers any loss or deprivation of and rights or interests in land or any injurious affection in respect of any ownership of land. This fund shall be administered under the law relating to public finance management.

Article 12 – The right to physical and mental health

26. Increase of maternal mortality rate

118. Maternal mortality rate has not increased- it stood at 488per 100,000 populations in the last financial period.
However analysis on maternal mortality rating by KDHS is yet to be released. Free maternity services introduced by the government have helped reduce the number of unskilled deliveries which in many ways have been the biggest contributor of the maternal deaths.

27. Sexual and reproductive health services, particularly for women and girls living in rural areas

119. The National Reproductive Health Policy, 2007 is the main policy framework to enhance the reproductive health status of all Kenyans by increasing equitable access to reproductive health services; improving quality, efficiency and effectiveness of service delivery at all levels; and improving responsiveness to the client needs. The National Reproductive Health Strategy, 2009-2015, was formulated to enable the achievement of the goal and objectives of the National Reproductive Health Policy. The Reproductive Healthcare Bill 2014, which is before Parliament, recognizes reproductive rights, and sets the standards of reproductive health. The Bill provides for the right to make decisions regarding reproduction free from discrimination, coercion and violence.

28. Knowledge of HIV Prevention among Adults and Young People

120. Women and men age 15-19 have lower levels of knowledge of these HIV prevention methods than people age 20 and older. Similarly, knowledge of prevention methods is lower among women and men who have never had sex than among those who are married or living together with a partner, those who are divorced/separated/widowed, or those who never married but have had sex. Urban residents were more knowledgeable on each of the described methods of HIV prevention than their rural counterparts. As expected, women and men with higher levels of education are more likely than those with lower levels of education to be aware of HIV prevention methods. Similarly, women and men in households in higher wealth quintiles have more knowledge of HIV prevention methods than those in lower quintiles.

121. Surveys have shown that knowledge varies across the counties and between women and men.

122. Women in Garissa, Wajir, and Mandera counties are less knowledgeable of methods of HIV prevention compared with women from other counties. Men’s knowledge in Garissa and Mandera is also lower than in other counties. Low levels of knowledge were also found among women and men in Turkana and in Kwale, men in Kilifi, and women in Kitui. It also depicted that knowledge of HIV prevention among young people age 15-24. About one half of young people in Kenya are knowledgeable about methods of HIV prevention; 54 percent among women and 64 percent among men. Knowledge of prevention methods is slightly lower among those who have never had sex than among those who have married or those who never married but have had sex.

123. Like the 2008-09 KDHS, the results indicate that young people (both women and men) residing in urban areas are more knowledgeable than their rural counterparts about HIV prevention. Education and household wealth are strongly related to young people’s knowledge. The level of awareness by region generally shows that young women and men in North Eastern region are the least knowledgeable about HIV prevention.

28.1. HIV and AIDS control measures

124. The health sector has continued to undertake interventions aimed at controlling the spread of HIV/AIDS in the country. As a result, considerable achievements have been made within the sector. The proportion of HIV positive pregnant women receiving ARVs to prevent-mother-to-child transmission of HIV have improved from 58.4% (2012/13) through 78.4% (2013/14) to 82.2% (2014/15). These efforts have led in a reduction in HIV infections due to mother-child transmission from 14,168 to 12,941 and finally 11,847 in 2012/13, 2013/14 and 2014/15 respectively (eMTCT Fact Sheet 2015).

125. Under HIV care and treatment, a total of 527,390 (2012/13) through 642,472 (2013/14) to 791,168 (2014/15) were enrolled on life-saving ARV treatment. The NACC in partnership with stakeholders developed the Kenya AIDS Strategic Framework (KASF 2014/15-2018/19) and the County Profile Reports on HIV and AIDS in 2014. Counties are required to contextualize KASF by developing County-specific HIV and AIDS Plans (CASP). The CASPs will guide counties in implementation and resource mobilization for HIV and AIDS.

28.2. Key challenges facing HIV and AIDS control

126. Dependence on donor funding as 75% of the funds spent on HIV and AIDS come from donors.

127. The donors are not scaling up their financial support, due to other competing priorities/needs.

128. The shrinking donor support calls for sustainable and innovative financing of HIV and AIDS from domestic sources. This is further aggravated by rebasing of the economy in September 2014 when Kenya became a Lower Middle Income Country (LMIC) and is therefore expected to contribute more funding to HIV and AIDS.

129. Two to three years down the line, the country may not be able to procure ARVs and related commodities using the pre-negotiated prices of poor countries.

Articles 13 and 14 – The right to education

29. Measures taken to increase Public Primary Schools

130. The following measures have been taken:
• Providing funding for infrastructural development through government and CDF
• Fast-track of registration of schools
• Establishment of institutions of Alternative Provision of Basic Education (Non-Formal Schools Mobile Schools)

131. The following measures have been taken to enhancing the quality of public school education:

• Increasing the capitation for Free Day Secondary School by 30%
• Enhancing in service for teacher especially in science and mathematics
• Provision of grants for laboratory equipment and infrastructure
• Strengthening quality Assurance and Standards by establishing a Council to ensure there is quality education in basic education institutions
• Recruitment of additional teachers and gradual replacement of teachers who leave service

132. Ways in which state parties have regulated and monitored informal private schools:

• The Education Standards and Quality Assurance Council (ESQAC) has been established and is being operationalized
• The mandate of ESQAC includes monitoring the schools for quality assurance through regular school inspections and assessments
• Registration rules for the establishment of APBET institutions have been put in place
• All teachers including those in such schools must be registered

30. Effectiveness of measures taken to bring the large number of children dropping out of school back to school, including girls who have dropped out due to pregnancy

133. Measures taken to ensure that girls who drop out of school go back:

• The Basic Education Act, No. 14 of 2013 directs head teachers to ensure that any girl including boys who drops out of school because of pregnancy is allowed back or re-located to another school
• Re-entry policy is in place to ensure girls who get pregnant or drop because of other reasons re-enter and continue with school
• The No Repetition Policy
• A gender policy in education is also in place to ensure that girls do not drop out of school
• Bursaries are also in place for the needy girls
• A voucher system has also been established to cushion needy families
• Low-cost boarding schools have been established especially in ASAH regions
• Special fund available for girls from North Eastern province who excel in academic and are needy
• Scholarships awarded to girls as a way of encouraging them to continue learning
• School feeding programs are in place especially in areas prone to famine
• Peace Education
• HIV and AIDS policy

Article 15 – Cultural rights

31. Information on the steps taken to protect intellectual property rights arising from traditional knowledge and forms of traditional cultural expression as well as traditional farmers’ rights 134. The following initiatives have been taken:

• Construction of 16 community cultural centres
• Annual Cultural Community Festivals in various regions of the country
• Kenya has signed and domesticated several international Covenants relating to conservation and sustainable use of Genetic Resources and has developed regulations to govern Access to Genetic Resources and Benefit Sharing e.g. The Covenant on Biological Diversity (CBD)
• Kenya has developed a National Policy on Traditional Knowledge, Genetic Resources and Cultural Expressions
• The Kenya Copyright Board (KECOBO) has taken the lead in developing a legal and administrative framework for the protection of Traditional Knowledge
• Enactment of the Kenya National Commission for UNESCO Act 2013, to safeguard the intangible cultural heritage and promotion and preservation of the diversities of cultural expression
• Kenya has signed the African Regional Intellectual Property Organization (ARIPO) Protocol on the protection of traditional knowledge and traditional cultural expressions (The Swakopmund Protocol)
• The Seed and Plant Varieties Act is in compliant with International Covenant for the Protection of New Varieties of Plants (UPOV), 1978 and has provisions for protection of farm-saved seeds for propagation by the farmer in the subsequent seasons
List of issues in relation to the combined second to fifth periodic reports of Kenya
**i. Introduction**

1. The Elizabeth Glaser Pediatric AIDS Foundation (EGPAF) has been working in Kenya since 2000 to increase women’s access to high-quality services to prevent mother-to-child HIV transmission, as well as to expand access to HIV prevention, care, and treatment for women, children, and their families. EGPAF is a key partner of Kenya’s Ministry of Health and collaborates with multiple partners to support mother-to-child HIV transmission prevention and other HIV prevention, care, and treatment services in Kenya.

2. As detailed below, Kenya is one of the countries with the highest rates of HIV prevalence, and the epidemic disproportionately affects young women and children. Significant progress has been made in recent years in Kenya to prevent mother-to-child transmission of HIV, though increased efforts are needed to meet the goal of elimination of such transmission. On the other hand, there remains significantly more work to be done to address the large gap in treatment between children and adults and to increase the overall rate of persons retained on antiretroviral treatment (ART). Stigma and discrimination are recognized by the government of Kenya and civil society actors as significant barriers to ensuring an adequate HIV/AIDS response.

3. The International Covenant on Economic, Social and Cultural Rights (CESCR) contains several provisions with a bearing on the prevention and treatment of HIV among women, children, and their families, including the right to health, non-discrimination, education, social security, and the protection of children. Kenya’s report touches on some of the steps they have taken to further respect, protect, and fulfill such rights in the reporting period, including several provisions included in the 2010 Constitution. At the same time, the report provides little information on specific steps Kenya has been taking to address the ongoing shortcomings in HIV prevention and treatment, especially among children.

4. As described below, EGPAF considers that further elaboration should be requested in the List of Issues on steps taken by Kenya to create a more enabling social, political, financial, and legal environment for HIV prevention and treatment services, especially among women and children. This report will focus on the prevention and treatment of HIV among children, who are disproportionately affected by the epidemic in Kenya. It will examine the right to health, including HIV/AIDS health services, domestic financing for HIV, combating stigma and discrimination, and sexual and reproductive health. It will also look at gender equality, the right to education, and social protection as they relate to HIV prevention and treatment.

**ii. HIV and the Right to Health**

5. Article 12 of the International Covenant on Economic, Social and Cultural Rights guarantees “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” with States Parties required to take steps, inter alia, to provide for the reduction of infant mortality and for the healthy development of the child; prevent, treat and control epidemic, endemic, and other diseases; and create conditions which would assure to all medical service and medical attention in the event of sickness. In the context of HIV/AIDS, these provisions entail a legal responsibility for each State Party to progressively ensure fully available, accessible, acceptable, and quality HIV prevention, testing, treatment, and care services, including access to affordable medicines. All services, including testing, should be voluntary with sufficient protection for confidentiality of data. Furthermore, States Parties must review all laws and policies and revise or repeal any elements that act as barriers to effective HIV diagnosis, treatment, care, and counseling.

6. As noted above, children suffer disproportionately from HIV in Kenya. According to the latest data from UNAIDS, children make up around 11% of the estimated 1.4 million people living with HIV. Yet children counted for 23% of total new HIV infections in Kenya in 2014, and 25% of deaths from AIDS-related causes. As well, only 41% of children living with HIV were receiving antiretroviral treatment (ART) in 2014, as opposed to 57% of adults. Such data signifies a need for Kenya to make a more determined effort to improve pediatric HIV prevention and treatment in order to meet its obligations under Article 12.

7. Decreasing rates of mother-to-child HIV transmission and increasing rates of testing and treatment for HIV-exposed children will require Kenya to undertake a wide range of additional efforts, many of which are contingent upon improvements in Kenya’s overall health care infrastructure, including adequate health facilities, sufficient and properly trained health care workers, and affordable and available medicine and diagnostics. In order to ensure long-term sustainability of such services, it is important for Kenya to decrease dependence on foreign aid and increase domestic financing attributed to health.

8. Prevention of mother-to-child transmission of HIV (PMTCT) involves several areas of action along the “cascade” of care. First, there needs to be increased effort to prevent HIV among women by addressing legal, cultural, economic, and social factors that put some women at higher risk of acquiring HIV (such as dropping out of school, early and forced marriage, intimate partner violence, and economic insecurity that leads to transactional sex). Second, there needs to be comprehensive, available, and accessible sexual and reproductive health services to help HIV-positive women decide if and when they want to become...
pregnant. Next, HIV-positive women who are pregnant need to know their status through early testing, and then should be initiated on ART as early as possible during the pregnancy and through the end of breastfeeding to maximize protection for the baby.

9. Recent WHO guidelines call for pregnant and breastfeeding women to stay on ART for life regardless of their CD4 count to best protect their health and that of the baby during pregnancy, breastfeeding, and any later pregnancies. Kenya adopted these so-called “Option B+” guidelines in 2014, and is working on scale-up to the national level. Significant challenges remain to completing this considerable expansion of treatment, however, including insufficient human resources and laboratory equipment to cover the increased need for distribution of medicine and regular testing of viral loads. Long distances to health clinics and the costs associated with travel or time away from economic activities also discourage many women from regular adherence.

10. Kenya has made good progress in improving access to ART for pregnant and lactating women, though it still has far to go before reaching virtual “elimination” of mother-to-child transmission according to the WHO definition. In 2014, 67% of pregnant women with HIV received ART, compared with a global average rate of 73%. The mother-to-child transmission rate in 2014 was 17%, slightly higher than the 14% average rate for 21 UNAIDS focus countries in Sub-Saharan Africa. Among the many remaining challenges is the fact that many pregnant women are not completing the recommended four ante-natal care visits, which enable health-care workers to monitor adherence to treatment, check whether the ART is effectively suppressing the virus, and conduct further testing of HIV-negative women to determine if they have become infected with HIV during the pregnancy.

11. Progress on diagnosing and treating infants and children with HIV has been much slower in Kenya, with only 41% of children with HIV taking life-saving antiretroviral drugs in 2014. For those infants exposed to HIV during pregnancy or breastfeeding, it is critical to both quickly give them prophylactic drugs and test them for HIV. Infants with HIV must be initiated on treatment as quickly as possible. Due to their immature immune systems, infants with HIV are at much higher risk of developing AIDS. Without treatment, 50% of children with HIV will die by their second birthday, and 80% will die before they turn five. UNAIDS has recently set a global target of 90% of persons with HIV knowing their status; 90% of diagnosed persons on ART; and 90% of persons on ART with viral load suppression by 2020. The targets apply to children as well as adults. Kenya will need to double the number of children on treatment by 2020 to meet this target.

12. Knowing an HIV-exposed baby’s HIV status is the critical first step to providing life-saving treatment. Yet early infant diagnosis tests are usually only available in centralized laboratories, which may be far from villages where women and infants are receiving postnatal care. EGPAF has observed that long turn-around-times on such test results continue to be a problem in Kenya. As it can take weeks or even months to deliver results, it may be too late to save the baby’s life by the time results are received. As well, poor follow-up of mother-baby pairs mean that many mothers or caregivers never receive test results or linkage to treatment for the baby. There is also a need to increase the laboratory capacity though lab networking and ensuring that the appropriate commodities are available for more testing of HIV status and viral load (which shows how people are responding to medicines).

13. In recognition of the significant treatment gap between children and adults, Kenya’s president stated in February 2015, “I have directed the ministries of education and health to initiate programmes that will ensure all HIV-positive children are provided with life-saving medication. The issue of children living with HIV not on antiretroviral therapy must be addressed without further delay.” Improved care and treatment of HIV-exposed infants will require early infant diagnosis at point of care (a project EGPAF will soon begin in collaboration with the Ministry of Health); better tracking and servicing of mother-infant pairs; increased use of community outreach programs to find cases and retain children on treatment; and training of health care workers on effectively delivering HIV care and treatment to children. Better data collection is also needed in Kenya, as the current Health Information System does not disaggregate HIV data on children and adolescents separately, making it difficult to take evidence-based steps for these age groups with distinct prevention, care, and treatment needs.

14. Kenya’s report to the Committee on Economic, Social and Cultural Rights under Articles 16 and 17 notes some positive developments in its efforts to promote the right to health in global terms, in relation to HIV/AIDS, and in connection to the steps outlined above to prevent and treat HIV among women and children. First of all, Kenya’s 2010 Constitution guarantees the right to the highest attainable standard of health as well as access to essential healthcare services, including reproductive health. It also “requires the State to take legislative, policy and other measures to progressively achieve the realisation of those rights (Article 21)” and domesticates international legal obligations, such as International Covenant on Economic, Social, and Cultural Rights. Taken together, Kenya has a clear legal responsibility, to the maximum of its available resources, to ensure access to prevention, testing, care, and essential medicines at affordable prices by persons living with HIV or AIDS and those exposed to the risk of HIV infection.

15. In addition, Kenya passed the HIV and AIDS Prevention and Control Act of 2006, as recommended by the Committee. The law, which came into force on 30 March 2009, creates a legal framework for the prevention, management and control of HIV and AIDS. Full implementation of commitments under the Constitution and the HIV and AIDS Act would certainly help ensure all women and children with HIV have access to essential testing, treatment, and care.

16. Kenya also reports that maternity fees were abolished in all public hospitals as part of its efforts to decrease maternal and child mortality. According to UNAIDS, this change resulted in a 50% increase in births in a health facility, which is an important factor in ensuring safe deliveries and that mothers and babies are given medicines to prevent HIV transmission.

17. According to Kenya’s report, the High Court recently declared as unconstitutional anticontcounterfeit legislation that might have prevented HIV-positive patients from accessing generic antiretroviral drugs, which are significantly less expensive than

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4 According to the WHO, elimination of mother to child HIV transmission requires under 2% rate with no breastfeeding, and under 5% if a mother breastfeeds.
6 Report by Kenya to the Committee on Economic, Social, and Cultural Rights, July 2013, p.12.
7 Report by Kenya to the Committee on Economic, Social, and Cultural Rights, July 2013, p.38.
brand-name medicines. The Court asked the government to revise Article 2 to differentiate between generic and counterfeit drugs, thereby ensuring those persons in need of life-saving medicines could access them at affordable prices.

18. In March 2015, Kenya’s High Court also ruled unconstitutional a section of the HIV and AIDS Prevention and Control Act that imposed a broad obligation on persons with HIV to disclose their status and made it a crime to “knowingly or recklessly” put another person at risk of becoming infected with HIV. As part of its justification for the decision, the Court affirmed that the language “could be interpreted to apply to women who expose or transmit HIV to a child during pregnancy, delivery or breastfeeding.” Indeed, the fear of such an interpretation could lead some pregnant women to refrain from life-preserving HIV testing and counseling.

19. According to UNAIDS, “the AIDS response has been costing more than 2% of [Kenya’s] GDP, with the government covering 16%, private households providing 14%, and international sources supplying 70%.” The government of Kenya has pledged to “lead by example” by raising domestic HIV funding to 50% of the costs, while reducing some costs through more efficient processes. According to a 2012 UNAIDS report, Kenya had already begun to substantially increase domestic allocations in recent years.

20. Under the Abuja Declaration of 2001, African Union heads of state pledged to allocate at least 15% of their domestic spending to “the improvement of the health sector.” They also pledged that “an appropriate and adequate portion of this amount” would be “put at the disposal of the National Commissions/Councils for the fight against HIV/AIDS, Tuberculosis and Other Related Infectious Diseases.” Although the Declaration included a call for sustained international assistance, the political leaders demonstrated their commitment to increased domestic spending as a more sustainable approach to improving health and tackling these diseases. Kenya appears far from meeting this goal, however, with only 4.5% of spending allocated to health care in 2013.

21. In addition, devolution of primary healthcare to the county level under the new Constitution has put an additional strain on an already under-resourced and over-stretched healthcare system. While HIV program management had mainly been a function of the central government, the county governments now have primary responsibility. The county governments are required to allocate 30% of the resources that are devoted to health, but it is unclear what percentage of this amount is actually allocated to HIV programs. Nor is it clear what the central government is doing to ensure there is sufficient funding and health care worker capacity to implement HIV programs in both in high-burden counties, as well as in less heavily-affected areas that are expected to receive less foreign assistance in the future.

22. Globally, stigma and discrimination still represent key barriers to an effective HIV/AIDS response, standing in the way of people seeking a diagnosis and keeping up with treatment for fear of the impact this might have on personal, societal, or professional relations. Kenya is no exception to this phenomenon, with widespread societal stigma and discrimination, as well as certain laws or government policies that may contribute to discrimination.

23. On the positive side, the HIV & AIDS Prevention and Control Act 2006 clearly prohibits discrimination against persons with HIV in the context of employment, education, housing, or political elections. HIV testing may not be mandatory and cannot be used as a condition for employment, marriage, or admission to an educational institution. The law also established an HIV and AIDS Equity Tribunal to receive complaints from people who claim to have suffered discrimination or stigmatization based on their HIV status. Kenya does not include information in its report on the impact the Tribunal has had to date.

24. Despite legal protections, individuals with HIV in Kenya still report widespread societal stigma that prevents them from disclosing their status, even to family members. The real or perceived stigma in communities and within families has led some HIV patients to hide their medicines, and has promoted others to stop treatment altogether or even throw pills away.

25. Children living with HIV in particular suffer from the impact of stigma as they are more sensitive than adults to negative feedback from others, especially from peers or authority figures. Poor treatment by teachers and schoolmates often discourage them from staying in school or on treatment. With this in mind, President Kenyatta announced in February 2015 that more would be done to fight stigma and discrimination in schools and to help keep children on ART. Yet one of the steps the President took to get a better understanding of the extent of the problem could inadvertently endanger the right to privacy of children with HIV and consequently increase the stigma they face. In February 2015, the President issued a directive calling for data to be collected on children’s HIV status, as well as information about their guardians. Both the name of the person and his/her HIV status would apparently be stored together in centralized records, which could have “have far-reaching ramifications for HIV patients in terms of their privacy and confidentiality.” In addition, no effort was reportedly made to consult with people with HIV about the directive’s implementation, which could have helped the government to collect data in a manner that respected children’s privacy. Human rights NGOs are currently challenging the directive in court, arguing it violates a set of fundamental rights and freedoms under the Kenyan constitution.
26. Finally, in line with Kenya’s constitutional right to reproductive health, girls and young women must have full and unimpeded access to age-appropriate information about HIV as well as confidential sexual and reproductive health services in order to reduce their risk or acquiring or transmitting HIV. Kenya’s report to the Committee states that it has created a pilot voucher system to improve access to and use of reproductive health services. But no further information is provided on steps to broaden availability of such family planning services, contraceptives, and sexual and reproductive health education in schools, as previously recommended by the Committee. A 2014 report by the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) lists as one of its recommendations a continued need to “remove legal barriers to condoms, comprehensive and age-appropriate sex education, sexual and reproductive health services.”

iii. Equal rights of men and women

27. Gender inequality, gender-based violence, and sexual exploitation greatly increase the risk of acquiring HIV by women and girls, and interfere with the ability of those living with HIV to seek treatment. Early and forced marriage, lower levels of schooling, unequal inheritance practices, economic pressure to engage in transactional sex, lack of freedom on health decisions within families, insufficient access to sexual and reproductive health education, and all too frequent gender-based violence all contribute to the fact that girls make up 71% of new infections among adolescents (15-19 years) in sub-Saharan Africa.

28. Kenya has laws that prohibit discrimination, physical abuse, and exploitation of women and girls, but such laws have not yet overcome longstanding cultural norms and societal practices, especially around property rights. As Kenya notes in its report, “A systemic key challenge facing implementation of equal rights for women and men is that, despite any clarity in the law, Kenya’s cultural and societal realities still mean that women are de facto discriminated in fields such as inheritance…. Married women in Kenya have been at a disadvantage when it comes to matrimonial and family property, due to cultural practices that prioritise men’s claims over land and property over women’s claims.”

29. In addition, KELIN argues that in Kenya, “Women are likely to be blamed by their intimate partners, families and communities for ‘bringing HIV into the home.’ This will increase the HIV related violence against women, increase evictions, ostracism, loss of property and inheritance and loss of child custody by women living with HIV.”

30. In addition, UNAIDS reports that over 30% of Kenyan women between 15-24 years old that are, or were, married experienced intimate partner violence in 2014. A study in South Africa found that young women who experienced intimate partner violence were 50% more likely to have acquired HIV than women who had not experienced violence. Indeed, modeling suggests that eliminating sexual violence alone could avert 17% of HIV infections in Kenya.

iv. Right to Education

31. Studies have shown that the longer girls stay in school, the later they are likely to begin sexual relations, get married, or get pregnant; the more likely they are to engage in safe practices when they do become sexually active; and the greater the chance of achieving economic independence – all of which will help protect them from HIV infection. However, many children living with HIV drop out of school because they face discriminatory policies, practices or attitudes, or due to cultural or economic pressures, especially for girls.

32. According to Kenya’s submission, Article 43 of the Kenyan Constitution guarantees every person the right to education, and Article 53 reaffirms that children have the right to basic and compulsory education. Primary education is free in Kenya, and Kenya has taken steps to reduce costs of secondary education and otherwise make it affordable to more children of poor families. Further steps to keep girls in secondary school as long as possible will maximize HIV prevention benefits. Evidence from a Kenyan cash transfer program showed that school enrolment reduced the likelihood of early sexual debut by 24.9% among females and 9.8% among males aged 15–20 years, respectively, one of the factors in reducing HIV transmission risk.

v. Social Protection and Adequate Standard of Living

33. Article 10 of the ICESCR requires that “special measures of protection assistance should be taken on behalf of all children” and that children “be protected from economic and social exploitation.” Article 11 of the Covenant also grants the “right of everyone to an adequate standard of living for himself and his family, including adequate food” and the “fundamental right of everyone to be free from hunger.” The particular vulnerabilities of children living with or affected by HIV mean that they need a variety of types of social, economic and legal protection and poverty reduction initiatives.

34. An estimated 13 million children in Sub-Saharan Africa have lost one or both parents to AIDS, including around 650,000 living in Kenya. For families already living in poverty, such a loss creates further economic hardship, causing some children to be removed from school in order to seek income for the family. Some children become de facto head of household for younger siblings, and some children are rejected by their families and forced to live on the streets, especially if they are also HIV-positive. Children who lose both parents – especially girls – are at even greater risk of losing their homes and other inheritance if there is
no written will or other (properly enforced) legal protection against such “property grabbing.”[31] Girls may be forced into early marriage, relationships with older men, transactional sex, or prostitution, all of which increase their risk of contracting HIV.

35. Given the heavy economic burden HIV/AIDS places on families, social protection programs need to be put in place for orphans and other vulnerable children (OVCs), including those heading their own households or otherwise without legal guardians. The more protection given to children, the longer they may be able to stay in school, another important factor in reducing the risk of HIV. Adequate nutrition and safe water is also crucial for helping children with HIV stay healthier and better tolerate ART. Kenya reports that it has cash transfers for OVCs and feeding programs to provide nutritional supplements to malnourished children and lactating mothers.[32] But it does not report specifically on steps it is taking relative to OVCs living with or affected by HIV to ensure whether all counties are providing sufficient economic, nutritional, and social support.

vi. Recommendations for List of Issues

36. Based on the analysis above, the Elizabeth Glaser Pediatric AIDS Foundation would like to recommend that the Committee include the following points in its List of Issues on Kenya’s report:

Article 3: Equal rights of men and women

- Please elaborate on efforts being made to protect women with HIV from disinheritance and other abusive practices within and outside of marriage.
- Please also describe steps the government is taking to ensure the implementation of laws against gender-based violence take into account the particular needs of women and girls living with HIV and protecting them from domestic violence.

Article 10: Protection of the family and children

- Please provide additional information on steps being taken to ensure that all orphans and other vulnerable children in Kenya are appropriately protected from discrimination, economic, and social exploitation, especially among children that have lost one or both parents to AIDS-related illnesses.

Article 11: Right to an Adequate Standard of Living

- Please provide additional information on efforts being made to ensure that the nutritional needs of children—whether they are in school or not—are being adequately met, particularly for children living with HIV.

Article 12: Right to Health

- Please provide information on how the government is monitoring the devolved responsibility to counties for HIV programs to ensure adequate funds are allocated and health care workers are properly trained.
- Please describe interventions the government is taking to optimize early identification of children and adolescents living with HIV and to substantially increase the number of children and adolescents initiated and retained on antiretroviral treatment. Specifically, what steps are being taken to increase the numbers and technical capacity of health care workers, to provide psycho-social support for people living with HIV who are put on treatment, and to encourage and monitor adherence?
- Please indicate the steps that are being taken to increase domestic spending on HIV, including funding for preventing and treating pediatric HIV, as prioritized by President Kenyatta.
- Please describe the impact that free maternity care has had on reducing maternal mortality and improving PMTCT, and what other steps the government is taking to increase the frequency and quality of ante-natal care.
- Please describe Kenya’s plans to fight against stigma and discrimination against people living with HIV, especially the most vulnerable populations such as children and adolescents. Please note how Kenya is consulting with people living with HIV in order to develop the most effective and appropriate solutions.
- Please describe the development of the HIV and AIDS Tribunal, including support for the secretariat, cases it has reviewed, and its impact to date.
- Please provide more detailed information on measures being taken to provide increased sexual and reproductive health education, especially for adolescents and other young people living with or at risk of exposure to HIV.

Article 13: Right to Education

- Please provide more information on efforts being made to keep children in school longer (through primary and secondary levels) given the documented connection between longer schooling and reduced HIV rates.
- Please describe actions being taken to reduce stigma against children in schools in a way that also protects their right to privacy.


Distinguished Committee Members,

This letter is intended to supplement the periodic report submitted by the government of Kenya, which is scheduled to be reviewed during the 56th pre-session of the Committee on Economic, Social and Cultural Rights (the Committee). The Center for Reproductive Rights (the Center) a global legal advocacy organization with headquarters in New York and, and regional offices in Nairobi, Bogotá, Kathmandu, Geneva, and Washington, D.C., hopes to further the work of the Committee by providing independent information concerning the rights protected under the International Covenant on Economic, Social and Cultural Rights (CESCR), and other international and regional human rights instruments which Kenya has ratified. The letter provides supplemental information on the following issues of concern regarding the sexual and reproductive rights of Kenyan women and girls: the high rate of preventable maternal mortality and morbidity; the abuse and mistreatment of women that attend maternal health care services; inaccessibility of safe abortion services and post-abortion care; lack of access to comprehensive family planning services and information; and discrimination resulting in gender-based violence and female genital mutilation.

i. The Right to Equality and Non-Discrimination

It has long been recognized that the obligation to ensure the rights to non-discrimination and substantive equality for all people underlies all human rights. Accordingly, states are required to address both de jure and de facto discrimination in private and public spheres. They are further required to not only remove barriers but also take positive measures “to achieve the effective and equal empowerment of women.” To this end, they should “adopt whatever legislation is necessary to give full effect to the principle of equality between men and women,” develop policies that promote gender equality, take efforts to eliminate gender stereotypes about women in the family and society, and address practices that disproportionately impact women. As the Committee noted, it is not sufficient for states just to guarantee women formal equality, as it does not adequately account for, and may even perpetuate, existing economic, social, and cultural inequalities between men and women. Instead, states must ensure women substantive equality, which seeks to remedy entrenched discrimination by addressing inequalities that women face. Similarly, it has been affirmed that to fulfill women’s human rights, states must use all appropriate means to promote substantive equality. To this end, the Committee recognizes that states may need to adopt temporary special measures “in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others,” which may include “taking measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination.”

One major element of women’s right to equality and nondiscrimination is their ability to exercise reproductive autonomy—that is, to make decisions regarding whether and when to have a child without undue influence or coercion. For women to enjoy reproductive autonomy, their options must not be limited by lack of opportunities or results. As such, it is crucial that women have access to reproductive health services, and that those services can be accessed with their consent alone. In addition, reproductive health services must “be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice.”

ii. The Right to Reproductive Health Care

The right of women and girls to access comprehensive reproductive health services receives broad protection under all the major international and regional human rights instruments, including the CESCR, which, under Article 12, recognizes “the right of everyone to the enjoyment of the highest standard of physical and mental health.” The Committee, in General Comment 14, has clarified that the right to health includes “the right to control one’s health and body, including sexual and reproductive freedom,” which “requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health.” In order to comply with this obligation, therefore, states are required to take “measures to improve child and maternal health, sexual and reproductive health services, including access to family planning … emergency obstetrics services and access to information, as well as to resources necessary to act on that information.”

A. High Incidences of Preventable Maternal Mortality and Morbidity (Articles 2 (2), 3, 10 (2), 12)

This Committee, as well as other treaty-monitoring bodies (TMBs), have framed the issue of maternal mortality as a violation of women’s right to health and right to life, and have repeatedly expressed concern regarding the high maternal mortality and morbidity in Kenya. Particularly, during the review of Kenya in 2008, the Committee stated its “concern about the high maternal…mortality rates, the lack of adequately equipped maternal health facilities and skilled birth attendance … and de facto discrimination against poor women, elder women and women with HIV/AIDS in access to maternal health care” and recommended that the government take concrete steps to address the problem. Similarly, in 2011, the CEDAW Committee expressed concern regarding the high maternal mortality and recommended the government strengthen its efforts to reduce the rate and ensure that women, including those that live in rural areas have access to health care facilities.
However, the WHO reports that Kenya’s maternal mortality rate (MMR) has only decreased by 0.8% per year since 1990—well short of the target rate of 5.5%—which has left Kenya far off track in achieving its Millennium Development Goal target MMR of 175 deaths per 100,000 live births by 2015. Currently, according to the same report, 400 Kenyan women and girls die per every 100,000 live births. In some low-income urban areas, the estimated MMR is as high as 706 deaths per 100,000 births. Citing the 2003 MMR of 414 deaths per 100,000 live births and the 2008-09 rate of 488 death per 100,000 live births, the government, in its current report to the Committee, stated that the “declining maternal health indicators are worrying.” Although the current MMR has shown some improvement from the 2008-2009 rate, it has not reduced significantly from the rate in 2003.

In order to reduce Kenya’s high maternal mortality rate, it is crucial that women have access to comprehensive care throughout the antenatal, delivery, and postnatal periods. However, access to quality maternity care remains a significant challenge, particularly for vulnerable groups of women, including low-income women, women with lower levels of education, and those in rural areas. According to the 2014 Kenya Demographic Health Survey summary report (2014 KDHS), although nine out of ten mothers reported at least one antenatal care visit, only 58% of pregnant women attend the WHO recommended four or more antenatal care visits. Moreover, a woman’s geographic location has a significant impact on her access to antenatal care: for example, 68% of women living in urban areas are more likely to attend four or more antenatal care visits compared to 51% of those living in rural areas. Women with higher education and those in a higher wealth quintile area are also more likely to attend the recommended antenatal care visits than their counterparts.

Women also face challenges in obtaining quality delivery care; access to skilled providers during delivery is markedly worse for lower income, less educated, and rural women. The 2014 KDHS notes that only about 50% of rural women versus 82% of urban women obtain delivery assistance from a skilled provider such as a doctor, nurse, or midwife. Similarly, only 30% of women in the lowest wealth quintile delivered in a health facility compared to 93% of women in the highest wealth quintile. Further, while the WHO recommends postnatal care starting an hour after giving birth for the first 24 hours in order to check for complications, only 51% of women receive a postnatal checkup within two days of giving birth. Disparities in access exist here as well: approximately 71% of women from the highest wealth quintile received postnatal care within two days as compared to only 29% of women from the lowest quintile. In its current report, the government admits that there are some challenges in the health sector including “inadequate universal health coverage, inadequate budgetary allocation and improper resource use.”

(i) Abuse and Neglect of Women Seeking Maternal Health Services in Health Care Facilities

During the review of Kenya in 2008, the Committee, recommended the state take measures to ensure that all women have “access to skilled care free from abuse during pregnancy, delivery, postpartum, postnatal periods.” Nevertheless, according to a fact finding report conducted by the Center and FIDA- Kenya, women who attend maternal health care services are frequently neglected and encounter systematic abuse from health care professionals and staff. These findings were further documented in a 2012 national public inquiry by the Kenyan National Human Rights Commission (KNHRC). Women who attend these services often experience delays and a lack of adequate medical care. They also reported not being provided with adequate information about health services and available procedures, or were denied services. They recounted rough, painful, and degrading treatment during physical examinations and delivery, as well as verbal abuse from nurses if they expressed pain or fear. For example, women arriving at Pumwani Maternity Hospital (PMH) recounted being told to find their own way to the delivery ward and to lift themselves onto the maternity bed while they were in labor. The research also found delays in medical care during labor or waiting for stitches after delivery, including being stitched without anesthesia, causing women to endure excruciating pain.

For instance, one woman, who gave birth at St. Mary’s hospital in Langata, was subjected to verbal and physical abuse by a medical provider. During the delivery, the medical provider treated her so roughly that she feared for her and her baby’s life. Since she was already in labor in an extremely vulnerable state, she was unable to stop the abusive treatment. The provider further subjected her to terrible pain and suffering by mutilating her genitals with a sharp object without her consent. She was unable to obtain redress for the abuse and ill-treatment she suffered in the hands of the health care provider even though she reported the incident to the police, hospital authorities, as well as the Kenya Medical Practitioners and Dentist Board.

Another woman, who attended PMH, also recounted how hospital staff refused to assist her during labor and one nurse told her to “stop pretending to be in pain.” When her pain worsened, a staff member told her to continue suffering because she was responsible for her own pregnancy. At night, when her pain intensified, she had to crawl to the nurses for assistance, who, instead of helping her, mocked her and asked if she was exercising. When her water broke, she had to walk to the delivery ward on her own and was assisted by another patient who had just delivered her baby.

In response to these egregious actions, the Center filed a case in the High Court of Kenya in 2012 highlighting the abuse that women face at health care facilities and seeking declaration that this treatment amounts to a violation of their human rights. One of the petitioners in this case was mistreated and treated inhumanly at PMH. Even though she was in labor and severely bleeding upon arrival, she did not receive immediate care and was not taken to the operating room until two hours after her arrival. Due to the delay in emergency care, her bladder ruptured after her caesarean section. Her suffering was compounded by the fact that her wound was infected and the stitching had been poorly performed. To make matters worse, during the days following her caesarean section, she was detained because she was unable to pay her hospital fees and was forced to sleep on a cold floor without any subsequent medical care. On September 17, 2015, the Court passed a decision and found that the rights of the women, including their right to health, liberty and dignity, had been violated by the actions of the health care professionals at PMH and that they were discriminated against based on their socio-economic status. The court also ordered the government to pay monetary compensation to the petitioners for the damages they suffered as a result of these violations.

(ii) Illegal Detention of Women in Health Care Facilities for Failure to Pay Maternity Health Care Fees

In addition to the inhuman and abusive treatment women face when seeking maternal health care, the factfinding report revealed that women in Kenya are often detained or denied access to services altogether when they fail to pay fees in private and public health care facilities. In its most recent concluding observations on Kenya, the Committee against Torture (CAT Committee) noted its concern about “the ongoing practice of post-delivery detention of women unable to pay their medical bills, including
in private health facilities.” The user fees for maternal health services reduces the likelihood that low-income, less educated, or rural women will be able to access essential health care since fees make health care prohibitively expensive and inaccessible. For instance, women are often barred from entering the hospital if they are unable to afford the admission fee. Once women are admitted to the hospital, they may be denied essential or life-saving treatment if they fail to pay the remaining balance of their hospital fees. In many instances, women who are unable to pay the required fees for services rendered during their labor and delivery are detained at health care facilities, often without postnatal care or basic necessities such as bedding and food for themselves and their newborns. Both petitioners in the Center’s 2012 case, discussed above, were made to sleep on the floor during their detention—one was even forced to sleep next to a toilet, which routinely flooded. The internal and external mechanisms through which women can get redress for these violations of their human rights are ineffective. Even when redress mechanisms are available, women often do not know about them or lack the necessary information about how to access them. Accordingly, it is vital for the government to immediately comply with the recent judgment from the High Court, confirming that the detentions are human rights violations, by ensuring the detentions do not continue.

Inadequate Implementation of Presidential Directive on Free Maternity Care

As noted in Kenya’s current report, the government issued a Presidential Directive in June 2013, which provided that all pregnant women would be able to “access free maternity services in all public health facilities.” However, the government’s report fails to detail the steps that are being taken to ensure the effective implementation of this declaration despite various reports indicating that serious problems with implementation have prevented women from accessing quality maternity services in practice. According to the KNCHR, hospital infrastructure and staffing cannot support the additional number of women who come seeking free maternal health care due to this declaration, and the government has failed to allocate sufficient additional resources to remedy this issue. Furthermore, there have been no clear guidelines set by the government about how to implement the free maternal services. Although some facilities have reportedly been given extra money to cover the influx of deliveries, others have remained uncertain of how to balance the new policy of free care with their need to cover costs.

In addition, although the government has said that maternal health services would be free for women, in reality, not all costs associated with giving birth have been eliminated. Women still have to purchase basic goods required for delivery, such as cotton wool and the medications used to induce labor, straining their resources. Other key components of maternal health services, including antenatal and postnatal care, are also not covered under the directive. Further, the Reproductive Healthcare Bill that was tabled in parliament provides for free antenatal care, but does not cover postnatal care or provide any guidance regarding implementation of the Directive.

The declaration of free services has also not addressed the issue of abuse and mistreatment of women that attend maternal health services; in fact, the situation may have worsened as health care staff attempt to cope with an influx of delivery patients. For instance, it was recently reported that a woman was forced to give birth while standing at Nyeri Hospital because there was no nurse to attend to her, and the baby fell on the floor and died from the impact. The continued abuse following the Presidential Directive has been challenged in a recent case filed by the Center at the Bungoma High Court where the petitioner was neglected and abused by the hospital’s staff. She was not monitored while in labor and, when she was unable to find a free bed in the delivery ward, she collapsed unconscious on the floor, where she gave birth. When she subsequently regained consciousness, two nurses were slapping her face and shouting at her for dirtying the hospital floor during delivery.

B. Lack of Access to Safe Abortion Services and Post-Abortion Care

During the 20008 review of Kenya, the Committee expressed concern “about the high number of unsafe clandestine abortions” and recommended the state “decriminalize[e] abortion in certain situations, including rape and incest.” CEDAW Committee, in its 2011 concluding observations, also urged the state to “[p]rovide women with access to good-quality services for the management of complications arising from unsafe abortions and to consider reviewing the law relating to abortion with a view to removing punitive provisions imposed on women who undergo abortion.” Similarly, in 2013, the CAT committee recommended that the government “evaluate the effects of its restrictive legislation on abortion on women’s health with a view to regulating this area with sufficient clarity” and amend its laws to allow abortion on the grounds of rape and incest. Further, Kenya is a signatory of the Maputo Protocol of which Article 14(2) (c) obligates states parties to “protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.” However, in its report, the government does not mention any efforts to bring its law in line with its human rights obligations or to address the prevalence of unsafe abortions.

In Kenya, unsafe abortion accounts for one-third of maternal deaths, which can be due to the numerous barriers women face in accessing safe abortion services. The laws governing abortion in Kenya are not only confusing, but also contradictory. While Kenya’s 2010 Constitution provides for abortion in situations where a woman’s life or health is at risk, the Penal Code has not been revised to reflect this change. Therefore, a woman could still face prosecution for seeking an abortion in circumstances allowed under the Constitution, such as when the pregnancy places her health at risk. Moreover, before its revision in 2014, the 2004 National Guidelines on the Medical Management of Rape and Sexual Violence provided that “[t]ermination of pregnancy is allowed in Kenya after rape” since it is allowed under the 2006 Sexual Offences Act. Even though this statement was removed during the revision of the guideline in 2014, the new guideline still provides that survivors of sexual violence have the right to “[a]ccess termination of pregnancy and post-abortion care in the event of pregnancy from rape.” Yet, neither the Constitution nor the Penal Code have expressly provided for this exception, and the government has not clarified whether this exception for rape applies under the 2010 Constitution. Further, although the proposed Reproductive Health Bill would codify the life and health exception from the Constitution, the Bill places unnecessary and likely unconstitutional restrictions on access under these circumstances. The Bill would require an adolescent to get the consent of parents or a guardian to get an abortion where her life or health is at risk, which would violate her rights to life, health, and non-discrimination by putting her at heightened risk of
dying due to the denials or delays in access to safe abortion care.

In fact, the Ministry of Health worsened the confusion surrounding the legality of abortion by withdrawing its 2012 Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya, which provided guidance to medical professionals as to when they could perform abortion services under the 2010 Constitution. In addition, in 2014, the Ministry of Health issued a memo to all health care providers stating that “abortion on demand is illegal” without clarifying the legal exception under the Constitution. The memo further stated that it is illegal for health workers to participate in trainings on either safe abortion care or the use of the drug Medabon for medical abortion. The memo threatened health workers with legal and professional sanctions, even though trainings are essential to the development of health workers’ skills in comprehensive and life-saving abortion care.

This lack of clarity in the legal framework and restrictions on safe abortion services compel women and girls to resort to clandestine abortions, which are often unsafe and subject women to grave pain and suffering. In its 2012 public inquiry, the KNCHR found that women resort to “crude methods,” administered by unqualified persons to terminate pregnancies, due to the inaccessibility of abortion services in Kenya. The KNCHR further concluded that restrictive abortion laws contribute significantly to high maternal mortality and morbidity in Kenya. A 2013 study conducted by the Ministry of Health estimated that nearly 465,000 abortions occur in Kenya each year. Approximately 120,000 women sought care in health care facilities for unsafe abortion-related complications. One study found that up to 60% of all gynecologic emergency hospital admissions are a result of complications from unsafe abortion. It concluded that the numbers of maternal death due to unsafe abortion is high. At least 266 Kenyan women and girls die per 100,000 unsafe abortions each year. The harshness of Kenya’s abortion laws most heavily impacts young women and low income women—for whom the unintended pregnancy rate is highest—where even relatively safe abortion procedures are available, because the cost of these services often exceeds these women’s financial resources.

In August 2015, a major newspaper in Kenya reported multiple stories of women who experienced unsafe abortion and suffering kidney failure. In June 2015, the Center filed a case in the High Court of Kenya at Nairobi that challenged the Ministry of Health’s memo and the withdrawal of the Standards and Guidelines. The case was brought on behalf of four petitioners, including “Wanjiku,” a 15-year-old girl who had an unsafe abortion after an older man coerced her into having sex with him. Feeling anguished and fearing rejection from her family, Wanjiku decided to end the pregnancy but found safe abortion services to be unavailable. She was forced to seek care from an unqualified individual who used a dangerous method and botched the procedure. Afterwards, she started to vomit, bleed heavily, and swell—signs that her kidney was failing. However, when she could not afford to pay the medical bills for post-abortion care, she was detained by the hospital and forced to sleep on the floor. Doctors diagnosed Wanjiku with a kidney disease that requires regular dialysis, and ultimately a kidney transplant. Two organizations—East Africa Center for Justice and Kenya Christian Professionals Forum—have been granted permission to join the case as interested parties. The government has also filed its response to the claims in the case and the Center is in the process of preparing a response.

Post-Abortion Care

Access to post-abortion care (PAC) is essential to protect health and lives of women following an unsafe abortion—particularly in Kenya where the rate of unsafe abortion and resulting complications remain high. For example, a hospital in Mombasa received at least 102 patients in need of PAC during a four month period from late 2014 to early 2015. Moreover, a 2015 study found that 77% of Kenyan women seeking PAC suffered from moderate or severe complications. However, barriers to access to PAC create delays in receiving essential treatment, which cause disproportionately higher rates of severe post-abortion complications.

Reports by the KNCHR and the Center have revealed that women often delay seeking PAC due to fear of the social stigma and legal risks associated with the procedure, including harassment by the police and possible prosecution. Although the government has stated that PAC is “legal and not punishable by any part of Kenya laws,” this declaration only offers protection to the health care providers and not to women who seek PAC. Further, delays in arriving at the health care facility and obtaining the right treatment are endemic in Kenya as a result of “shortages in staffing, equipment, drugs, and poor attitude of health care providers.” These delays can have fatal consequences for women that present with treatable conditions.

Furthermore, medical providers may exacerbate the barriers women face in accessing PAC. Studies indicate that medical personnel—particularly nurses—are inadequately trained, so women suffering from complications may have to wait an extended period of time for a trained provider to attend to their medical needs. Medical providers may also make women feel like criminals instead of patients by insulting and shaming them for having undergone abortion. Some medical providers may even be unaware that providing PAC is legal, particularly after the Ministry of Health withdrew the Standards and Guidelines which also provided guidance on the provision of PAC. Furthermore, the recording of PAC in a woman’s medical history can expose her to harassment by law enforcement officials or family members, a predicament medical staff use to extort bribes from patients.

Lack of Access to Family Planning Information and Services

In its 2011 concluding observations, the CEDAW Committee urged Kenya to “[s]trengthen and expand efforts to increase knowledge of and access to affordable contraceptive methods throughout the country and ensure that women in rural areas do not face barriers to accessing family planning information and services.” This is similar to the concern expressed by this Committee in 2008, about “the limited access to sexual and reproductive health services and contraceptives, especially in rural and deprived urban areas,” and the recommendation for the government to “ensure affordable access for everyone, including adolescents, to comprehensive family planning services [and] contraceptives.” However, Kenya’s report, despite acknowledging the recommendation of the Committee on family planning, does not discuss the effort the government is making to ensure access to family planning information and services.

A woman’s ability to choose her preferred method of contraception is instrumental in enabling her to control her own fertility and
to decide whether and when to bear a child. However, according to the 2014 KDHS, only about half of Kenyan women (53.4%) are able to access modern methods of contraceptives, an increase of only seven percentage points from the 2008 rate. A large portion of Kenyan women have an unmet family planning need, which is defined as women who would like to delay their next birth by at least two years or would like to cease childbearing, but are not currently using a contraceptive method. The 2014 KDHS found that although women from all demographic backgrounds have significant unmet family planning needs, the rate of unmet need falls precipitously as wealth increases with a rate of 29% unmet need in the lowest wealth quintile and only 11% in the highest quintile. In addition, usage disparities are even more pronounced by geographic area due to factors including inequitable regional distribution of contraception and frequent stock outs. For example, only 3.4% of women in the former Northeastern Province—a region with low socio-economic indicators—use contraceptives, whereas 70.4% of women in the former Eastern Province and 72.8% in the former Central Province reported using contraceptives. These disparities in usage rates are due to a variety of barriers to women’s and adolescent’s access to family planning information and services. Physical barriers to accessing contraceptives include public health facility stock outs, inequitable distribution throughout the country, and costs associated with procuring contraceptives, such as lost wages or transportation. Despite the Ministry of Health’s policy that contraceptives should be available free of charge, many government health facilities charge their patients “user fees” for family planning services and some charge for the contraceptive method itself. Moreover, a woman’s preferred method of contraception is often unavailable or may be too costly. Women also face negative attitudes and stigma against contraceptive use from family or community members. Examples include perceptions of young women who carry condoms as promiscuous, “sexually wayward,” or “untrustworthy”; women’s husbands becoming angry when their wives begin using contraceptives; or unmarried women feeling ashamed to obtain contraceptives. Social stigma against the use of contraception is particularly problematic for adolescents, who are one of the groups most vulnerable to experiencing discrimination in access to family planning services. For example, in the Center’s fact-finding report, one young woman recounted being turned away when she attempted to get an intrauterine device. “[T]hey said no at the government facility. They said you are a Muslim girl, you are going to burn in hell. She was a Muslim nurse and refused to give me contraceptives.”

Access to Emergency Contraception

Many women and girls could prevent unplanned or unwanted pregnancies by using emergency contraception (EC), a safe and effective method that can be used within 120 hours of unprotected sex and a critical component of care for survivors of sexual violence. Indeed, the National Guideline on the Management of Sexual Violence in Kenya also requires that EC be available 24 hours a day for survivors of sexual violence in all health facilities. In Kenya, nine products of EC are registered, and the MOH broadly recommends its use for those “who have had unprotected sexual intercourse and desire to prevent pregnancy.” The Ministry of Health also has recognized that EC “is an important component of adolescent reproductive health.” In addition, it is included in Kenya’s essential drugs list and the National Family Planning Guidelines for Service Providers, which stipulates that EC should be provided without restriction. However, in practice, there are significant barriers to accessing EC. Consistent stock outs in pharmacies and shipment delays prevent women and girls from reliably accessing the medicine. Some pharmacists also decline to distribute EC altogether or refuse to dispense it without a prescription, although EC is registered in Kenya as an over-the-counter medicine. Despite the MOH guidelines that explicitly permit EC’s usage for any unprotected sex, arbitrary refusals stem from the perception that the contraceptive is only intended to be used by rape victims. Moreover, adolescents are routinely denied access to EC for arbitrary or discriminatory reasons such as “the person look[ed] young.” A 2014 study found out that only 18% of women and girls surveyed in Nairobi have ever used EC. Private health care facilities may not always offer EC either. For example, although facilities run by the Catholic Church or Christian Health Association of Kenya provide services to survivors of sexual violence, they do not provide EC to these individuals. Women’s access to EC is an essential component of the full range of contraceptive options that women must have—particularly for survivors of sexual assault and following unprotected sex—in order to ensure their right to reproductive autonomy.

iii. DISCRIMINATION RESULTING IN GENDER-BASED VIOLENCE AND HARMFUL TRADITIONAL PRACTICES AGAINST WOMEN AND GIRLS

Harmful practices, including physical and sexual violence, are manifestations of the inequality and discrimination that women and girls encounter in their day-to-day lives. Gender-based violence has been addressed in many of the concluding observations on Kenya issued by various treaty monitoring bodies. The Human Rights Committee stated in its 2012 concluding observations that Kenya “should adopt a comprehensive approach to preventing and addressing FGM, and gender-based violence in all its forms and manifestations.” In 2008, this Committee also recommended that “the State party raise public awareness of the need to abolish laws and customs which discriminate against women and adopt … Gender Equality and Affirmative Action Bills.”

The Kenyan government noted in its report that it has passed and introduced various legislation to address issues of gender-based violence, including the repealing of Section 38 of the Sexual Offences Act (No. 3 of 2006) which carried sanctions for false sexual violence allegations. However, the government also acknowledges that “a number of gender facilitative bills including the marriage bills, have for years remained unlegislated.” As a result, significant gaps remain in the legal and policy framework to address violence against women and girls; the government must do more to effectively implement the existing legal protections and ensure access to services for survivors of gender-based violence.
A. Sexual and Domestic Violence against Women and Girls

In its 2008 concluding observations, the Committee noted the high rate of domestic violence and “the low number of complaints filed by victims.”\(^{114}\) Despite this chronic underreporting, data from various sources demonstrate that violence against women, sexual and otherwise, is prevalent in Kenya. In March 2013, the Gender Minister reported that 32% of females in Kenya have experienced sexual violence.\(^{115}\) The 2014 KDHS shows that approximately 44% of ever-married women have experienced sexual or physical violence by their husband or partner,\(^{116}\) which is not a significant decrease from 2008-2009 KDHS where 47% of ever-married women reported to having experienced such violence.\(^{117}\) In addition, roughly 28% women aged 20-29 have experienced some form of violence in the previous 12 months preceding the survey.\(^{118}\) Furthermore, women who were divorced, separated, or widowed are more likely than their married counterparts to report past experiences of sexual or physical violence.\(^{119}\)

Although the domestic legal framework in Kenya provides a mechanism for addressing violence against women and girls,\(^{120}\) this framework has a number of gaps. The passage of the Sexual Offences Act of 2006 represented an improvement over earlier laws on sexual violence, but still the government has not implemented the Committee’s recommendation of explicitly criminalizing marital rape and domestic violence.\(^{121}\) This is significant given that more than one in three female survivors of sexual violence report that the perpetrator was either a current or former husband or boyfriend.\(^{122}\)

In addition, survivors of sexual and physical violence lack access to needed services and face a number of barriers that prevent them from receiving meaningful assistance from medical or legal professionals. These barriers include a lack of comprehensive facilities where victims can report complaints and receive medical treatment, including emergency contraceptives; a lack of awareness among sexual violence victims of the services that are available; difficulties in proving sexual violence; and the high cost of obtaining services after sexual violence.\(^{123}\) Further, health care providers may lack adequate training or an understanding of the appropriate medical and gender-sensitive response toward sexual violence.\(^{124}\) In addition, many women and girls are reluctant to engage in the justice system because the police often harbor negative attitudes toward victims. Although designated ‘Gender Desks’ were established in some police stations to assist victims of gender-based violence, poor equipment and infrastructure, weak investigations, and inadequate training have combined to undermine their effectiveness.\(^{125}\) Therefore, women and girls who experience violence are subjected to social stigma, humiliation, and bribe requests in police stations.\(^{126}\) Legal assistance is not readily available, which makes access to remedies daunting and disincentivizes the use of the legal system for redress.\(^{127}\)

Sexual Violence against Girls and Adolescents, Particularly in Educational Settings

Violence and abuse against adolescents and girls is a pervasive problem in Kenya, with an even higher prevalence than statistics suggest due to underreporting. Recent survey results show that one in three Kenyan girls experience some form of sexual violence before the age of 18.\(^{128}\) A household survey of more than 3,000 young people aged 13 to 24 revealed that three out of four had experienced physical, sexual, or emotional violence.\(^{129}\) Of those who had experienced violence, six out of ten have been physically abused.\(^{130}\) Rape is rarely reported as a result of pervasive social stigma and a deep mistrust in police and the criminal justice system.\(^{131}\) A 2012 UNICEF study determined that only 3% of sexually abused girls received professional help in the form of medical, psychological, or legal assistance.\(^{132}\) Sexual violence against girls and adolescents is also a significant problem in schools and other educational settings. According to a 2012 UNICEF study of women aged 18 to 24 who experienced unwanted sexual touching before the age of 18, about 25% reported that the first incident took place in school.\(^{133}\) A 2009 report by the Kenya Teachers Service Commission (TSC) and the Centre for Rights Education and Awareness estimated that 12,660 girls were sexually abused by their teachers in Kenya between 2003 and 2007, although the report notes that 90% of sexual abuse cases go unreported.\(^{134}\)

In W.J. & Another v. Astarikoh Henry Amkoah & 9 Others, a case in which the Center submitted an amicus brief, two adolescent girls were sexually abused by the Deputy Head teacher at Jamhuri Primary School in Nakuru County, Kenya.\(^{135}\) The High Court of Kenya at Nairobi not only found the teacher civilly liable for sexual assault, but also determined that the government and Teachers Service Commission (TSC) handled the case inadequately. The Court ordered the government to provide financial reparations to the two girls and the TSC to update its guidelines to better handle sexual assault allegations.\(^{136}\) Although the TSC circular, or employee guidelines, mentions disciplinary action for the sexual assault of students,\(^{137}\) the circular fails to indicate clear mechanisms for disciplinary action or provide sexual assault survivors with psychological or essential health care.\(^{138}\) The Government of Kenya must ensure that the TSC complies with order of the High Court to end the practice of “shuffling abusive teachers from one school to another, and finally, content itself with dismissals.”\(^{139}\) The Government must also follow the Court’s order to “put in place an effective mechanism”\(^{140}\) to ensure that teachers are held accountable for any sexual abuse that they commit against their students.

B. Female Genital Mutilation (FGM)

Female genital mutilation (FGM)—“the partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons”—\(^{141}\) disrupts the natural functioning of girls’ and women’s bodies and leaves them susceptible to serious health risks including pain, shock, bacterial infection, hemorrhaging, or death.\(^{142}\) FGM has been internationally recognized as a human rights violation as “an extreme form of discrimination against women,” and violates the “rights to health, security and physical integrity, the right to be free from torture and cruel, inhuman or degrading treatment, and the right to life when the procedure results in death.”\(^{143}\) In 2008, the Committee called on the government to pass a legislation to criminalize FGM, ensure implementation of the law and raise the awareness of the community regarding the harmful effect of FGM.\(^{144}\) In its 2013 concluding observations, the CAT Committee stated that Kenya “should redouble its efforts to eradicate the practice of female genital mutilation, including through awareness-raising campaigns and by prosecuting and punishing perpetrators of such acts. The State party should ensure that all measures to combat the practice comply with legal safeguards.”\(^{145}\)
Even though Kenya has implemented some parts of these recommendations by passing the Prohibition of Female Genital Mutilation Act, 2011 and establishing an Anti-FGM Board, it has failed to take concrete steps to effectively enforce the law, which is demonstrated in the very high rate of the practice: FGM is universal in Northeastern Kenya, where 97.5% of women have undergone FGM, compared with only 8% of women in Nairobi. Without a robust enforcement mechanism and equitable implementation across the country, the Prohibition of Female Genital Mutilation Act will remain ineffective.

We hope that the Committee will consider addressing the following questions to the Government of Kenya:

Maternal Health

1. What concrete steps is the Government of Kenya taking to reduce the high maternal mortality rate? How does the government plan to expand access to quality health care throughout the duration of a woman’s pregnancy, including antenatal, delivery, and postnatal care, including for low-income women and those in rural areas?

2. What steps is the Government taking to effectively implement the Presidential Directive in order to ensure all women have access to free maternal health care? What measures are being taken to ensure that there are sufficient resources to properly implement the free maternal health care program? How is the Government going to ensure that hospitals are equipped to deal with the increased number of women seeking maternal health care services?

3. What measures are being taken to eliminate the practice of detaining women in both public and private hospitals who cannot afford hospital fees after giving birth? How is the government working to improve the training of healthcare providers about patients’ rights and eliminate the abuse and neglect of women by medical and hospital staff? What steps are being taken to protect women and girls from gender-based violence and abuse in healthcare facilities? How does the government propose to ensure that women are able to report and seek redress for such abuses?

Unsafe Abortion and Lack of Access to Post-Abortion Care

4. What measures will the government undertake to review and clarify the existing abortion laws to ensure that women have access to safe, legal abortion services and post-abortion care, as provided under the 2010 Constitution? When does the Government intend to issue new guidelines clarifying the circumstances in which health care professionals can provide safe, legal abortion services under the 2010 Constitution? What steps is the Government taking to ensure that its abortion laws are consistent with the international and regional human rights standards by allowing abortion in cases of rape, incest, and fetal anomalies?

5. How will the government reduce the high levels of unsafe abortions in Kenya? What steps has the government taken to ensure equal opportunities for rural and low-income women and adolescents to receive respectful and comprehensive post-abortion care?

Access to Family Planning Information and Services

6. What is being done to ensure that women and adolescents have access to the full range of family planning and contraceptive methods and information? How does the government propose to improve awareness about, and the availability of, emergency contraception?

Physical and Sexual Violence against Women and Girls and FGM

7. What measures will Kenya take to ensure that victims of sexual violence have access to necessary support services, including medical and legal resources? How will the government ensure that health care professionals and police handle cases of sexual violence in a manner that is sensitive to the needs of victims? What progress has the government made towards criminalizing marital rape and domestic violence?

8. How will the government ensure the implementation of the High Court decision holding teachers accountable for sexual violence in schools? What steps is it taking to guarantee the TSC complies with the order to rewrite the circular to ensure that disciplinary proceedings are effective and uniform, and that survivors of sexual assault in schools receive the medical and psychological support they require.

9. What concrete steps is the government of Kenya taking to effectively implement the Female Genital Mutilation Act, 2011, particularly in rural areas, to eradicate the practice of FGM from Kenya?

Sincerely,

Evelyne Opondo Onyema Afulukwe
Regional Director Senior Legal Advisor
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11. Id. paras. 6-7.

12. Id. para. 15.

13. Id.


15. Id.


17. ESCR Committee, supra note 1, art. 12.


20. Id. para. 21.


See id. at 23, 24 tbl.3.13 (2015); see also WORLD HEALTH ORGANIZATION, Antenatal Care (at least 4 visits) (2015), http://www.who.int/gho/urban_health/services/antenatal_care_text/en/ (last visited July 6, 2015).

31. KDHS 2014 SUMMARY, supra note 27, at 23.

32. See id., at 24, tbl.3.13 & 25, tbl.3.14.


34. Id. at 30, 32, 37.

35. Id.

36. See KDHS 2014 SUMMARY, supra note 27, at 23.

37. See id.


42. FAILURE TO DELIVER, supra note 39, at 7-10.


44. See id., at 30, 32, 37.

45. Id. at 28 (citing focus group discussion with an unnamed participant, Nairobi, Feb. 9, 2007).

46. Id. at 53–54; KNCHR REPORT 2012, supra note 40, at 54.

47. Id. at 56.

48. Id.


50. Id. at 21.

51. Id. at 24, 54 Id.

52. Id. at 26.


Increasingly Troubling Trend of Maternal Deaths in Kenya 1 (Jan. 20, 2014) available at

MATERNAL-DEATHS-IN-KENYA-FINAL-1.pdf; see AFRICAN SUMMIT ON HIV/AIDS.

TUBERCULOSIS AND OTHER RELATED INFECTIOUS DISEASES, ABUJA DECLARATION ON HIV/AIDS, TUBERCULOSIS AND
aids/pdf/abuja_declaration.pdf.

69 A matron at PMH explained that the government was reimbursing them at a flat rate of Ksh 5,000 per delivery, even though the hospital used to charge Ksh 5,000 for normal deliveries and Ksh 10,000 for caesarean sections. This created a critical financial gap at the hospital: KNCHR, FREE MATERNAL HEALTH CARE 2013, supra note 67, at 6. 70 Henry Owino, Not So Free After All: Delivery Services the Only Free Package on Maternal Health Care, REJECT 1, 4 (2013) [hereinafter Owino: Not so Free], available at http://issuu.com/awcfs/docs/reject_online_issue_87. 71 Majani v. A.G. of Kenya & 4 Others, Petition No. 5 of 2014, 6 (High Ct. Kenya, Bungoma).

Owino: Not so Free, supra note 70, at 1, 4.


75 Pregnant Woman Forced to Give Birth While Standing in Nyeri Hospital, STANDARD MEDIA, http://www.standardmedia.co.ke/
ktr/video/watch/2000074070/-pregnant-woman-forced-to-give-birth-while-standing-in-nyeri-hospital (last visited June 18, 2015); see also Bosh, Dying to Give Birth, supra note 74.


Maputo Protocol, supra note 2, art. 14(2)(c).


KENYA MINISTRY OF HEALTH, NATIONAL POST ABORTION CARE CURRICULUM FOR SERVICE PROVIDERS xii


MINISTRY OF PUBLIC HEALTH & SANITATION, NATIONAL GUIDELINES ON MANAGEMENT OF SEXUAL VIOLENCE IN KENYA
VIOLENCE].

MINISTRY OF HEALTH, NATIONAL GUIDELINES ON MANAGEMENT OF SEXUAL VIOLENCE IN KENYA Annex 11, 78


Ministry of Public Health and Sanitation, Memo to health care providers on abortion training and Medabon (2014) (on file with the Center).

See, e.g., Chimbi, Crossroads Over Unsafe Abortion, supra note 88.

KNCHR REPORT 2012, supra note 40, at 47. 92 Id. at 66-67.

MINISTRY OF HEALTH, INCIDENCE AND COMPLICATIONS OF UNSAFE ABORTION IN KENYA: KEY FINDINGS OF A NATIONAL

See id.

Id; see also Bernard Muthaka, Penal Code Slowing down Constitutional Abortion Care Services, STANDARD DIGITAL (Dec. 9, 2012), http://www.standardmedia.co.ke/?articleID=2000072431&story_title=Kenya-Penal-codeslowing-down-constitutional-abortion-care-services (last visited July 6, 2015)

GUTTMACHER FACT SHEET 2012, supra note 25.
MINISTRY OF HEALTH, INCIDENCE OF UNSAFE ABORTION 2013, supra note 93, at 8.

FAILURE TO DELIVER, supra note 39, at 24–25 (finding that half of the women treated by a hospital for complications from unsafe abortion were under the age of 20).


Muchangi, Alarm Over Unsafe Abortion, supra note 88.

Severe complications are defined as death, sepsis, running a temperature above 37.9 degrees Celsius, evidence of mechanical injury or foreign body, shock, pulse less than 119 beats per minute, organ or system failure, generalized peritonitis, or tetanus. Moderate complications include offensive products of conception, running a temperature between 37.3 and 37.9 degrees Celsius, or localized peritonitis. See. 65.4 percent of post-abortion care relied on vacuum aspiration, 7.9 percent utilized dilation and

The training manual provides that “[c]omprehensive PAC is a life-saving procedure that should be available to all women and provision of comprehensive post-abortion care does not lead to punishment or withdrawal of registration of the service provider.” It does not, however, address the issue of women who are deterred from seeking PAC for fear of prosecution. Id. at 1-24.


See id.

GUTTMACHER IN BRIEF 2012, supra note 99, at 2. IN HARM’S WAY, supra note 100, at 88–90.

FAILURE TO DELIVER, supra note 39, at 25; IN HARM’S WAY, supra note 100, at 92–93.

IN HARM’S WAY, supra note 100, at 76–78 (noting further that fears of prosecution are not unfounded despite the legality of the treatment).

FAILURE TO DELIVER, supra note 39, at 25.

IN HARM’S WAY, supra note 100, at 90–92.


Id.

See Kenya Periodic Report 2013, supra note 26, at 41.

Maputo Protocol, supra note 2, arts. 14(1) (a)-(c).

See KDHS 2014 Summary, supra note 27, at 17, tbl.3.9. A small percentage of women also rely upon traditional methods of birth control which KDHS counts toward satisfied demand for family planning. Id.

See KDHS 2008–09, supra note 24, at 61 (reporting that 46% of women used modern contraceptives).

See KDHS 2014 Summary, supra note 27, at 20.

See id. at 20–21 & tbl.3.11.

See id. at 20.

See id. at 17–19.

128. See KDHS 2014 Summary, supra note 27, at 18–19.


130. IN HARM’S WAY, supra note 100, at 45.

131. Id., at 44–45.

132. Young, unmarried women who wish to use condoms, in particular, face stigma. Unmarried women feel that they may not ask for methods of contraception as freely as their married counterparts.


134. IN HARM’S WAY, supra note 100, at 46.

135. Id., at 46.

136. See Ochako, Barriers to Modern Contraceptive Methods, supra note 129, at 126.

137. IN HARM’S WAY, supra note 100, at 47.


140. IN HARM’S WAY, supra note 100, at 47; EC Status and Availability, supra note 143.

141. Maputo Protocol, supra note 2, art. 14(1)(b)-(c).


146. See KDHS 2014 SUMMARY, supra note 27, at 59, tbl. 3.40 (relying upon the statistics from the 41–49 year old women, 44% of whom have ever experienced sexual or physical violence).


148. See KDHS 2014 SUMMARY, supra note 26, at 59, tbl. 3.40. 163 See id. at 60.

149. CONST. REPUB. KENYA, 2010, art. 29 (c), 53 (1) (d); see also The Sexual Offences Act, No. 3 (2006) KENYA GAZETTE SUPPLEMENT

[hereinafter HIDDEN IN PLAIN SIGHT].

163. KNCHR REPORT 2012, supra note 40, at 82–83.

164. KNCHR REPORT 2012, supra note 40, at 82–83.

165. KNCHR REPORT 2012, supra note 40, at 82–83.


168. See IRC, MY ACTION COUNTS, supra note 169, at 37–41.


170. This information was not disaggregated into male and female statistics. See Migiro, One third of Kenyan girls, supra note 217; see also HIDDEN IN PLAIN SIGHT, supra note 166, at 85.

171. Id., at 85.

172. See Migiro, One third of Kenyan girls, supra note 166.

173. Professional help includes assistance provided by institutions such as the police department, medical facilities, legal aid, religious groups and/or social services. Female victims, especially adolescents, are far more likely to seek assistance from their families or close friends. UNICEF ET AL., VIOLENCE AGAINST CHILDREN IN KENYA: FINDINGS FROM A 2010 NATIONAL SURVEY 129, tbl.7.2.1. (2012), available at http://www.unicef.org/esaro/VAC_in_Kenya.pdf [hereinafter VIOLENCE AGAINST CHILDREN IN KENYA]

174. See id. at 51; see also Samuel Siringi, Shocking Details of Sex Abuse in Schools, DAILY NATION (Nov. 1, 2009), available at http://allafrica.com/stories/200911020402.html (last visited June 6, 2015).

175. VIOLENCE AGAINST CHILDREN IN KENYA, supra note 176, at 51.


177. Id. paras. 111–12, 123.

178. Id. paras. 123, 132–33, 150.


180. Id.


182. Id.


188. See KDHS 2014 SUMMARY, supra note 27, at, 61, tbl.3.42.
Dear Committee Members:

This shadow letter is intended to complement the periodic report submitted by the State of Kenya for your consideration during the 56 Pre-Sessional Working Group of the CESCR. Ipas Africa Alliance is a nongovernmental organization (NGO) which is based in Kenya and works continentally to increase women’s ability to exercise their sexual and reproductive rights and to reduce deaths and injuries from unsafe abortion. Ipas believes that every woman has the right to the highest attainable standard of health, to safe reproductive choices, and to high-quality health care. This letter is intended to provide the Committee with an independent report on maternal mortality and unsafe abortion in Kenya, particularly under Article 12 of the Covenant on Economic, Social, and Cultural Rights (the Covenant).

Under the Covenant, the government of Kenya has a responsibility to take measures to reduce maternal mortality and increase access to health care services for women. Specifically, article 12 protects the right to the highest attainable standard of physical and mental health for all people, including women’s ability to obtain necessary reproductive health care services that include safe, legal abortion care. In General Comment 14, the Committee specifies that States must implement measures to "(i)mprove child and maternal health, sexual and reproductive health care services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as resources necessary to act on that information." This Committee has underlined in this General Comment the need for State parties to provide a full range of high-quality and affordable health care, including sexual and reproductive health services; the Committee has also emphasized States’ obligation to reduce women’s health risks and lower maternal mortality rates, including by removing all barriers to women’s access to health services, education and information, including in the area of sexual and reproductive health. In General Comment 14, the Committee has also elaborated on principles of non-discrimination on the basis of gender, and equal treatment with respect to the right to health.

In several Concluding Observations, this Committee has expressed deep concern over the relationship between high rates of maternal mortality and illegal, unsafe abortions. The Committee has made recommendations to States that they increase education on reproductive and sexual health, as well as implement programs to increase access to family planning services and contraception.

This Committee has previously expressed concern to the government of Kenya about the high number of unsafe clandestine abortions and recommended that the State party ensure affordable access for everyone, including adolescents, to comprehensive family planning services, contraceptives and safe abortion services and to decriminalize abortion in certain situations, including rape and incest. In 2011, the Committee on the Elimination of Discrimination against Women expressed concern that illegal abortion remains one of the leading causes of the high maternal mortality rate in Kenya and that the restrictive abortion law further leads women to seek unsafe and clandestine abortions. CEDAW was further concerned at the number of deaths resulting from unsafe abortions and expressed regret that maternal health policies do not pay sufficient attention to complications arising from unsafe abortion. CEDAW recommended that Kenya provide women access to good-quality services for the management of complications arising from unsafe abortions and consider reviewing the law relating to abortion with a view to removing punitive provisions imposed on women who undergo abortion, in line with CEDAW’s general recommendation No. 24, and the Beijing Declaration and Platform for Action.

In its current report to this Committee, the government has reported on its progress dealing with the reproductive health rights of women, particularly following the revision of the Constitution such that abortion may be allowed under certain limited and regulated circumstances (Article 26 (4)). We wish to supplement the government’s report by commenting on the positive steps that the government of Kenya has taken by adopting a Constitution allowing for legal abortion and to identify areas where the government should take further measures to fulfill women’s right to health under the Covenant.

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2 Id.
3 Id. at par. 18.
7 CEDAW, Concluding comments of the Committee on the Elimination of Discrimination Against Women: Kenya, par. 37, April 2011.
8 Id.
The Legal Framework for Abortion
The Constitution adopted in 2010 in Kenya provides for legal abortion where there is need for emergency medical treatment, to save the life or health of the woman, or when permitted by any other written law. Despite the fact that the Constitution allows for legal abortion in these circumstances, the government has not taken positive measures to develop clinical and policy standards and guidelines that would allow women to access the abortion care to which they are entitled. Additionally, abortion continues to be criminalized under the penal code that makes the provision of abortion services a felony and liable to imprisonment for up to fourteen years. Moreover, recent cases have shown gross misinterpretation of the Penal Code and the Kenya Constitution, where health care providers have been charged and convicted for murder and consequently sentenced to the death penalty.9

Barriers to full implementation of the law mean that women are unable to access safe, legal abortion care. Without access to safe abortion, women in Kenya risk their health and lives by resorting to unsafe abortion. There are 465,000 induced abortions in Kenya every year, nearly all of them clandestine and unsafe.10 The abortion rate is 48 abortions per 1,000 women of reproductive age (15–49 years), which is higher than many other countries in Africa. Additionally, 120,000 women are treated for complications of unsafe abortion; for women aged 19 or younger who came to a health facility for post-abortion care, 45% experienced severe complications.11

We urge this Committee to remind the government of its obligation under the Covenant to make health services more readily available to women in the country and to remove barriers that keep women from accessing lifesaving health services, including safe, legal abortion services.

Barriers to Safe Abortion in Kenya
The barriers to safe services in Kenya are a direct result of non-implementation of the national laws and policies as enshrined in the Constitution and regional and international human rights standards. These barriers include:

1. Withdrawal of National Standards and Guidelines on Provision of Safe Abortion
A lack of standards and guidelines for health care providers on how and when to provide safe abortion care is a significant barrier to effective implementation of the Constitution. The Ministry of Health withdrew the safe abortion guidelines published in 2012 and the government has banned government healthcare providers from receiving training on the provision of safe abortion care. This action has caused a great deal of confusion about the legal status of abortion and how and when it may be administered, as well as a chilling effect on delivery of legal abortion services.

The withdrawal of the standards and guidelines and the ban on government healthcare workers from receiving safe abortion training has also led to an even sharper demarcation between women of means and women who are poor, rural, or otherwise dependent on government-provided healthcare; safe abortions can be obtained in private clinics but remain out of reach to the majority of women. In General Comment 14, this Committee has been clear on the obligation of States to fulfill the right to “a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health,” also noting that States are under an obligation to abstain from “imposing discriminatory practices related to women’s health status and needs.”11

We request the Committee to urge the government to reinstate and disseminate clear standards and guidelines on the legal provision of safe abortion services so that all women, regardless of age, socioeconomic status or geographical location, can receive the healthcare to which they are entitled.

2. Knowledge about the legal status of abortion in Kenya
Research undertaken by Ipas Africa Alliance on abortion knowledge, attitudes, and care-seeking behavior among women seeking abortion services in public health facilities revealed that even several years after the promulgation of a Constitution that allowed for legal abortion in some circumstances, women still did not know or understand their rights in this regard. Almost one in three women who sought comprehensive abortion care were unaware that safe abortion could be performed legally in Kenya under certain circumstances.14

We urge this Committee to request that the State clarify the legal indications for abortion not only to healthcare providers but also to the women they serve, as part of the broader spectrum of reproductive health services available to women.

3. Continued Criminalization of Abortion:
Chapter 63 of the Laws of Kenya, the Penal Code, under sections 157 and 158 continues to criminalize abortion by providing that the provision of abortion services is a felony, punishable by up to 14 years imprisonment. A woman who seeks abortion services can be found guilty of a felony, punishable by up to 7 years imprisonment. These Penal Code provisions lead to incorrect and overly restrictive interpretations on the rights of women seeking safe, legal abortion care. These provisions create a blanket criminalization of abortion as they are a remnant of the previously restrictive regime. These provisions also contravene the Constitution of Kenya, 2010.

We urge this Committee to request that the State amend the Penal Code to be in line with the Constitution of Kenya as well as the provisions of this Covenant.

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13 Id. at par. 34
4. Structural and Institutional Abortion Stigma
A recent study done in February 2013 by Ipas Africa Alliance on institutional and structural abortion stigma in health care centers in Bungoma, Busia, Kericho, Transnzoia, Nandi and Kisumu counties of Kenya revealed that the lack of implementation by the State of policies, protocols and procedures that regulate abortion services continues to contribute to increased levels of stigma by health care providers. These providers regularly turn away women seeking comprehensive abortion care. The failure to decriminalize abortion adds to this stigma related to abortion. The highly stigmatized topic of abortion therefore continues to be subject to great opposition at all levels in Kenya (at the individual, community, institutional and structural levels, including in the political and religious sectors). Abortion stigma therefore, has led to the dissociation of communities and service providers from the true needs and rights of women related to comprehensive and legal abortion care.

We request this Committee pose the following questions to the State of Kenya during the 56 Pre-Sessional Working Group of the CESCR:

1. What is being done to ensure that safe, legal abortion is accessible to women, especially poor and young women, and that health care providers receive training on providing comprehensive abortion care services?
2. What steps is the Kenya government taking to amend Sections 157 and 158 of the Penal Code to align them with the Constitution and international human rights standards on access to safe abortion?
3. What further steps will the State take to ensure that maternal mortality due to unsafe abortion is reduced?
4. What measures will be taken to reduce ignorance of the abortion law and stigmatization of abortion? What is being done to ensure that health care personnel and other stakeholders are aware of the abortion law?
5. How will the State ensure that young women and poor women do not experience additional barriers in accessing reproductive health services, including family planning services and safe abortion care?

While the rights guaranteed under the Covenant are not yet a full reality for all women in Kenya, we hope that the CESC will recognize the measures taken by the Government of Kenya to ensure women’s access to health care services under article 12 of the Covenant. We also wish to acknowledge the gaps that still exist between the government’s action and its duties under the treaty. We hope that this information is useful during the Committee’s review of the Kenya government’s compliance with the Covenant.

Very Sincerely,

Erick Yegon, Acting Director
Ipas Africa Alliance
Re: Supplementary Information on Kenya, Scheduled for Review by the Committee on Economic, Social, and Cultural Rights during its 57th Session

Distinguished Committee Members,

This letter is intended to supplement the periodic report submitted by the government of Kenya, which is scheduled to be reviewed during the 57th session of the Committee on Economic, Social and Cultural Rights (the Committee). The Center for Reproductive Rights (the Center) a global legal advocacy organization with headquarters in New York and, and regional offices in Nairobi, Bogotá, Kathmandu, Geneva, and Washington, D.C., hopes to further the work of the Committee by providing independent information concerning the rights protected under the International Covenant on Economic, Social and Cultural Rights (CESCR), and other international and regional human rights instruments which Kenya has ratified. The letter provides supplemental information on the following issues of concern regarding the sexual and reproductive rights of Kenyan women and girls: the high rate of preventable maternal mortality and morbidity; the detention, abuse and mistreatment of women seeking maternal health care services; inaccessibility of safe abortion services and post-abortion care; lack of access to comprehensive family planning services and information; and discrimination resulting in gender-based violence and female genital mutilation.

I. The Right to Equality and Non-Discrimination

It has long been recognized that the obligation to ensure the rights to non-discrimination and substantive equality for all people underlies all human rights. Accordingly, states are required to address both de jure and de facto discrimination in private and public spheres. They are further required to not only remove barriers but also take positive measures “to achieve the effective and equal empowerment of women.” To this end, they should “adopt whatever legislation is necessary to give full effect to the principle of equality between men and women,” develop policies that promote gender equality, take efforts to eliminate gender stereotypes about women in the family and society, and address practices that disproportionally impact women. As the Committee noted, it is not sufficient for states just to guarantee women formal equality, as it does not adequately account for, and may even perpetuate, existing economic, social, and cultural inequalities between men and women. Instead, states must ensure women substantive equality, which seeks to remedy entrenched discrimination by addressing inequalities that women face. Similarly, it has been affirmed that to fulfill women’s human rights, states must use all appropriate means to promote substantive equality. To this end, the Committee recognizes that states may need to adopt temporary special measures “in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others,” which may include “taking measures in favour of women in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others.”

One major element of women’s right to equality and nondiscrimination is their ability to exercise reproductive autonomy—that is, to make decisions regarding whether and when to have a child without undue influence or coercion. For women to enjoy reproductive autonomy, their options must not be limited by lack of opportunities or results. As such, it is crucial that women have access to reproductive health services, and that those services can be accessed with their consent alone. In addition, reproductive health services must “be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice.”

II. The Right to Reproductive Health Care

The right of women and girls to access comprehensive reproductive health care services receives broad protection under all the major international and regional human rights instruments, including the CESCR, which, under Article 12, recognizes “the right of everyone to the enjoyment of the highest standard of physical and mental health.” The Committee, in General Comment 14, has clarified that the right to health includes “the right to control one’s health and body, including sexual and reproductive freedom,” which “requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health.” In order to comply with this obligation, therefore, states are required to take “measures to improve child and maternal health, sexual and reproductive health services, including access to family planning … emergency obstetrics services and access to information, as well as to resources necessary to act on that information.” In the absence of these services, women and girls may experience unwanted and unsafe pregnancies and deliveries, possibly exposing them to life-threatening complications.

A. High Incidences of Preventable Maternal Mortality and Morbidity

This Committee, as well as other treaty-monitoring bodies (TMBs), have framed the issue of maternal mortality as a violation of women’s right to health and right to life, and have repeatedly expressed concern regarding the high maternal mortality and morbidity in Kenya. Particularly, during the review of Kenya in 2008, the Committee stated its “concern about the high maternal… mortality rates, the lack of adequately equipped maternal health facilities and skilled birth attendance … and de facto discrimination against poor women, older women and women with HIV/AIDS in access to maternal health care” and recommended that the government take concrete steps to address the problem.
However, the World Health Organization’s (WHO) 2015 report found that Kenya’s maternal mortality rate (MMR) had only decreased by 1.2% per year since 1990—well short of the target rate of 5.5%—and that Kenya had not achieved its Millennium Development Goal target MMR of 175 deaths per 100,000 live births which it had committed to achieve by end of 2015.21 According to the same report, 510 Kenyan women and girls die per every 100,000 live births,23 which is an increase from the MMR of 400 death per 100,000 live births documented in the 2013 version of the same WHO report.24 The Committee in the List of Issues (LOIs) asked the government to “explain why the maternal mortality rate has increased” and to indicate “measures taken to reverse this alarming trend and on the impact of those measures.”25 Similarly the government, in its current report to the Committee, stated that the “declining maternal health indicators are worrying.”26

Part of this increasing trend in the MMR can be attributed to the significant challenges women and girls, particularly low-income women, women with lower levels of education, and those in rural areas, encounter in accessing quality maternal health care services. According to the 2014 Kenya Demographic Health Survey summary report (2014 KDHS), although nine out of ten mothers reported at least one antenatal care visit, only 58% of pregnant women attended the WHO recommended four or more antenatal care visits.26 Moreover, a woman’s geographic location has a significant impact on her access to antenatal care: for example, 68% of women living in urban areas are more likely to attend four or more antenatal care visits compared to 51% of those living in rural areas.26 Women with higher education and those in a higher wealth quintile area are also more likely to attend the recommended antenatal care visits than their counterparts.27

In its response to the LOIs on maternal mortality, the government stated that “[f]ree maternity services introduced by the government have helped reduce the number of unskilled deliveries which in many ways have been the biggest contributor of the maternal deaths.”27 Although free maternity services were introduced in 2013 through a Presidential Directive, women continue to face challenges in obtaining quality delivery care; access to skilled providers during delivery is markedly worse for lower income, less educated, and rural women.22 The 2014 KDHS notes that only about 50% of rural women versus 82% of urban women obtain delivery assistance from a skilled provider such as a doctor, nurse, or midwife.23 Similarly, only 30% of women in the lowest wealth quintile delivered in a health facility compared to 93% of women in the highest wealth quintile.24 Further, while the WHO recommends postnatal care starting an hour after giving birth for the first 24 hours in order to check for complications,25 only 51% of women receive a postnatal checkup within two days of giving birth.26 Disparities in access exist here as well: approximately 71% of women from the highest wealth quintile received postnatal care within two days as compared to only 29% of women from the lowest quintile.27 In its current report, the government admits that there are some challenges in the health sector including “inadequate universal health coverage, inadequate budgetary allocation and improper resource use.”28

In recent years, the Kenyan government has made some efforts to address these issues. For example, in June 2013, the government issued a Presidential Directive which provided that all pregnant women would be able to, “access free maternity services in all public health facilities.”29 Nevertheless, as described below, implementation of this Presidential Directive remains a challenge. In addition, in January 2014, the First Lady of Kenya spearheaded the Beyond Zero Campaign to raise awareness about the link between good health and a strong nation, specifically demonstrating the importance of maternal, newborn, and children’s health.30 The Campaign has delivered thirty six mobile clinics since its inception.31 However, as the First Lady has stated, “the initiative alone cannot bring about success. Success requires all actors in the health sector especially county governments to expand this program to every corner” of Kenya.32 Indeed, the increasing MMR shows that the government needs to scale up its efforts to ensure all pregnant women have access to comprehensive maternal health services.

Detention, abuse and neglect of women seeking maternal health services in health care facilities

As result of a fact finding report conducted by the Center and FIDA- Kenya, which revealed that women who attend maternal health care services are frequently neglected and encountered systematic abuse from health care professionals and staff,41 the Committee, during the review of Kenya in 2008, recommended the state take measures to ensure that all women have “access to skilled care free from abuse during pregnancy, delivery, postpartum, postnatal periods.”44 However, violations of the rights of women and girls attending maternal health services including abuse and detention has continued. For instance, at a focus group discussion which the Center and the Kenya Network of Grassroots Associations organized in 2012, 25 of the 26 women who participated in the discussion, stated that they were detained after giving birth for not paying their bills at Pumwani Maternity Hospital (Pumwani), which is the largest hospital in Kenya.45 Most of the women were detained for durations of between two weeks and two months.46 The majority of them also reported that they were not released until after someone paid the hospital fees on their behalf or advocacy groups intervened.47 One woman was detained for nine months with her baby and was not released until she went on a hunger strike.48 In its most recent concluding observations on Kenya, the Committee against Torture (CAT Committee) noted its concern about “the ongoing practice of post-delivery detention of women unable to pay their medical bills, including in private health facilities.”49

Most women who are detained are denied post-natal and other crucial medical care. For instance, one woman was denied care even though her surgical wounds were bleeding.50 Another woman reported being subjected to “abusive and frustrating statements.”51 The detained women—whose newborns are most often also detained with them—are not provided with basic necessities: one casual worker in a district hospital, in describing the situation of women detained in the hospital, revealed that at times three women were forced to share one bed since all the beds were occupied and women who had been detained for a long time had to struggle to get food.52 The user fees for maternal health services reduces the likelihood that low-income, less-educated, or rural women will be able to access essential health care since fees make health care prohibitively expensive and inaccessible.53 For instance, women are often barred from entering the hospital if they are unable to afford the admission fee.54 Once women are admitted to the hospital, they may be denied essential or life-saving treatment if they fail to pay the remaining balance of their hospital fees.55 In many instances, as mentioned above, women who are unable to pay the required fees for services rendered during their labor and delivery are detained at health care facilities.
facilities, often without postnatal care or basic necessities such as bedding and food for themselves and their newborns. The internal and external mechanisms through which women can get redress for these violations of their human rights are ineffective. Even when redress mechanisms are available, women often do not know about them or lack the necessary information about how to access them.

These findings were further documented in a 2012 national public inquiry by the Kenyan National Human Rights Commission (KNHRC). Women who attend these services often experience delays and a lack of adequate medical care. They also reported not being provided with adequate information about health services and available procedures, or were denied services. The women interviewed for the research conducted by the Center recounted rough, painful, and degrading treatment during physical examinations and delivery, as well as verbal abuse from nurses if they expressed pain or fear. The research also found delays in medical care during labor or waiting for stitches after delivery, including being stitched without anesthesia, causing women to endure excruciating pain. In response to these egregious actions, the Center filed a case on behalf of two women in the High Court of Kenya in 2012 highlighting the abuse women face at health care facilities and seeking declaration that this treatment amounts to a violation of their human rights. One of the petitioners in this case was mistreated and treated inhumanly at PMH. Even though she was in labor and severely bleeding upon arrival, she did not receive immediate care and was not taken to the operating room until two hours after her arrival. Due to the delay in emergency care, her bladder ruptured after her caesarean section. Her suffering was compounded by the fact that her wound was infected and the stitching had been poorly performed. To make matters worse, during the days following her caesarean section, she was detained because she was unable to pay her hospital fees and was forced to sleep on a cold floor without any subsequent medical care. On September 17, 2015, the Court passed a decision and found that the rights of the petitioners, including their right to health, liberty and dignity, had been violated by the actions of the health care professionals at PMH and that they were discriminated against based on their socio-economic status. The court also ordered the government to pay monetary compensation to the petitioners for the damages they suffered as a result of these violations. Accordingly, it is vital for the government to implement this judgment and ensure that women are no longer detained in maternal health facilities but rather receive quality and respectful maternal health care.

Inadequate implementation of presidential directive on free maternity care

As noted above and in Kenya’s current report, the government issued a Presidential Directive in June 2013, which provided that all pregnant women would be able to “access free maternity services in all public health facilities.” However, the government’s report fails to detail the steps that are being taken to ensure the effective implementation of this declaration despite various reports indicating that serious problems with implementation have prevented women from accessing quality maternity services in practice. According to the KNCHR, hospital infrastructure and staffing cannot support the additional number of women who come seeking free maternal health care due to this declaration, and the government has failed to allocate sufficient additional resources to remedy this issue. Furthermore, there have been no clear guidelines set by the government about how to implement the free maternal services. Although some facilities have reportedly been given extra money to cover the influx of deliveries, others have remained uncertain of how to balance the new policy of free care with their need to cover costs. In fact, on October 21, 2015, Nairobi’s County Governor, Dr. Evans Kidero, abolished free maternity care at the PMH, Kenya’s largest public maternity hospital, due to the national government’s failure to reimburse Nairobi KES165 million spent covering maternity services over the past nine months. A number of other counties also complained that the national government was slow in distributing reimbursements for free maternity services.

In addition, although the government has said that maternal health services would be free for women, in reality, not all costs associated with giving birth have been eliminated. Women still have to purchase basic goods required for delivery, such as cotton wool and the medications used to induce labor, straining their resources. Other key components of maternal health services, including antenatal and postnatal care, are also not covered under the directive. Further, the Reproductive Healthcare Bill that was tabled in parliament provides for free antenatal care, but does not cover postnatal care or provide any guidance regarding implementation of the Directive.

The declaration of free services has also not addressed the issue of abuse and mistreatment of women that attend maternal health services; in fact, the situation may have worsened as health care staff attempt to cope with an influx of delivery patients. For instance, it was recently reported that a woman was forced to give birth while standing at Nyeri Hospital because there was no nurse to attend to her, and the baby fell on the floor and died from the impact. The continued abuse following the Presidential Directive has been challenged in a recent case filed by the Center at the Bungoma High Court where the petitioner was neglected and abused by the hospital’s staff. She was not monitored while in labor and, when she was unable to find a free bed in the delivery ward, she collapsed unconscious on the floor, where she gave birth. When she subsequently regained consciousness, two nurses were slapping her face and shouting at her for dirtying the hospital floor during delivery.

B. Lack of Access to Safe Abortion Services and Post-Abortion Care

During the 2008 review of Kenya, the Committee expressed concern “about the high number of unsafe clandestine abortions” and recommended the state “decriminaliz[e] abortion in certain situations, including rape and incest.” The committee on the Elimination of Discrimination against Women (CEDAW Committee), in its 2011 concluding observations, also urged the state to “[p]rovide women with access to good-quality services for the management of complications arising from unsafe abortions and to consider reviewing the law relating to abortion with a view to removing punitive provisions imposed on women who undergo abortion.” Similarly, in 2013, the CAT committee recommended that the government “evaluate the effects of its restrictive legislation on abortion on women’s health with a view to regulating this area with sufficient clarity” and amend its laws to allow abortion on the grounds of rape and incest. In the LOIs, the Committee asked the government to “provide information on the incidence of illegal abortions and the measures contemplated to address resulting problems.”
Although the government has not responded to this question, research shows that, in Kenya, unsafe abortion accounts for one-third of maternal deaths, which can be due to the numerous barriers women face in accessing safe abortion services. For instance, the laws governing abortion in Kenya are not only confusing, but also contradictory. While Kenya’s 2010 Constitution provides for abortion in situations where a woman’s life or health is at risk, the Penal Code has not been revised to reflect this change. Therefore, a woman could still face prosecution for seeking an abortion in circumstances allowed under the Constitution, such as when the pregnancy places her health at risk. Moreover, before its revision in 2014, the 2004 National Guidelines on the Medical Management of Rape and Sexual Violence provided that “[t]ermination of pregnancy is allowed in Kenya after rape” since it is allowed under the 2006 Sexual Offences Act. Even though this statement was removed during the revision of the guideline in 2014, the new guideline still provides that survivors of sexual violence have the right to “[a]ccess termination of pregnancy and post-abortion care in the event of pregnancy from rape.” Yet, neither the Constitution nor the Penal Code have expressly provided for this exception, and the government has not clarified whether this exception for rape applies under the 2010 Constitution. Further, although the government, in its response to the Committee, stated that the Reproductive Health Bill “provides for the right to make decisions regarding reproduction free from discrimination, coercion and violence,” it merely codifies the health and life exceptions for abortions provided under the Constitution and places unnecessary and likely unconstitutional restrictions on access under these circumstances. For instance, the Bill would require a health care professional to consult the parents or a guardian of an adolescent before providing an abortion where her life or health is at risk, which would violate her rights to life, health, and non-discrimination by putting her at heightened risk of dying due to the denials or delays in access to safe abortion care.

In fact, the Ministry of Health worsened the confusion surrounding the legality of abortion by withdrawing its 2012 Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya, which provided guidance to medical professionals as to when they could perform abortion services under the 2010 Constitution. In addition, in 2014, the Ministry of Health issued a memo to all health care providers stating that “abortion on demand is illegal” without clarifying the legal exception under the Constitution. The memo further stated that it is illegal for health workers to participate in trainings on either safe abortion care or the use of the drug Medabon for medical abortion. The memo threatened health workers with legal and professional sanctions, even though trainings are essential to the development of health workers’ skills in comprehensive and life-saving abortion care.

This lack of clarity in the legal framework and restrictions on safe abortion services compel women and girls to resort to clandestine abortions, which are often unsafe and subject women to grave pain and suffering. In its 2012 public inquiry, the KNCHR found that women resort to “crude methods,” administered by unqualified persons to terminate pregnancies, due to the inaccessibility of abortion services in Kenya. The KNHRC further concluded that restrictive abortion laws contribute significantly to high maternal mortality and morbidity in Kenya. A 2013 study conducted by the Ministry of Health estimated that nearly 465,000 abortions occur in Kenya each year. Approximately 120,000 women sought care in health care facilities for unsafe abortion-related complications. One study found that up to 60% of all gynecologic emergency hospital admissions are a result of complications from unsafe abortion. It concluded that the numbers of maternal death due to unsafe abortion is high. The harshness of Kenya’s abortion laws most heavily impacts young women and low income women—for whom the unintended pregnancy rate is highest—even where relatively safe abortion procedures are available, because the cost of these services often exceeds these women’s financial resources. In August 2015, a major newspaper in Kenya reported multiple stories of women who experienced unsafe abortion services with grave consequences to their life and health. One such story is that of Beatrice, a college student, who procured an unsafe abortion and suffered kidney failure and was paralyzed as a result.

In June 2015, the Center filed a case in the High Court of Kenya at Nairobi that challenged the Ministry of Health’s memo and the withdrawal of the Standards and Guidelines. The case was brought on behalf of four petitioners, including “Wanjiku,” a 15-year-old girl who had an unsafe abortion after an older man coerced her into having sex with him. Feeling anguished and fearing rejection from her family, Wanjiku decided to end the pregnancy but found safe abortion services to be unaffordable. She was forced to seek care from an unqualified individual who used a dangerous method and botched the procedure. Afterwards, she started to vomit, bleed heavily, and swell—signs that her kidney was failing. However, when she could not afford to pay the medical bills for post-abortion care, she was detained by the hospital and forced to sleep on the floor. Doctors diagnosed Wanjiku with a kidney disease that requires regular dialysis, and ultimately a kidney transplant.

Post-abortion care

Access to post-abortion care (PAC) is essential to protect the health and lives of women following an unsafe abortion—particularly in Kenya where the rate of unsafe abortion and resulting complications remain high. For example, a hospital in Mombasa received at least 102 patients in need of PAC during a four month period from late 2014 to early 2015. Moreover, a 2015 study found that 77% of Kenyan women seeking PAC suffered from moderate or severe complications. However, barriers to access to PAC create delays in receiving essential treatment, which cause disproportionately higher rates of severe post-abortion complications.

Reports by the KNCHR and the Center have revealed that women often delay seeking PAC due to fear of the social stigma and legal risks associated with abortion, including harassment by the police and possible prosecution. Although the government has stated that PAC “is legal and not punishable by any part of Kenya laws,” this declaration only offers protection to the health care providers and not to women who seek PAC. Further, delays in arriving at the health care facility and obtaining the right treatment are endemic in Kenya as a result of “shortages in staffing, equipment, drugs, and poor attitude of health care providers.” These delays can have fatal consequences for women that present with treatable conditions.

Furthermore, medical providers may exacerbate the barriers women face in accessing PAC. Studies indicate that medical personnel—particularly nurses—are inadequately trained, so women suffering from complications may have to wait an extended period of time for a trained provider to attend to their medical needs. Medical providers may also make women feel like criminals instead of patients by insulting and shaming them for having undergone abortion. Some medical providers may even not be aware that providing PAC is legal, particularly after the Ministry of Health withdrew the Standards and Guidelines which also provided guidance on the provision...
of PAC. Furthermore, the recording of PAC in a woman’s medical history can expose her to harassment by law enforcement officials or family members—a predicament medical staff use to extort bribes from patients.

C. Lack of Access to Family Planning Information and Services

In its 2011 concluding observations, the CEDAW Committee urged Kenya to “[s]trengthen and expand efforts to increase knowledge of and access to affordable contraceptive methods throughout the country and ensure that women in rural areas do not face barriers to accessing family planning information and services.” This is similar to the concern expressed by this Committee in 2008, about “the limited access to sexual and reproductive health services and contraceptives, especially in rural and deprived urban areas,” and the recommendation for the government to “ensure affordable access for everyone, including adolescents, to comprehensive family planning services [and] contraceptives.” However, Kenya’s report, despite acknowledging the Committee’s recommendation on family planning, does not discuss the effort the government is making to ensure access to family planning information and services.

According to the 2014 KDHS, only about half of Kenyan women (53.4%) are able to access modern methods of contraceptives, an increase of only seven percentage points from the 2008 rate. A large portion of Kenyan women have an unmet family planning need, which is defined as women who would like to delay their next birth by at least two years or would like to cease childbearing, but are not currently using a contraceptive method. The 2014 KDHS found that although women from all demographic backgrounds have significant unmet family planning needs, the rate of unmet need falls precipitously as wealth increases with a rate of 29% unmet need in the lowest wealth quintile and only 11% in the highest quintile. In addition, usage disparities are even more pronounced by geographic area due to factors including inequitable regional distribution of contraception and frequent stock outs. For example, only 3.4% of women in the former Northeastern Province—a region with low socio-economic indicators—use contraceptives, whereas 70.4% of women in the former Eastern Province and 72.8% in the former Central Province reported using contraceptives.

These disparities in usage rates are due to a variety of barriers to women’s and adolescent’s access to family planning information and services. Physical barriers to accessing contraceptives include public health facility stock outs, inequitable distribution throughout the country, and costs associated with procuring contraceptives, such as lost wages or transportation. Despite the Ministry of Health’s policy that contraceptives should be available free of charge, many government health facilities charge their patients “user fees” for family planning services and some charge for the contraceptive method itself. Moreover, a woman’s preferred method of contraception is often unavailable or may be too costly. Women also face negative attitudes and stigma against contraceptive use from family or community members. Examples include perceptions of young women who carry condoms as promiscuous, “sexually wayward,” or “untrustworthy”; women’s husbands becoming angry when their wives begin using contraceptives; or unmarried women feeling ashamed to obtain contraceptives.

In the LOIs, the Committee asked the government to “provide information on the measures taken to ensure comprehensive knowledge, particularly among adolescents...about... safe sex.” Apart from stating that adolescents have low knowledge regarding HIV prevention, the government has not provided information about the steps it is taking to increase adolescents’ access to reproductive health information. Research shows that social stigma against the use of contraception is particularly problematic for adolescents, who are one of the groups most vulnerable to experiencing discrimination in access to family planning services. For example, in the Center’s fact-finding report, one young woman recounted being turned away when she attempted to get an intrauterine device: “[T]hey said no at the government facility. They said you are a Muslim girl, you are going to burn in hell. She was a Muslim nurse and refused to give me contraceptives.” Young people in Kenya also lack formal and comprehensive sex education, resulting in misinformation about their reproductive health, including concerns about poor outcomes from using contraceptives. These misconceptions lead to lower contraceptive use rates and a higher incidence of unplanned and unwanted pregnancies.

Access to emergency contraception

Many women and girls could prevent unplanned or unwanted pregnancies by using emergency contraception (EC), a safe and effective method that can be used within 120 hours of unprotected sex and a critical component of care for survivors of sexual violence. Indeed, the National Guideline on the Management of Sexual Violence in Kenya requires that EC be available 24 hours a day for survivors of sexual violence in all health facilities. In Kenya, nine products of EC are registered, and the Ministry of Health broadly recommends its use for those “who have had unprotected sexual intercourse and desire to prevent pregnancy.” The Ministry also has recognized that EC is an important component of adolescent reproductive health. In addition, it is included in Kenya’s essential drugs list and the National Family Planning Guidelines for Service Providers, which stipulates that EC should be provided without restriction.

However, in practice, there are significant barriers to accessing EC. Consistent stock outs in pharmacies and shipment delays prevent women and girls from reliably accessing the medicine. Some pharmacists also decline to distribute EC altogether or refuse to dispense it without a prescription, although EC is registered in Kenya as an over-the-counter medicine. Despite the Ministry of Health’s guidelines that explicitly permit EC’s usage for any unprotected sex, arbitrary refusals stem from the perception that the contraceptive is only intended to be used by rape victims. Moreover, adolescents are routinely denied access to EC for arbitrary or discriminatory reasons such as “the person look[ed] young.” A 2014 study found out that only 18% of women and girls surveyed in Nairobi have ever used EC. Private health care facilities may not always offer EC either. For example, although facilities run by the Catholic Church or Christian Health Association of Kenya provide services to survivors of sexual violence, they do not provide EC to these individuals. Women’s access to EC is an essential component of the full range of contraceptive options that women must have—particularly for survivors of sexual assault and following unprotected sex.

III. DISCRIMINATION RESULTING IN GENDER-BASED VIOLENCE AND HARMFUL TRADITIONAL PRACTICES AGAINST WOMEN AND GIRLS

Gender-based violence has been addressed in many of the concluding observations on Kenya issued by various TBMs. In 2008,
this Committee also recommended that “the State party raise public awareness of the need to abolish laws and customs which discriminate against women and adopt ... Gender Equality and Affirmative Action Bills.” The Kenyan government noted in its report that it has passed and introduced various legislation to address issues of gender-based violence, including the repealing of Section 38 of the Sexual Offences Act (No. 3 of 2006) which carried sanctions for false sexual violence allegation. However, the government also acknowledges that “a number of gender facilitative bills including the marriage bills, have for years remained unlegislated.” As a result, significant gaps remain in the legal and policy framework to address violence against women and girls; the government must do more to effectively implement the existing legal protections and ensure access to services for survivors of gender-based violence.

A. Sexual and Domestic Violence against Women and Girls

Previously, the Committee expressed concern regarding the high rate of domestic violence and “the low number of complaints filed by victims.” Despite chronic underreporting, data from various sources demonstrate that violence against women, sexual and otherwise, remains prevalent in Kenya. In March 2013, the Gender Minister reported that 32% of females in Kenya have experienced sexual violence. The 2014 KDHS shows that approximately 44% of ever-married women have experienced sexual or physical violence by their husband or partner, which is not a significant decrease from 2008-2009 KDHS where 47% of ever-married women reported to having experienced such violence. In addition, roughly 28% women aged 20-29 had experienced some form of violence in the previous 12 months preceding the survey.

In May 2015, the President signed into law the Protection against Domestic Violence Act which criminalizes a wide range of gender-based violence including marital rape, economic and sexual abuse and harmful traditional practices such as female genital mutilation. It also sets out protection mechanisms for victims, such as counseling and medical assistance, as well as protection orders against the perpetrator. In the LOIs, the Committee asked for information on the measures the government has taken to enforce the provisions of the Bill. In response, the government listed some measures it has implemented, such as the establishment of an online Gender Based Violence forum; training of police and chiefs and sensitization of the community; and dissemination of a simplified version of the Act, in an effort to implement it. However, the government also acknowledged that “there is still a lot that needs to be done as the enforcement of this act is still very low.” Indeed, the government needs to take concrete steps to ensure the full and effective implementation of the Domestic Violence Act. For instance, it must allocate adequate budget to ensure medical services, including counselling are available to victims. Per the requirement of the Act, the Inspector General must also set up reporting procedures by training of police officers, facilitate “the reporting process so that complainants may report to the police without fear,” and ensure the expedient and efficient processing of complaints.

This is particularly important since survivors of sexual and physical violence often lack access to needed services and face a number of barriers that prevent them from receiving meaningful assistance from medical or legal professionals. These barriers include a lack of comprehensive facilities where victims can report complaints and receive medical treatment, including emergency contraceptives; a lack of awareness among sexual violence victims of the services that are available; difficulties in proving sexual violence; and the high cost of obtaining services after sexual violence. Further, health care providers may lack adequate training or an understanding of the appropriate medical and gender-sensitive response toward sexual violence. In addition, many women and girls are reluctant to engage in the justice system because the police often harbor negative attitudes toward victims. Although designated ‘Gender Desks’ were established in some police stations to assist victims of gender-based violence, poor equipment and infrastructure, weak investigations, and inadequate training have combined to undermine their effectiveness. Therefore, women and girls who experience violence are subjected to social stigma, humiliation, and bribe requests in police stations. Legal assistance is also not readily available, which makes access to remedies daunting and disincentivizes the use of the legal system for redress.

Sexual violence against girls and adolescents, particularly in educational settings

Violence and abuse against adolescents and girls is a pervasive problem in Kenya, with an even higher prevalence than statistics suggest due to underreporting. Recent survey results show that one in three Kenyan girls experience some form of sexual violence before the age of 18. A household survey of more than 3,000 young people aged 13 to 24 revealed that three out of four had experienced physical, sexual, or emotional violence. Of those who had experienced violence, six out of ten have been physically abused. Rape is rarely reported as a result of pervasive social stigma and a deep mistrust in police and the criminal justice system. A 2012 UNICEF study determined that only 3% of sexually abused girls received professional help in the form of medical, psychological, or legal assistance. Sexual violence against girls and adolescents is also a significant problem in schools and other educational settings. According to the same UNICEF study, from the women aged 18 to 24 who experienced unwanted sexual touching before the age of 18, about 25% reported that the first incident took place in school. A 2009 report by the Kenya Teachers Service Commission (TSC) and the Centre for Rights Education and Awareness estimated that 12,660 girls were sexually abused by their teachers in Kenya between 2003 and 2007, although the report notes that 90% of sexual abuse cases go unreported.

In W.J & Another v. Astarikoh Henry Amkoah & 9 Others, a case in which the Center submitted an amicus brief, two adolescent girls were sexually abused by the Deputy Head teacher at Jamhuri Primary School in Nakuru County, Kenya. In a decision passed in 2015, the High Court of Kenya not only found the teacher civilly liable for sexual assault, but also determined that the government and Teachers Service Commission (TSC) handled the case inadequately. The Court ordered the government to provide financial reparations to the two girls and the TSC to update its guidelines to better handle sexual assault allegations. Although the TSC circular, or employee guidelines, mentions disciplinary action for the sexual assault of students, the circular fails to indicate clear mechanisms for disciplinary action or provide sexual assault survivors with psychological or essential health care. The Government of Kenya must ensure that the TSC complies with the order of the High Court to end the practice of “shuffling abusive teachers” from one school to another, and finally, content itself with dismissals. The Government must also follow the Court’s order to “put in place an effective mechanism” to ensure that teachers are held accountable for any sexual abuse that they commit against their students.
B. Female Genital Mutilation (FGM)

In 2008, the Committee called on the government to pass a legislation to criminalize FGM, ensure implementation of the law and raise the awareness of the community regarding the harmful effect of FGM. In its 2013 concluding observations, the CAT Committee stated that Kenya “should redouble its efforts to eradicate the practice of female genital mutilation, including through awareness-raising campaigns and by prosecuting and punishing perpetrators of such acts. The State party should ensure that all measures to combat the practice comply with legal safeguards.”

Even though Kenya has implemented some parts of these recommendations by passing the Prohibition of Female Genital Mutilation Act, 2011 and establishing an Anti-FGM Board, it has failed to take concrete steps to effectively enforce the law, which is demonstrated in the very high rate of the practice: FGM is universal in Northeastern Kenya, where 97.5% of women have undergone FGM, compared with only 8% of women in Nairobi. Without a robust enforcement mechanism and equitable implementation across the country, the Prohibition of Female Genital Mutilation Act will remain ineffective.

IV. Recommendations for the government of Kenya

We hope that the Committee will consider making the following recommendations to the Government of Kenya:

1. The government should scale up its efforts to reverse the alarming trend of increasing maternal mortality including by ensuring women and girls’ access to quality and respectful antenatal, delivery and postnatal services. The government should take the necessary measures to effectively implement the Presidential Directive on Free Maternity Services including by allocating sufficient resources. It should also undertake measures aimed at preventing the detention, abuse and mistreatment of women in maternal health care facilities.

2. The government should clarify the laws on abortion including by reinstating the “Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya” and provide healthcare professionals with the necessary trainings and resources to provide abortion and post-abortion care without fear of prosecution, bias or discrimination.

3. The government should ensure that all women and girls have access to comprehensive family planning information and services, including by allocating adequate budget to address stock-outs of contraceptives and training health care professionals and raising awareness of the public to combat stigma against contraceptive use.

4. The government should take concrete steps to implement the 2015 Protection against Domestic Violence Act by establishing reporting mechanisms at police stations as well as allocating adequate budget for the provision of medical, psychosocial and legal support to victims of sexual and physical violence. It should also establish a system to gather data on the number of cases reported, investigated and successfully prosecuted to monitor the effectiveness of the strategies it’s implementing to address violence against women and girls.

5. The government should intensify its efforts to combat FGM including through allocating adequate resources to the Anti-FGM board and implementing the law against FGM.

Sincerely,

Evelyne Opondo
Legal Advisor Africa Program

Onyema Afulukwe
Regional Director
Senior
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Committee on Economic, Social and Cultural Rights (ESCR Committee), General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3), (34th Sess., 2005), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, paras. 7-8, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter ESCR Committee, General Comment No. 16].

Id. paras. 6-7.

Id. para. 15.

Id.


Id.


ICESCR, supra note 1, para. 12.


Id. para 21.

Id. para. 14.


See WHO ET AL., TRENDS IN MATERNAL MORTALITY: 1990 TO 2013, supra note 22, para 22, at 33.


KDHS 2014 SUMMARY, supra note 27, para 23.

Id.


See KDHS 2014 SUMMARY, supra note 27, at 24, tbl.3.13 & 25, tbl.3.14.

Id.

See id.


See KDHS 2014 SUMMARY, supra note 27, at 27.

See id.


Id.


Focus group discussion participant, in Nairobi, Kenya (Mar. 1, 2012) (on file with the Center for Reproductive Rights).

Id.

Id.

Id.


Focus group discussion, supra note 45.

FAILURE TO DELIVER, supra note 43, at 37.

Id.
One woman recounted witnessing another woman near labor being harassed at a hospital entrance and then turned away because she could not pay the admission fee. See id., at 52–53.


A matron at PMH explained that the government was reimbursing them at a flat rate of Ksh 5,000 per delivery, even though the hospital used to charge Ksh 5,000 for normal deliveries and Ksh 10,000 for caesarian sections. This created a critical financial gap at the hospital: KNCHR, FREE MATERNAL HEALTH CARE 2013, supra note 70, at 6.


Owino: Not So Free, supra note 75, at 1, 4.


Pregnant Woman Forced to Give Birth While Standing in Nyeri Hospital, STANDARD MEDIA, http://www.standardmedia.co.ke/ktv/video/watch/2000074070/-pregnant-woman-forced-to-give-birth-while-standing-in-nyeri-hospital (last visited June 18, 2015); see also Bosh, Dying to Give Birth, supra note 79.


CESCR Committee, List of issues, supra note 25, para. 28.

90 MINISTRY OF HEALTH, NATIONAL GUIDELINES ON MANAGEMENT OF SEXUAL VIOLENCE IN KENYA Annex 11, 78 (3d ed., 2014) [hereinafter NATIONAL GUIDELINES ON MANAGEMENT OF SEXUAL VIOLENCE, 2014].
91 Replies of Kenya to the list of issues, supra note 31, para. 119.
94 Ministry of Public Health and Sanitation, Memo to health care providers on abortion training and Medabon (2014) (on file with the Center).
95 Id.
96 KNCHR REPORT 2012, supra note 59, at 47.
97 Id. at 66–67.
100 GUTTMACHER FACT SHEET 2012, supra note 85.
101 FAILURE TO DELIVER, supra note 43, at 24–25 (finding that half of the women treated by a hospital for complications from unsafe abortion were under the age of 20).
103 Id. at 2. (“Women and men interviewed in 2002–2003 were aware that the strict abortion law led women to procure unsafe procedures from ‘quacks,’ and they believed that rich women could obtain relatively safe abortions, while poorer women were more likely to die from unsafe procedures.”); CENTER FOR REPRODUCTIVE RIGHTS, IN HARM’S WAY: THE IMPACT OF KENYA’S RESTRICTIVE ABORTION LAW 59–60 (2010) [hereinafter IN HARM’S WAY], available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/InHarmsWay_2010.pdf.
105 See KNCHR REPORT 2012, supra note 59, at 49–59; IN HARM’S WAY, supra note 104, at 76.
106 GUTTMACHER IN BRIEF 2012, supra note 103, at 2. IN HARM’S WAY, supra note 104, at 88-90.
107 See id. at 3.
108 See id.
109 See id. at 1.
110 See id.
111 See id. at 1.
112 See id.
113 See id.
114 See id.
115 See id.
116 See id.
117 See id.
118 See id.
119 See id.
120 See id.
121 See id.
122 See id.
123 See id.
124 See id.
125 See id.
127 See id. at 20–21 & tbl.3.11.
128 See id. at 20.
129 See id. at 17-19.
131 See KDHS 2014 Summary, supra note 27, at 18-19.
133 IN HARM’S WAY, supra note 104, at 45.
134 Id., at 44-45.
135 Young, unmarried women who wish to use condoms, in particular, face stigma. Unmarried women feel that they may not ask for methods of contraception as freely as their married counterparts. See Ochako, Barriers to Modern Contraceptive Methods, supra note 132; UNFPA, Family Planning in Kenya: Not for Women Only (Jul. 1, 2009), available at http://www.unfpa.org/public/News/pid/3015 (last visited July 6, 2015).
136 See Ochako, Barriers to Modern Contraceptive Methods, supra note 132, at 119.
137 CESCR Committee, List of issues, supra note 25, para. 29.
138 Replies of Kenya to the list of issues, supra note 31, para. 120-125.
139 IN HARM’S WAY, supra note 104, at 46.
140 Id., at 46.
141 See Ochako, Barriers to Modern Contraceptive Methods, supra note 132, at 126.
142 IN HARM’S WAY, supra note 104, at 47.
143 See Ochako, Barriers to Modern Contraceptive Methods, supra note 132, at 126; IN HARM’S WAY, supra note 139, at 47-48.
145 NATIONAL GUIDELINES ON MANAGEMENT OF SEXUAL VIOLENCE, 2014, supra note 90, at 14.
146 Eight registered EC products are available from a pharmacist without a prescription, while one registered EC product, Optinor, is only available from family planning clinics. International Consortium for Emergency Contraception, EC Status and Availability: Kenya (2015), available at www.cecinfo.org/country-by-country-information/status-availability-database/countries/kenya/ (last visited, July 6, 2015) [hereinafter EC Status and Availability].
148 Maputo Protocol, supra note 2, art. 14(1) (b)-(c).
152 Id., at para. 57 (describing the bills that were passed or introduced to address issues of sexual violence in Kenya).
155 See KDHS 2014 SUMMARY, supra note 27, at 59, tbl. 3.40 (relying upon the statistics from the 41-49 year old women, 44% of whom have ever experienced sexual or physical violence).
156 KDHS 2008–09, Supra note 23, at 253.
157 See KDHS 2014 SUMMARY, supra note 27, at 59, tbl. 3.40.
Id.

CESCR Committee, List of issues, supra note 25, para. 20.

Replies of Kenya to the list of issues, supra note 31, para. 92.

Id., para. 93.


Protection Against Domestic Violence Act 2015, supra note 168, Art. 6 (4) (a) - (b).

KNCHR REPORT 2012, supra note 59, at 82–83.

Id. at 88.


Id. at 83.

See IRC, MY ACTION COUNTS, supra note 177, at 37–41.


This information was not disaggregated into male and female statistics. See Migiro, One third of Kenyan girls, supra note 2172; see also UNICEF, HIDDEN IN PLAIN SIGHT: A STATISTICAL ANALYSIS OF VIOLENCE AGAINST CHILDREN 85 (2014), http://files.unicef.org/publications/files/Hidden_in_plain_sight_statistical_analysis_EN_3_Sep_2014.pdf.

Id.

See Migiro, One third of Kenyan girls, supra note 180.

Professional help includes assistance provided by institutions such as the police department, medical facilities, legal aid, religious groups and/or social services. Female victims, especially adolescents, are far more likely to seek assistance from their families or close friends. UNICEF, VIOLENCE AGAINST CHILDREN IN KENYA, supra note 180, 129, tbl.7.21.

See id. at 51; see also Samuel Siringi, Shocking Details of Sex Abuse in Schools, DAILY NATION (Nov. 1, 2009), available at http://allafrica.com/stories/200911020402.html (last visited July 6, 2015).

UNICEF, VIOLENCE AGAINST CHILDREN IN KENYA, supra note 180, at 51.


Id. paras. 111-12, 123.

Id. paras. 123, 132-33, 150.


Id.


See KDHS 2014 SUMMARY, supra note 27, at 61, tbl.3.42.
**COUNTRY FACTSHEET FOR CESCR COMMITTEE**  
**COUNTRY: KENYA**

**REPORT NO**
N° 2-5 periodic report for the CESCR Committee

**PRE-SESSION/SESSION**
Pre-sessional: 56th (October 2015)

**LAWS(THC-1993, GUIDELINES, DOMESTIC LAWS)**
- Children Act 2001 (Part XII on adoption) - its review is ongoing;
- Adoption Regulations 2005;
- National Standards for Best Practices in Charitable Children Institutions 2013;
- Guidelines for the Alternative Family Care of Children in Kenya 2014 (following the 2008 Technical assessment of the legal provisions and practices of guardianship, foster care and adoption of children in Kenya);
- THC-1993 acceded to and in force since 2007.

**GENERAL SITUATION OF CHILDREN DEPRIVED OF THEIR FAMILY**
- It is estimated that 2.6 million children have been orphaned due to all causes, whilst 1 million of them were orphaned due to HIV/AIDS. Indeed, according to UNICEF Kenya, ‘HIV/AIDS has claimed the lives of many parents, leaving in its wake a trail of over a million orphans. (…) The capacity of families to care and protect orphans is overstretched. This, combined with the increasing levels of poverty, has resulted in many children heading their own households, living in institutional care or surviving on the streets. (…) In Kenya, orphans are taken in mostly by the extended family, while a few children remain on their own. Child headed households are on the increase, especially in impoverished areas like North Eastern Province’.

**ALTERNATIVE CARE OPTIONS**
Various types of child care do exist in Kenya:
- **Kinship care:** like most Africans, Kenyans have a long tradition of caring for their children via informal care although this situation is changing due to the current social and economic context. It is estimated that approximately 2 million Kenyan children live under some form of kinship care (Save the Children, June 2012), or approximately 10% of the estimated national child population of 19 million (Kenya National Bureau of Statistics, 2010).
- **Foster care (non kinship):** Not very known about but expanding. According to a recent study (see Source), 720 children were living in formal foster care in 2012.
- **Residential care:** although the Kenyan government has enacted guidelines and regulations for the management for Charitable Children’s Institutions (CCI) as well as a training manual, the findings of the above mentioned study indicate that care child institutions must be better regulated and monitored. The study stipulates that out of the 700 CCI (non-state) running in the country, only 591 were legally registered by the government in 2012. The same year 2012, 8,176 children were living in state residential care and 40,230 in non-state residential care.

**ADOPTION**
- Most recently, a Notice in The Kenya Gazette (Gazette Notice Nº 1092) was published and announced the establishment and appointment of an Expert Committee to review and develop a detailed policy and legal framework to regulate and manage child adoptions in Kenya. The aim is to address the cases of situations initiated prior to the moratorium as well as to reflect and develop documents to address general concerns in domestic and intercountry adoption. Gazette Notice 1092 also revokes Gazette Notice No. 15639 of 2013 appointing the National Adoption Committee.

- **Kenya issued a moratorium on domestic and intercountry adoptions on 26 November 2014.** This moratorium was decided and issued in a context of repeated reports of child abduction, child trafficking due to gaps and abuse of adoption regulations in the country, including improper financial gain, as well as due to a higher number of children being adopted internationally than domestically.

**STATISTIC**
- No available statistics on domestic adoption.

**RISKS**
- Poverty leading to family breakdown
- There have been reports of child abduction, trafficking and abuse of legal provisions for adoption purposes, which have resulted in the above-mentioned moratorium.
- There is a need for better regulations and higher quality in care, in particular in residential care. Foster care also needs to be better regulated if it is to be promoted and further implemented.
- Lack of leaving care policies, which makes this population highly vulnerable

**POSSIBLE QUESTIONS**
- What poverty reduction measures are in place to prevent family breakdown?
- What specific support is being offered to child headed households to ensure members have access to economic, social and cultural rights?
- How does the country intend to support the placement of children in kinship care, whilst preventing any risks of abuse (e.g.: child labour and domestic slaves) in this form of care?
- What is being considered to better register and monitor children’s homes and to provide follow-up to the situation of children placed? What educational, vocational and health standards are in place?
- What leaving care policies are in place to ensure that young adults re-integrate well into the community?
- What will the Expert Committee focus on in order to address the reports of abduction, trafficking and other abuses and issues in these proceedings? What follow-up will be given to the moratorium and are there any plans to maintain or suspend the moratorium?
1.0 Introduction

This submission provides a synopsis of critical issues and recommendations of the civil society organizations in Kenya. Pursuant to Article 16 of the International Covenant on Economic, Social and Cultural Rights, the government must submit reports highlighting the extent to which they are fulfilling their human rights obligations. This report complements the information presented in Kenya’s 2nd -5th Periodic Report of July 2013, highlighting concrete issues as it pertains to the State’s compliance with its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). The report makes specific reference to issues unsatisfactorily addressed, omitted or absent from the State report. It seeks to respond to the questions put forth in the List of Issues adopted by the Committee’s Pre-sessional Working Group on 16th October 2015. It relies primarily on government statistics, which, as outlined in the submission, is not always reliable in terms of its accuracy. Supplementary data from credible international agencies is also cited.

In the time since the submission of its state report, Kenya has been undergoing a constitutional transition. There have been a lot of changes in political leadership, governance and legal order. The Kenyan Constitution has been applauded and accredited as both progressive and ideal by the international community. However, the country still faces challenges in its effective implementation. The expectations of the citizens of Kenya at its inauguration have chiefly remained unmet. This is as a result of political, economic and social environment that is unfavorable for actualization of human rights. Article 43 of the Constitution recognizes economic and social rights. Article 21 mandates the State to take significant steps including policy, legislative and other measures together with the setting of standards and resource allocation towards the realization of these rights. The period under review has seen great efforts by the political class in abscinding their constitutionally enshrined obligations, particularly those relating to international law. There was an increase in actions that violated human rights in antiterrorism activities, determination of salaries and benefits of parliamentarians and former members of the executive and lack of accountability under the Rome Statute. Business entities have also undermined human rights in their pursuit of profit generation. An important illustration of this has especially been witnessed in the mining industry. Additionally, public appreciation and support of human rights has continued to erode, particularly with regards to efforts of curbing the rising cases of insecurity in the country. This is also true of the public’s perception of human rights defenders work to ensure the respect of guaranteed rights.

The participating civil society organizations express grave concerns that the previous and current government under the new constitution have failed to meet the requirements of Article 43. As detailed in this submission, in some instances, the different administrations have consciously taken steps to undermine the respect for and realization of economic, social and cultural rights which is a breach of the state’s obligations. More broadly, in response to the country’s worsening education crisis, the different administrations have so far continued to prioritize short-term measures to attract foreign loan for instance in proposing regressive taxes on basic goods and cutting essential subsidies which fail to address the systemic dysfunctions in the country’s economy and risk leading to significant retrogression in the realization of socio-economic rights.

2.0 Article 1: The right to self-determination

2.1 Internal and external challenges of self-determination

Kenya has witnessed a lot of aggressions from Alshabab1 from the neighboring war torn country Somali and also clashes between communities particularly in the Arid and semi arid areas over natural resources like water, land and grazing fields. The September 21 2013 attack on Nairobi’s Westgate mall killed at least 67 people and highlighted the security threat posed by the militant Islamist Somali group Al-Shabaab both within Somalia and in Kenya, which hosts an estimated 500,000 Somali refugees. The Somali refugee community has frequently been subjected to discrimination and reprisals in the wake of attacks in Kenya, including a brutal police operation from November 2012 to January 2013 in Nairobi’s Eastleigh neighborhood. Another terror attack on Garissa University College claimed the lives of 147 Kenyans leaving others emotionally and physically impaired. Terrorism remains a major challenge to self determination in Kenya. The education system has been affected more so when teachers are forced to withdraw from conflict and terror stricken areas and the communities re-locate from their settlements for fear of being invaded. Conflict also acts as a disincentive to investment by the communities and development agencies, both in the long-term and short-term particularly in the tourism sector that forms 21% of the national GDP.

**Recommendation**

- The State should provide information on what measures it 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 Mandera, Wajir, Garissa, Lamu 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.
- What steps is the government taking to protect citizens from frequent terror attacks that have directly affected peoples endavours to self determination.

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1 Al-Shabaab is a Somali group that wants to turn Somalia into a fundamentalist Islamic state. Al-Shabaab has staged numerous attacks in Kenya. The 2 April 2015 massacre at Garissa University, near the border with Somalia, is the bloodiest so far.
3.0 Article2 Progressive realization

3.1 The State should 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 economic, social and cultural rights? The State should also provide information on the steps it has taken to comply with court orders in relation to cases below. The Kenya National Commission on Human Rights is mandated under Section 8 of the KNCHR Act, 2011 (Revised 2012) to act as the principal state agency in the promotion and protection of human rights. In discharging this function, the Commission is required to ensure observance of human rights in all spheres of life in the Republic of Kenya. However, the Commission has not been able to do much due to political interference. Additionally the concept of economic and social rights is fairly new in Kenya. To a large extent the Commission needs capacity and technical support and benchmarks to properly understand and effectively execute their mandate.

The Commission also requires sufficient budgetary allocations to run. We have to underscore the fact that the Commission has established an ECOSOC department with its office which is a big step going forward. However, the Commission needs to come out strongly and develop smart indicators against which the government can evaluate itself in realization of these rights.

The judiciary is one of the three co-equal arms of government. Its chief mission is to resolve disputes in a just manner with a view to protecting the rights and liberties of all, thereby facilitating the attainment of the rule of law. The recognition of economic and social rights in the Kenyan constitution was one major step in the history of these rights in Kenya. The judiciary in the recent past has made some progressive judgments on violation of economic and social rights. Although, several cases touching on violation of individuals’ economic and social rights have been determined in Kenyan courts, the government has remained adamant in enforcing court decisions, a blatant disregard of Article 50. This has been propelled by the impugnitive Government Proceedings Act that protects the government from having its assets attached and shield it from being forced to comply with court decisions. Some of the pending cases include:

Satrose Ayuma and the Ibrahim Sangor Case.

**Question**

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? What measures has the state taken to repeal retrogressive and unconstitutional laws such as the Government Proceedings Act?

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

3.1.1 Persons living with disabilities (PWDs)

The Constitution of Kenya under Article 54 provides that persons with disabilities are entitled to the following:

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.

**Recommendations**

a) The State should elaborate on the policies and legislation put in place to ensure persons living with disabilities are recruited to the public service.
b) The State should provide a monitoring framework on the measures taken to ensure 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 as per Article 54(2) of the Constitution of Kenya, 2010.

3.1.2 Refugees and Internally Displaced Persons

Since the Kenya Defense Forces entered Somalia in October 2011, the registration of refugees and asylum seekers in both urban and camp centers have been discontinued. 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 nonregistration and punitive measures against undocumented persons, recent terror attacks have compounded the already precarious protection environment of refugees with an increase in cases of harassment, extortion and discrimination.

**Recommendation**

a. The government takes relevant steps to ensure timely and efficient issuing of work permits to refugees. This will also reduce illegal immigrants and terrorists.
b. The government should develop procedures of repatriation in line with the 1951 Convention relating to the status of the refugees and the 1969 African Union Convention governing the Specific Aspects of Refugee Problems in Africa.
3.1.3 Internally Displaced Persons (IDPs)

The Kenyan government has made strides to prevent, resolve and control internal displacement. The government has also tried to address land issues from a legal and policy perspective. The enactment of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No 56 of 2012 now makes provision for the assistance of internally displaced persons and also gives effect to the provisions of the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, and the United Nations Guiding Principles on Internal Displacement. However, the government has not enacted laws to comprehensively address the problem of land tenure, which is one of the main causes of displacement. In addition, while the Act recognizes that internal displacement can be caused by the government on account of development projects, there is no framework for evictions or resettlement procedures. Some of these issues would be addressed through enactment of the Evictions and Resettlement Procedures Bill. This is an area that needs to be remedied, alongside efforts to implement the laws already enacted. The challenges that have been witnessed include lack of adequate stakeholder awareness about the instruments in question, delays in the establishment of the bodies mandated to oversee their implementation, funding shortages and weak land governance at national and county levels.

Recommendations;

i. Harmonization through organized communication and cooperation within government line ministries when dealing with IDPs

ii. The government should compile an up-to-date data on internal displacement. As things stand, no organisation or authority consistently tracks IDPs' location and needs over time. Those outside camps are largely invisible, and any information that is available tends to be sparse and focus on new displacements.

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

Despite making substantial progress to ensure that women are equally able to enjoy economic, social and cultural rights, discrimination against women persists in Kenya in all its facets. In practice, opportunities for women as compared to their male counterparts in public and private spaces are limited, and the constitutional requirement for non-discrimination and affirmative action is implemented half-heartedly. Although Kenyan women are gradually joining the civil service and making significant strides to develop careers in the previously male-dominated professions, they are still grossly underrepresented in senior management and public decision positions. In job group P and above, they only form 0.5% compared to 24.3% of those in job group A-G.

Recommendation

The State should take decisive measures to implement the constitutional directive to effect the 2/3 gender rule representation in elective and appointive bodies as provided by Article 27(8) of the Constitution

5.0 Article 6 & 7: The right to work and just and favorable conditions of work

Article 41 of the Constitution of Kenya talks about the labor relations in Kenya. It states that every person has the right to fair labour practices. This Article provides that every worker has the right:-

(a) To fair remuneration;
(b) To reasonable working conditions;
(c) To form, join or participate in the activities and programmes of a trade union; and
(d) To go on strike.

The country’s unemployed population falls between the ages of 15-34 years old. 80% of the population in Kenya falls between ages 15-34. Further, young people aged 25 and 30 years show unemployment rate of 25% and 15% respectively. Kenya’s youth unemployment is a major issue that has led to a lot of social ills like the youth joining terrorist activities. The government has placed a lot of measures to increase the employment rate of the youth within the nation. This ranges from the start up of loan opportunities like Uwezo Fund, Youth Funds, Constituency Development Funds and Women Enterprise Development Fund. However the funds have been marred by corruption and duplication beating its own essence. Additionally, youth complain of stringent processes in application of these funds in terms of collateral as a requirement.

Recommendations

a) The government needs to have in place proper and effective accountability mechanisms that checks on the expenditure and allocation of these funds. Statistics show that the funds have not adequately addressed youth unemployment.

b) The government should revise the unfavourable application processes for these funds to allow young people to easily access the funds.

The 2010 Constitution at Article 41(1)(c) is very clear on labour relations, thus any contravention by employers with regards to this right is already dealt with in law. This right is not only premised on workers’ rights and collective bargaining but also on social development whereby trade unions are supposed to be drivers of social development of workers’ rights and ensuring that employers obligations to their workers are adhered to especially with regards to workers’ socio-economic interests. However, much has not been done in the informal sector where violations are rife. Labor officers are few and unable to deal effectively with labor issues particularly labor rights that are rife within the informal sector in the urban areas.

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5 http://kenyalaw.org/caselaw/cases/view/105977/
6.0 Article 9: The right to social security

Article 9 of the ICESCR requires universal access of social security and social insurance. Kenya has made efforts towards implementing these rights through the provisions of Article 43 of the 2010 Constitution which guarantees the right to social security. In addition, the National Social Security Fund Act and the National Hospital Insurance Fund Act provide the basis for the realization of social security and social insurance rights. However, the complementary nature and interrelated experience of realizing economic, social and cultural rights demands for an integrated approach which in Kenya, under the social protection banner covers social security, social insurance and social assistance. These speak to the realization of Article 9 of the ICESCR but gaps still exist in common principles especially those concerned with universality and indivisibility.

6.1 Coverage of programmes

Social protection programmes under which social security and social insurance fall are faced with coverage challenges that undermine uptake of services among the citizenry. Both social security and social insurance remain open to all citizens. However the discrepancy is noticed in the formal and informal sector workers. Whereas in the formal sector payment of social security and social insurance are compulsory and are deducted at source (employer) by the government, the informal sector workers have this as a voluntary contribution.

The dichotomy between contributors and workers is evident and points to great parallels in terms of access to both social security and social insurance. In the case of vulnerable groups i.e. older persons, persons with disabilities, orphans and vulnerable children, cash transfers which look to safeguard consumption irregularities (safety net measures) as well as enhancement access to other basic amenities such as health and education targeting mechanisms are employed, which have high inclusion and exclusion errors. According to the Social Protection Sector Review only 28% of OVCs are covered by the Orphans and Vulnerable Children Cash Transfer. This again points to poor coverage of both social security and social insurance from a systemic perspective in so far as the targeting for both the social insurance fund and the social security fund is concerned. Coverage of all the programmes remain low especially because the two funds favour contributions from those in the formal sector. Social protection schemes continue to be dogged by questions as to their adequacy stemming from price inflation eroding the value of the shilling and therefore the purchasing power of households. The issue of a progressive contribution system for the funds is key in the sense that it has to build the funds (efficiency in financing) while ensuring that service provision and expansion of benefits remains core to its expenditure.

The Social Protection Sector Review of 2012 identified duplication and lack of coordination as a key hindrance to the enjoyment of social protection benefits. The lack of a coordination mechanism rooted in law as spelt out in the National Social Protection Policy has meant that the Social Protection Council which among other tasks, is charged with setting up a Social Protection Fund does not exist. Under the Council, a secretariat charged with the function of coordination and with powers to act would also be set up. Although the secretariat exists, it is not founded in law nor does it have the power to coordinate functions of the NHIF, which is run under the Ministry of Health under the NHIF Act and the NSSF which is under a different department in the Ministry of Labour, Social Security and Services established under the NSSF Act.

Recommendations

The government should increase the number of labour officers to ensure strict adherence to labour laws. This will ensure enforcement of labour standards. The state should further stop interfering in trade unions management structures thought the ministry of labour.

7.0 Article 10: Protection of the family

7.1 Discrimination against children

7.1.1 Legal Framework

Article 53(1) (b) and (c) of the Constitution states that every child has the right to free and compulsory basic education, and basic nutrition, shelter and health care. Section 7 (1) and (2) of the Children’s Act 2001 states that every child shall be entitled to education the provision of which shall be the responsibility of the government and the parents. It further states that every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child.
Article 19 of United Nations Convention on the Rights of the Child (UNCRC) obligates State Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 28 of the UNCRC, Sections 28, 29 and 32 of the Basic Education Act 2013 provide for free and compulsory education for children. Article 2 of UNCRC echoed by Section 5 of the Children’s Act 2001 provides that no child shall be discriminated against on grounds of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or connection.

Article 54 (1) of the Constitution 2010 relates to the rights of persons with disabilities. Specifically, Article 54 (1) requires that people with disabilities be treated with dignity and respect; to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with interests of the person; to reasonable access to all places; to use sign language, Braille or other appropriate means of communication; and to access materials and devices to overcome constraints arising from the person’s disability. Section 18 of the Persons with Disability Act 2003 also states that no person with disability shall be denied admission to any course of study by reason only of such disability; and learning institutions shall take into account the special needs of persons with disabilities with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical education requirements and other similar considerations. Section 9 of the Children’s Act 2001 provides for the right of a child to health and medical care while Section 12 states that a disabled child shall have the right to be treated with dignity and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible.

### 7.1.2 Children living with disabilities

A survey conducted by the National Coordinating Agency for Population and Development in 2008 revealed that the overall level of disability rates in Kenya is 4.6%. Among these, 1.6% have physical disabilities and 1.4% have visual disabilities. The report established that among children between 0-14 years, 0.5% suffer from hearing disabilities, 0.2% speech, 0.4% visual, 0.1% mental, 0.6% physical while 0.3% have self care challenges. Among teenagers between 15-24 years, 0.4% have hearing difficulties, 0.2% speech, 1.1% visual, 0.2% mental, 1.1% physical and 0.3% have challenges related to self care. The survey also established that 32% of Persons with Disability (PWDs) use assistive devices or support service. Out of this proportion, one in every five uses an information device while 12% use a personal mobility device. Other devices such as communication aids (0.3%), household items (0.1%), personal care and protection (0.4%), handling products and goods (0.1%), and computer (0.1%) were rarely used. PWDs in urban areas (41%) were more likely to use an assistive device or support service than their rural counterparts (26%). Similarly they were more exposed to use of information devices (30% for urban verses 11% for rural). Many children living with disabilities in Kenya continue to experience discrimination due to retrogressive cultural practices and dispositions. Many children with special needs are considered a bad omen by some families and are therefore denied opportunities for personal growth and development.

Many public schools in Kenya, both primary and secondary, have not prioritized and integrated special needs education into their learning curricula as required by law. There is a significant shortage of teachers with special needs training and many of the schools do not have adequate equipments or facilities that support learning for children with disabilities. Schools that are specialized in providing special needs education are very few and sparsely distributed across the country, often making them inaccessible to many children. Subsequently, the costs associated with special needs education are also high, making it expensive for many parents with low income to afford such specialized schools. Due to inadequate facilities and equipments for children with special needs in many public and private schools, children with special needs often find it difficult to catch up with the rest of their colleagues. Some schools continue to discriminate against children with special needs by refusing them admission.

Treatment and medication for children with special needs is often very expensive considering that many of these children are frequently ill and in need of regular medical attention. Some necessary equipment such as wheelchairs for physically disabled children, sun screen, sun glasses and prescription lens for children with albinism are very expensive and unaffordable to many families.

Lastly, children with disabilities, particularly those who have undergone apprenticeship or vocational training programmes also find it increasingly difficult to find job placements where they can put their skills to gainful use.

#### Recommendations

(a) Map out and create a database of the special needs requirements of all children living with disabilities, and through budgeting, fast-track the provision of assistive devices, materials, equipments and facilities to ease their learning.

(b) Take measures to facilitate training and recruitment of teachers for special needs education to eliminate the current shortage.

(c) Increase the number of units in public schools offering special needs education to increase access for children with special needs.

(d) Speed up the process of integrating special needs children into mainstream education and facilitate availability of materials and equipments to ease their learning.

(e) Fully implement the provisions of the Persons with Disabilities Act 2003 and other legislations to ensure all children with disabilities are able to access free treatment and medication in all public health facilities.

(f) Ensure non-discrimination of all children living with disabilities in all public and private institutions through enforcement of policies and legislations.

(g) Continue with its effort to create awareness among citizens with the view of creating a positive and receptive attitude towards children living with disabilities and to counter retrogressive cultures that continue to discriminate against them.

(h) Set aside special places for apprenticeship of children with disabilities through the National Youth Service and thereafter facilitate their absorption into employment.

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19 Basic Education Act, No 14 of 2013, Laws of Kenya
20 Children’s Act No 8 of 2001 Laws of Kenya
21 Persons with Disabilities Act, No 14 of 2003, Laws of Kenya
7.1.3 Children living with HIV/AIDS

A study conducted by the National AIDS Control Council of Kenya (2014) established that there were at least 190,131 children between 0-14 years living with HIV in Kenya in 2013, 95,743 male and 94,388 female. Children between the age of 15 years and above living with HIV were estimated at 87,291, of which 37,514 are male and 49,778 female.

The Government, other Non-Governmental Organizations (NGOs), Faith Based Organizations (FBOs) and Community Based Organizations (CBOs) have in the last decade scaled-up the fight against HIV/AIDS with a view to realizing the zero infection rates. A lot of public awareness has been created in this regard to combat the spread of HIV/AIDS including other policy interventions such as the Youth Communication Strategy, Condom Policy and Strategy, Male Circumcision Policy, HIV and AIDS policy at workplace, HIV and AIDS Prevention and Control Act, National Aids Control Council and Stakeholder’s Code of Conduct and guidelines inter alia. Deliberate programme interventions such as the Prevention of Mother to Child Transmission (PMTCT), Early Infant Diagnosis, PMTCT ARV prophylaxis, HIV counseling and Testing, and Cash Transfer Programmes where Orphans and Vulnerable Children receive Ksh 2000 per month have also been established.

However, despite these interventions, HIV/AIDS stigma, particularly of children living with HIV and AIDS still remains a significant cause for concern. Many orphaned children living with HIV suffer neglect from caregivers and family members due to the unfounded fear and belief that they may pass on the HIV virus to their children. For this reason, children living with HIV/AIDS are often stigmatized through restricted play and interaction with other children and even forced to use separate utensils and beddings.

Many children living with HIV/AIDS are not facilitated to attend hospitals or clinics for treatment and medication or when the medication has been provided, they are not properly administered by the caregivers as prescribed. Many children living with HIV/AIDS are often considered a burden in the family and believed to have a shorter time to live hence less attention is given to them, including the necessary medical and educational needs.

There are a growing number of children living with HIV/AIDS who have been disowned by their families and or caregivers, thus ending up on streets or children homes. In some instances, children are dispossessed of their inheritance by greedy relatives while others suffer physical, sexual and emotional abuse.

There are also incidents where children living with HIV/AIDS experience discrimination in schools. Some schools either refuse to admit children living with HIV/AIDS or in other incidents, insensitive language or examples related to HIV pandemic are used in class by teachers that continue to stigmatize these children. Many orphaned children are also forced to drop out of school due to lack of school fees, particularly due to high fees charged in most secondary schools.

Recommendations

(a) Provide adequate protection to orphaned children to ensure their rightful inheritance is guaranteed.

(b) Facilitate the provision of child and youth friendly desks in all health care institutions to sensitize children and teenagers on HIV/AIDS and reproductive health for behavior change and character formation.

(c) Step-up efforts to demystify HIV/AIDS retrogressive myths through appropriate campaigns, and training and workshop particularly for teachers to avoid revictimization of children living with HIV/AIDS within school set-ups.

8.2 Child abuse, neglect and child labor

7.2.1 Legal Framework

Chapter four of the Constitution of Kenya, 2010 provides for the bill of rights and fundamental freedoms of all citizens; Article 53 of the same provides for special guarantees for children's rights.

Drawing from Article 19 of UNCRC, Section 10 of the Children’s Act (2001) provides for protection from economic exploitation and any work that is hazardous or likely to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.

The International Labour Organization (ILO) Convention 13823 as domesticated in Section 56 the Employment Act 200724 and Section 4 of the Children’s Act 2001 establishes the minimum age of work permissible for children.

ILO Convention 18225 illustrates the worst forms of child labour. The Sexual Offenses Act (2006) provides for different forms of sexual offenses and applicable penalties thereto, including defilement, attempted defilement, gang rape, indecent act with child or adult indecent act with adult, promotion of sexual offences with a child and child sex tourism.

Section 13 of the Children’s Act (2001) provides for the protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person.

7.2.2 Situational Analysis

According to a national survey conducted in 2010 on violence against children in Kenya, three out of every ten females and nearly two out of every ten males aged 18 to 24 reported at least one experience of sexual violence prior to age 18.26 Seven percent of females aged 18 to 24 reported experiencing physically forced sexual intercourse prior to age 18. Of females whose first sexual encounter occurred before age 18, 24% reported that it was unwilling, they were forced, pressured, tricked or threatened to engage in sexual intercourse. In the 12 months prior to the survey, about 11% of females and 4% of males aged 13 to 17 experienced some type of sexual

23 International Labour Organization, Minimum Age Convention, 1973
24 Employment Act, No 11 of 2007, Laws of Kenya
25 International Labour Organization, Worst Forms of Child Labour Convention, 1999
violence. Among 18 to 24 year olds, almost two-thirds of females and three-quarters of males reported experiencing physical violence prior to age 18. Approximately half of all females and males aged 13 to 17 experienced some type of physical violence. About one-quarter of females and one-third of males aged 18 to 24 years reported experiences of emotional violence prior to age 18.

The government of Kenya has put in place important measures to protect children from abuse and facilitate easy access to justice. Such measures include the establishment of institutions such as the Children’s Courts, National Council for Children’s Services, and the introduction of children’s rights into school curriculum among other measures. Other Non-governmental Organizations also play a significant role in the promotion and protection of children’s rights by establishing institutions of child care and learning and by promoting awareness of child rights and abuse to local citizens.

However, many children in Kenya are continuously subjected to the worst forms of child abuse in schools, child care institutions and even at home. There have been a growing number of cases reported by the media of child defilement, physical abuse, neglect and emotional abuse. Cases of children being defiled, abducted, strangled and/or badly mutilated and their bodies dumped have been on a steady rise with some of them going unresolved. The reluctance of law enforcers to expedite investigations, make arrests and charge perpetrators is worrying. There is also reluctance among the public to assist with investigation, including instances of alleged bribery, either of law enforcers or family members to compromise or withdraw cases.

There is also a growing concern of alleged criminal activities perpetrated by children in many informal settlements. In Mukuru informal settlements and Kayole areas in Nairobi for instance, there is an alleged criminal gang named GAZA that is recruiting children, both boys and girls, as young as 9 years and thereafter inducting them into criminal activities. The children are lured through sports such as football and later made to take illegal oath which bind them as members of that gang. These children are then slowly introduced into crime, ranging from extortions, theft, robbery, prostitution and illicit drugs. The gang operates very secretly, making it difficult to know the whereabouts of its leaders, and it thrives through instilling fear through threats to local residents.

Child labour in Kenya is also rampant with a steady growth of street children, especially in Nairobi. In many informal settlements such as Mukuru, illicit brew, locally known as chang’aa also contributes to this problem. Many chang’aa dens are opened as early as 7.00 am and sometimes children are involved in selling, which is often their parents’ occupation. This happens despite the law requiring all pubs and bars selling alcohol to open not earlier than 5.00 pm on weekdays and 3.00 pm on weekends.

In addition, many children are involved in plastics and scrap metal collection, sometimes to supplement family income instead of going to school.

**Recommendations**

We therefore propose the following recommendations to the government of Kenya:

(a) Consider establishing a child unit within the National Police Service to promote public awareness on children’s rights and to fast-track investigations and prosecution of all cases related to child abuse.

(b) Investigate the activities of GAZA gang and provide safeguards to protect children from being recruited into this gang, and where applicable, prosecute all those found culpable of exploiting children to promote criminal activities.

(c) Promote community based initiatives that help children and teenagers to channel their energies through games, sports and the arts so as not to be victims of criminal gangs.

(d) Strengthen legislations to stop business people and individuals from buying scrap metals and plastics from children and prosecute all those found culpable of exploiting children for their commercial gain.

### 8.0 Article 11: Adequate standards of living

**8.1 Forced evictions**

In May 2004, the government assured Special Rapporteur on adequate housing, Miloon Kothari, that it would stop all evictions to work on a more organized and systematic plan for evictions. The government also informed the Special Rapporteur that it intended to “sensitize all citizens and stakeholders on procedures for evictions”. Both of these commitments are yet to be honored.

Despite the Constitution of Kenya protecting the right to accessible and adequate housing under Article 43(1)(b), this right is still being violated, both by private persons and by the State itself. The Constitution goes a step further and also enshrines the right to property in Article 40. Under Article 40(3) the government is expressly prohibited from arbitrarily depriving a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with the provisions of the Constitution; or is for a public purpose or in the public interest and is carried out in accordance with the Constitution and any Act of Parliament that:

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

Instances of forced displacement have been on the rise as a result of the increase in the number of mega developments being undertaken in the country, most notably the Lamu Port-South Sudan- Ethiopia Transport Corridor (LAPSSET Corridor). To pave way for these developments communities are being unprocedurally evicted from their homes and left homeless, vulnerable to further violations of their economic and social rights. This situation is facilitated by the continued absence of a comprehensive eviction

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27 Alcoholic Drinks Control Act, No. 4 of 2010, Laws of Kenya

policy or law. In its State of Housing Report, 2013/2014, the Economic and Social Rights Centre (Hakijamii) reported that the lack of an enabling policy and legal framework on evictions and resettlement was identified by members of the public as contributing significantly to the vulnerability of communities to forced evictions.29

8.2 No security of tenure

Another factor leaving Kenyans vulnerable to forced evictions is lack of security of tenure. Persons who do not hold title to land are protected in Article 40(4) of the Constitution of Kenya which states that 'provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.' Therefore, lack of title to land is no justification for unprocedural arbitrary evictions. This has been witnessed in areas such as Isiolo where the land has been held under communal tenure with the adjudication and titling process yet to be undertaken. Irregular and illegal evictions have been carried out against some residents with the officers carrying out the evictions alleging that the residents have no right to be there and therefore cannot be protected. Such statements also reveal a need for the government to carry out trainings and awareness building on human rights for security forces who need to understand a human rights approach to law enforcement, including the carrying out of evictions. The study undertaken by Hakijamii also found that security of tenure was identified by members of the public as the most important factor of adequate housing and in turn the lack of security of tenure left residents in informal settlements vulnerable to forced evictions.30

8.3 Legislative provision undermining the justiciability of socio-economic rights

The current legal framework is currently acting as an impediment to realising the right to housing and is also frustrating efforts towards ensuring the justiciability of economic and social rights, particularly the right to a remedy. In the case of Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security31, 1,123 petitioners went to court after their homes were demolished without notice by armed administration police officers in riot gear, in blatant violation of their right to housing, property and dignity and blatant disregard for due process. The court found that this amounted to a violation of, inter alia, their right to dignity, accessible and adequate housing, reasonable standards of sanitation, health care services, water and freedom from hunger. The court issued a mandatory injunction compelling the State authorities to return the Petitioners back to their land, reconstruct reasonable residences and/or alternative housing with all the amenities, facilities and schools they agree on. A permanent injunction was also ordered against any evictions done apart from the law and due process and the 1,123 Petitioners were granted damages of two hundred thousand Kenya shillings each. However, the enforcement of the award of damages in the judgment has been frustrated by Section 21(4) of the Government Proceedings Act32 which states that:

...no execution or attachment...shall be issued by any such court for enforcing payment by the Government of any such money or costs...and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer in the Government...of any money or costs.

This provision essentially undercuts any monetary awards against the Government, rendering them unenforceable in the event that the Government fails to pay. This problem is compounded by the Government's unwillingness to negotiate. Therefore, for the monetary awards granted to be effective, it is imperative to amend Section 21(4) of the Government Proceedings Act which states that:

Recommendations

1. The Government should expedite the enactment of legislation on evictions and resettlement, and this legislation should be comprehensive enough to provide effective protection of human rights and dignity of the persons protected. The Evictions and Resettlement Bill developed by the Taskforce appointed by the Ministry of Lands in 2012 incorporated public opinions and international best practice and should be adopted as the law governing evictions and resettlement.
2. The government should also expedite the process of adjudication of land, to ensure security of tenure for more citizens who will no longer have to live in fear of being forcefully evicted at any time.
3. To secure the justiciability of the Bill of Rights and the right to a remedy, the government should amend the provisions of the Government Proceedings Act (No 47 of 1956) to allow monetary judgements against the government to be enforced.

8.4 Women and Land Rights

The right to property is protected under article 40 of the Constitution of Kenya which states that “every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya.” Article 27(3) declares that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Women are also expressly provided for in the principles of land policy as set out in article 60, which also provides for equitable access to land, security of land rights and importantly, the elimination of gender discrimination in law, customs and practices related to land and property in land.

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29 The Economic and Social Rights Centre-Hakijamii, Annual State of Housing Rights in Kenya 2013 to 2014, (September 2014) pg 18.
30 Ibid, pg 17.
31 Embu Constitutional Petition No. 2 of 2011
32 Act No. 47 of 1956, Chapter 40, Laws of Kenya
Despite the constitutional emphasis on equity and equality, non-discrimination and affirmative action, women are still largely deprived of control of property and access to ownership and ownership documents. The Federation of Women Lawyers – Kenya reports that whereas 89% of subsistence farming is undertaken by women, only 5% of land title deeds in Kenya are held by women jointly with men and a dismal 1% of land titles in Kenya are held by women alone.33 This has been shown to leave them vulnerable to poverty, domestic violence and disease.34 Research has also shown that secure rights to land and housing empower women both socially and economically, and in turn, ‘insecure land tenure and property rights for women can contribute to the spread of HIV and to a weakened ability to cope with the consequences of AIDS.’35

Legislative provisions allowing the discriminatory customary practices are still in force, including the Trust Land Act, Land Adjudication Act and the Land Consolidation Act. The State has introduced the Community Land Bill 2015, which aims to repeal the Trust Land Act and the Land (Group Representatives) Act. This law should also repeal the Land Adjudication Act and Land Consolidation Act in order to ensure a more conducive legal environment for women to enjoy their right to land and property.

Women are still inadequately represented in the land administration institutions and both formal and traditional land decision making institutions.36 There is need for the government to take steps to increase the number of women in these crucial institutions to ensure their interests are represented and protected.

### 8.5 Right to water and reasonable standards of sanitation

A survey conducted by UNDP in Nairobi’s informal settlements revealed that access to water is most desired by residents to improve their living standards.37 Although there exists pro-poor water management policies in the informal settlements, disparities still exist. Tariffs have been set by the national bodies to ensure greater access for the rural and urban poor at a more affordable cost, citizens should pay only Ksh 2 for 20 litres of water. However from the UN Special Rapporteur’s report on the right to water and sanitation in Kenya 2014, citizens pay a minimum 5 shillings and up to 10 shillings, in the remote areas, for the same 20 litres.38 While those in poor urban areas pay a minimum of Ksh 5 and a maximum of Ksh 50 per 20 litre jerrican depending on the supply and availability of the commodity. This is partly due to the lack of both financial and human capacities to ensure compliance by small scale vendors and also due to the unregistered small vendors39 who are not subject to these regulations. The poor actually end up paying more than those who are connected to piped water.40

The state report presents numerous projects that have been undertaken by the government to improve water supply and access. There is a 62% coverage of water access and a corresponding 30% for sanitation. However 82% is in the urban areas while rural areas water access coverage is only at 55%.41 This is a large disparity between the two areas. The disparity is also big between formal and informal settlements. These disparities should be addressed considering Kenya’s commitment to put in place affirmative action programs that will ensure marginalized and disadvantaged groups have reasonable access to water and also in accordance with the principle of equality and non-discrimination in the execution of its mandate.42 The State report also fails to indicate that there has been a significant decrease in water access in the urban areas and this due to population increase in these areas. The decrease was from 92% to 82% in the year 2012.

### 8.6 The Water Bill 2014

The water Bill 2014 which is yet to be passed is an Act of Parliament that provides for the regulation, management and development of water resources, water and sewerage services and for connected purposes in Kenya. The Bill has been aligned to the Constitution 2010 and the national water master Plan 2030. It has gone through the second reading and is still awaiting further discussion. The Bill articulates that water resources in Kenya are vested and held by the national government on behalf of the people of Kenya. The Bill proposes the formation of Water Resources Regulatory Authority to replace the Water Resource Management Authority. The Bill articulates that every Kenyan has a right to safe and clean water in adequate quantities and to reasonable standards of sanitation43.

The State report to the committee on ECOSOC rights fails to mention the existence of the Water Bill 2014 that is currently before parliament and that will repeal the Water Act of 2002 once enacted. The report also does not mention the existence of the Water Policy 2012. Both of these

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35 Renee Giovarelli, Amanda Richardson, Aisha Davis; USAID Issue Brief, Land Tenure, Property Rights, and HIV/AIDS – Approaches for enhancing women's economic security and reducing HIV infection, (May 2013).
39 United Nations development Programme (UNDP)“small scale water providers in Kenya: pioneers or predators?” (2011)
42 Articles 56 (e) and 27(6), Constitution of Kenya, 2010.
43 Water Bill 2015
documents will be instrumental in the management of water resources and services in the country and will bring alignment of the water sector with the new constitution.

The report also leaves out the important structure of devolved governance in the water sector. With the new constitution being in force, and the anticipated Water Bill of 2014, some of the responsibilities and functions related to water and sanitation services have been devolved to the County Governments.

It has also not mentioned the transitional strategies in place that will ensure that during the devolution of some of the water services to the counties there will be no disruption of water services to citizens. From the UN report by the Special Rapporteur on the right to water and sanitation, it was noted that County governments have better understanding and interactions with the citizens and are therefore able to identify and provide for the needs of the community.

8.7 Under-investment in the water sector

The government report shows an increase of resource allocation to the water sector since 2002. However, the amount allocated in the financial year 2013/2014 reduced to 29.3 billion from the previous year’s 41.8 billion. The actual amount disbursed of the earmarked funds also reduced to Ksh. 29.1 billion in the year 2012/2013 to 21.4 in 2013/2014. The actual funds received from government as well as donors also reduced by 49% on the part of government and 16% by the donors. The loans received by the sector in the same financial year (2013/2014) were 10.3 billion a reduction of 10.5%. Grants amounted to 1.5 billion this is a 39% decrease.

These statistics reveal a general reduction of resource allocation to the water sector in the year 2013/2014; this is a departure from the increment trend in the last 5 years or so.

The report by UN Special Rapporteur showed that 4% of the budget is allocated to water and sewerage. This is a commendable effort. However, in a Water Sanitation and Hygiene (WASH) performance index released in 2015, Kenya ranked position 76 out of 117. This shows that Kenya is not yet investing its maximum resources to realize the right to water and sanitation. The government should ensure that there are continued ample budgetary allocations and other means of funds solicitation to ensure that the right to water and sanitation is protected. They should also ensure that allocation to the counties is done in an equitable way to protect areas with water scarcity. The last measure is to ensure there is transparency and accountability of those funds, so as to ensure the continuous attainment and enjoyment of this right.

8.8 Disparity in access to safe drinking water and sanitation especially for the unprivileged in urban and those in arid and semi arid areas

The Constitution, now, recognizes economic, social and cultural rights, such as the right to education, right to housing, right to water, right to health and the right to culture. Every person in Kenya must be able to enjoy these rights free from discrimination.

8.8.1 Water

The national coverage for water and sanitation is currently at 55.9% of the total population of 44.1 million people. Access to safe and clean water in urban centres in Kenya stands at 65.4% against the Millennium Development Goals (MDGs) requirement of 80%. Only 48% of people in rural areas had access to safe and clean drinking water in 2014.

All the Water Service Boards (WSB) in Kenya registered net increase in water supply coverage except the Northern Water Services Board. This covers the arid and semi arid areas of Laikipia, Samburu, Isiolo, Marsabit, Mandera, Wajir and Garissa Counties. Access to water in these areas remains a challenge. For example only 23.8% of residents in Garissa County have access to safe and clean drinking water.

8.8.2 Sewerage coverage

During the financial year (FY) 2013/2014, 431,729 people were connected to sewerage systems in urban areas. This raised the coverage by 1.6% from 20.6% to 22.1%. Note that the urban coverage for the financial year 2012/13 has been revised from 21.5% to 20.6% after Rift Valley WSB revised their coverage figures. This is still far below the National Water Services Strategy (NWSS) and Vision 2030 targets on sewerage coverage of 40%.

Recommendations

a. The government must pass the Water Bill 2014 to give effect to article 43 of the Constitution that guarantees the right to safe, clean drinking water in adequate quantities.

b. Direct county governments especially in arid and semi arid areas to prioritize water and sanitation services in their budgets and development agenda.

c. Entrench human rights principles and approaches in the development of County Integrated Development plans for easier planning and realization.

d. Invest more in sewer development to improve the standard of living especially for people living in urban informal settlements in major towns.

e. As a way out of this, the government should ensure that it monitors and ensures compliance of the price controls. It should involve the public and CSO’s as a way of getting information on any deterrence by water vendors.

9.0 Article 12: The right to health

9.1 Geographical disparities in accessing health care services

Geographic disparities in access to health care in Kenya are unacceptably high. For instance, in Wajir County, only 12 percent of deliveries are assisted by a skilled health worker, compared to 94 percent in Nyeri, the best performing county. Likewise, only 47 percent of children were fully immunized in Wajir compared to 93 in the Nyeri in 2014.

Recommendation
The government should fast track the passing of the Health Bill 2014 into law to assist in addressing the disparities.

9.2 Increased out of pocket spending for health services for the marginalized

A significant share of health expenditure is in the form of out-of-pocket (OOPs) payments; households account for about one third of total health expenditure. The review shows that total private spending on health increased from US$ 17.5 per capita in 2001/02 to US$ 21 in 2011/12. The contribution by donors, on- and off-budget, has also increased from US$ 5.3 per capita to about US$ 15 during this period. OOP payments are inequitable, are a major barrier to access, and contribute towards household poverty and impoverishment.

Recommendation
The government needs to:
   a. Include palliative care in the National Health Bill 2014. Also make morphine available and allow nurses to prescribe to patients
   b. Reduce reliance on out-of-pocket payments and move towards pre-payment financing mechanisms. Out-of-pocket (OOP) payments account for over a third of total health expenditure. The OOPs are inefficient, inequitable and contribute to households’ poverty and impoverishment. Increasing the share of tax funds allocated to the health sector and promoting health insurance can offer financial risk protection for the population.
   c. Undertake to address these inequalities through sealing specific budgets for health care related infrastructural development in marginalized areas

9.3 Maternal health care

Even with the government announcing free maternity care for women in Kenya in all public hospitals, maternal mortality remains high at 488 maternal deaths per 100,000 live births. Most maternal deaths are due to causes directly related to pregnancy and childbirth, lac unsafe abortion and obstetric complications such as severe bleeding, infection, hypertensive disorders, and obstructed labor. However in the recent past several other factors including ignorance from medical personnel, absenteeism and travelling long distances are common in Kenya.

Retention of expecting mothers in hospitals after delivery is the recent and most common violation of maternal health rights facing expecting women are facing in Kenya. The case at point is between Millicent Awuor Omuya (Petitioner 1) Vs the Attorney General, Minister for Health, City Council of Nairobi and Pumwani Maternity Hospital (Respondents). In the judgment, the court made the some critical observations that aim at protecting patient’s rights. We ask the government to obey the court orders and immediate embark on the following:
   • The government must take the necessary steps to protect all patients from arbitrary detention in health care facilities which include enacting laws and policies and taking affirmative steps to prevent future violations.
   • The government should develop clear guidelines and procedures for implementing the waiver system in all public hospitals.
   • That the government should take administrative, legal laws and policy measures that eradicate the detention of patients in hospitals due to lack of capacity to pay for their medical bills.

10.0 Article 13 and 14: The right to education and free compulsory primary education

10.1 Access to education

The right to education in Kenya is captured in Article 43(1) (f) of the Constitution of Kenya, 2010. The Constitution at Article 53 (1) (b) further guarantees the right to free and compulsory basic education for every child. In October 2012 a report by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on Kenya paints a picture of failure despite legislative and policy measures such as Free Primary Education (FPE) and Free Day Secondary Education (FDSE). According to the report, approximately one million children are still out of school in Kenya despite FPE and attempts at FDSE. While this is almost half the number reported in 1999, it is still the ninth highest of any country in the world. The survey also raised concerns about the inaccessibility of free education and resulting benefits to poor and marginalized groups. It reports that 55 percent of poor girls and 43 percent of poor boys living in the North-Eastern regions have never been to school.

10.2 Quality of education

Education in Kenya has also been noted to be of poor quality in that it does not ensure that all children learn the basics. According to a 2011 report by Uwezo Kenya,\(^5\) only three out of 10 children in Class Three can read a Class Two story [in English], while slightly more than half of them can read a paragraph. Four out of 100 children in Class Eight cannot read a Class Two story.\(^6\) Further, Uwezo Kenya reported that 30 percent of Class Three children are unable to complete Class Two division, and 10 percent of Class Eight children cannot do Class Two division. The 2012 survey by UNESCO also revealed that among young men aged 15-29 years who had left school after six years of schooling, six percent were illiterate and 26 percent were semi-literate. The figures are worse for girls, with nine percent illiterate and 30 percent semiliterate after being in school for six years.

10.3 Effects of low-cost private schools

The Basic Education Act, 2013 sets out guiding principles for the provision of basic education in Kenya which include the promotion of quality, transparency, accountability, promotion of integration and cohesion, non-discrimination, protection of the marginalized, appropriate human resource, funds, equipment and infrastructure that meet the needs of every child in basic education.\(^5\)

A 2015 study by the Economic and Social Rights Centre (Hakijamii) and Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) found that the number of private primary schools in Kenya increased from 385 in 1998 to 8917 in 2013.\(^5\) Further, the number of ‘lowcost’ for-profit private schools in Kenya has increased drastically, without a corresponding implementation of stringent regulations to ensure that the quality of education is not compromised and human rights standards are maintained. In Kibera and Mathare, the major informal settlements in Nairobi, 96 percent of schools in the area are private schools.\(^5\) It is estimated that 52 percent of children in Kibera informal settlement attend low cost for-profit private schools.\(^5\)

Whereas these schools play an important role in making education physically accessible, the State has failed to adequately regulate these institutions to ensure that the quality and curriculum offered in these schools meets international and national standards and basic education remains free and compulsory to all. These low cost private schools are largely under resourced with barely trained, unqualified, underpaid teachers, and deliver poor quality education in the sense that the learning experiences for the average student deteriorate.\(^5\) These institutions also deepen the discrimination and stratification in society by relegating the already marginalized children in informal settlements to poor quality education which in turn entrenches the cycle of poverty.\(^5\)

The Report of the Special Rapporteur on the right to education demonstrates that privatization adversely affects the right to education both as an entitlement and as empowerment. The report states that “privatization in education cripples the universality of the right to education as well as the fundamental principles of human rights by aggravating marginalization and exclusion in education and creating inequalities in society.”\(^5\) This is an exceptional tragedy considering education is supposed to be a tool of empowerment, giving disadvantaged children the means to ensure a better standard of living for themselves and their families. The report of the Special Rapporteur also emphasized that the State has the primary responsibility to provide education, which includes protecting the right against violation by private entities. However, the Government has facilitated the proliferation of these low cost alternative private schools by failing to adequately invest in and regulate public schools especially in these informal settlements. The number of public primary schools in Kenya has only increased by 24.9 percent between 1998 and 2013.\(^5\) A study done in 2015 found that for some of the poorest families in Kenya, public school is too expensive because of other costs for exams, uniforms and levies for special projects. Further, the classes are too overcrowded. These factors make basic education economically inaccessible for children from poor families, and have forced parents to move their children to low-cost private primary schools, where quality is undermined in favour of profits.\(^5\)

The legal framework governing the low-cost private schools is unclear. It appeared the Basic Education Act 2013 sought to eliminate them because it does not provide for them, yet there has been a Policy for Alternative Provision of Basic Education and Training (APBET) since 2009 and recently the State developed the Registration Guidelines For Alternative Provision Of Basic Education And Training, 2015.\(^5\) The cumulative effect of this is a violation of the right to a quality free basic education for every child.
The current government, through its campaign manifesto acknowledged the inequalities and poor standards of education in Kenya. It therefore pledged that it would increase the number of schools in disadvantaged areas and restrict class sizes to a maximum of 40. The Government is yet to disclose any programs it has formulated to honor these pledges.

**10.4 Early Childhood Development Education neglected**

For a long time, Early Childhood Development and Education (ECDE) has been neglected in Kenya. Under the Sixth Schedule of the Constitution of Kenya 2010, responsibility for managing pre-primary education vests with the County Government. However, under the Basic Education Act, both National Government and County Governments have a role to play in the provision of this service.

Currently, efforts to provide ECDE are disjointed and uncoordinated and this is because the current 2006 ECD Policy is outdated.61 There is no standardization in the provision of ECDE and as a result learning outcomes in primary and secondary are compromised.

**Recommendations**

a) Adequate resources should be directed to the public education system to build its capacity to make quality education free and physically accessible, especially to children in poor families and those living in informal settlements.

b) The Government should effectively enforce regulations in the education sector to ensure that free basic education remains free and accessible to all the members of society, particularly the vulnerable persons.

c) The State should urgently standardize and regularize provision of education in Kenya to ensure that quality, equity and development is maintained in both public and private schools at all levels of education. Low-cost private schools should be strictly regulated to maintain adequate standards of quality in education, specifically with regard to transparency and accountability, well trained and motivated teachers and availability of infrastructure for the holistic development of the child.

d) The Government should amend the policy and legal framework governing Alternative Provision of Basic Education and Training (APBET) to provide clarity on the legal status of these institutions and to align it with the new constitutional dispensation.

e) The National Government must fulfill its mandate to set education policy and standards related to Early Childhood Development and Education (ECDE) to ensure harmonized standards and delivery for ECDE across the country.

f) The 2006 policy framework governing Early Childhood Development and Education should be amended to include the devolved system of government, the division of roles between the National and County Government, and a renewed focus on the importance of early childhood development and education.

**11.0 Article 15: The right to participate in cultural life**

Culture forms an integral part in the daily practices and knowledge of Indigenous Peoples. Through cultural practices including duties and obligations, culture becomes a foundation necessary for continuity of social life. It is fundamental to the collective identity and distinctiveness of a group. Cultural rights are therefore deemed to protect the very survival and continued development of Indigenous Peoples.

The Universal Declaration of Human Rights (UDHR) in the year 1948 strongly considered and proclaimed cultural rights as human rights.62 Moreover, cultural rights are recognized as collective rights. For instance, the ICESCR states that ‘all people have the right of self determination.’63 By virtue of that right, they can freely pursue their economic, social and cultural development. The free pursuit of cultural development strengthened by the right of self determination, allow people to preserve their cultural identity.

International human rights jurisprudence under article 27 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the ICESCR sets out an integrated content of the rights of indigenous peoples. They provide for economic and social rights which are part of their culture; protection from forcible relocation; land and resource rights; protection of cultural sites; and guarantee against severe environmental degradation.

There are inter-linkages between right to culture and non-human rights instruments, for instance Convention on Biological Diversity which offers opportunities for implementation of cultural rights. It obligates states to address rights to traditional knowledge (article8 (j)) and to promote and protect customary use of biological resources in accordance with traditional practices (article 10(c)).

**11.1 Cultural Rights Issues in the Kenyan Context**

Cultural recognition amounts to respect for human dignity and social justice. It also includes recognition of indigenous peoples’ legitimate claims to redress long-standing political and economic inequities that stems from their cultural marginalization. It is therefore imperative to note that recognition of cultural rights is largely dependent on recognition as Indigenous Peoples (IPs). However, the Kenyan government still denies such recognition and this alone amounts to violation of cultural rights. The obligation to respect and to protect cultural productions of IPs is bestowed upon the governments.

**11.2 A Classical Case of Impending Cultural Rights Violation of IPs in Lamu Archipelago (Adopted from Kenya at 5)**


62 The United Nations, Universal Declaration of Human Rights, 1948, Article 27

63 International Convention on Economic Social Cultural Rights, 1966, Article 1
Background

Of the approximately 500,000 children in Nairobi, about 60% are enrolled in low-fee private schools. Most of these children are found in the informal settlement and come from households that survive on less than $1 a day. School fees have been identified as one of the biggest barriers to access to education, especially in developing countries where these costs bar children from accessing or completing quality basic education or force these families to sacrifice other essentials needs or make tough choices like which child will remain out of school.

In February 2012 the Taskforce on the Realignment of the Education Sector to the Constitution 2010 acknowledged the State had failed to provide the stringent supervision required to ensure that commercialization of education does not compromise access to and quality of education. To make matters worse, no clear policy on the role of private actors in education is in effect and generally, children in private institutions do not benefit from free education grants.

In the context of education as a human right and a public good, the persistent, unregulated commercialization of education entrenches inequalities by making it inaccessible to the poorest, most vulnerable members of community.

Legal Framework

The number of ‘low-cost’ for-profit private schools in Kenya has increased drastically over the last few years without a corresponding implementation of stringent regulations to ensure that the quality of education is not compromised, human rights standards are maintained and basic education remains economically accessible to all. The legal framework governing these low-cost private schools is unclear. It appeared the Basic Education Act 2013 sought to eliminate them because it does not provide for them, but the Policy for Alternative Provision of Basic Education and Training (APBET), 2009 remains in force, despite the fact that it has not been aligned with the Constitution of Kenya 2010. The cumulative effect of this ambiguity in the legal framework for education is a violation of the right to a quality free basic education for every child.

The Constitution of Kenya 2010

Basic education in Kenya is recognised as a human right in article 43(1)(f) of the Constitution of Kenya 2010 which acknowledges that every person has the right to education. Every child’s right to free and compulsory basic education is entrenched in article 53 (1), and is not subject to progressive realisation – contrary to article 43.

Article 2 (6) of the Constitution recognises that “any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”. Kenya has ratified the African Charter on Human and Peoples’ Rights (Banjul Charter) in 1992, the International Covenant on Economic, Social and Cultural Rights ratified in 1972, Convention on the Rights of the Child, ratified in 1990 - all of which protect the right to basic education and now form part of the laws of Kenya, legally binding on the State.

However, the protection and enforcement of this right cannot be achieved by providing for it in the Constitution alone. It is also necessary to enact supporting legislation to further expound on this right and set out the specific procedures that will facilitate its realization, along with the administrative structures that will enforce the processes.

The 2009 Kenya Policy on Alternative Provision of Basic Education and Training

The 2009 Kenya Policy on Alternative Provision of Basic Education and Training (APBET Policy) was enacted before the 2010 Constitution and is still the policy in force guiding provision of alternative basic education in Kenya. The Policy has not been reviewed to align with the 2010 Constitution and therefore should not be relied on fully. This situation is aggravated by the fact that no specific legislation has been enacted to operationalize the policy and it was not comprehensively incorporated into the Basic Education Act 2013.

Nonetheless, according to then Minister for Education, Professor Sam Ongeri, the APBET Policy was intended to “provide the necessary guidelines to streamline the development and management of alternative channels that provide education and training to needy Kenyans.” The Policy acknowledges that non-formal education programmes should maintain links to the formal education system or else it may degenerate into a parallel, inferior system for disadvantaged learners. Ideally therefore, non formal schools should follow the official primary school curriculum leading to national examinations and should be regulated closely to ensure the right quality and standards of education are maintained. Towards this end, the Policy declares that the Ministry of Education (MoE) should take measures to protect children from exploitation through provision of sub-standard education and services, by ensuring that all institutions meet minimum quality standards. The Government is therefore aware of the danger of leaving non profit schools insufficiently regulated and should do more to effectively regulate these schools.

The APBET Policy defines basic education as ‘a wide range of educational activities offered in formal, informal and non-formal settings.’ The policy does not provide a definition for informal education, but describes non formal education as “any organized, systematic and quality education and training programs, outside the formal school system, that are consciously aimed at meeting specific learning needs of children.” This provision creates ambiguity on what then is informal education and how does this differ if at all – from non-formal education. The APBET Policy also provides that ‘non-formal schools’ are institutions that resemble formal schools in that they aim at transmitting a formalised curriculum leading to formal school examinations. They however differ in school practices, management, financing, staffing conditions, registration, operating environment and school structures.

References:

3 Ibid.
The Basic Education Act, 2013 repealed the Education Act, enacted in 1980 (last revised in 2012). The Basic Education Act sought to streamline the provision of education in institutions of basic education, in line with the 2010 Constitution. The Act applies to all institutions of basic education, whether public or private. According to the Act, private schools are those established, owned or operated by private individuals, entrepreneurs and institutions, under this definition therefore, institutions offering APBET may be classified as ‘private schools’.

The Act does not mention APBET expressly, but defines non-formal education as any organized educational activity taking place outside the framework of the formal education system and targets specific groups/categories of persons with life skills, values and attitudes for personal and community development. This definition elaborates on the definition for non-formal schools given in the APBET Policy which was in more general terms.

The Act goes on to set out very elaborate guiding principles for the provision of basic education, starting with the right of every child to free and compulsory basic education. The guiding principles also include:

a) the importance of quality and relevance,

b) equitable access for the youth to basic education

c) accountability and democratic decision making within the institutions of basic education;

d) protection of every child against discrimination within or by an education department or education institution on any ground whatsoever;

e) protection of the right of every child in a public school to equal standards of education including the medium of instruction used in schools for all children of the same educational level;

f) promotion of good governance, participation and inclusiveness of parents, communities, private sector in the development and management of basic education,

9

g) transparency and cost effective use of educational resources and sustainable implementation of educational services;

h) non-discrimination, encouragement and protection of the marginalized;

i) provision of appropriate human resource, funds, equipment, infrastructure and related resources that meet the needs of every child in basic education.

7 https://miasinsight.wordpress.com/2015/02/19/non-formal-education-sector-equabbles-a-threat-to-their-survival/

8 The Kenya Policy for Alternative Provision of Basic Education and Training, May 2009, p 21

9 Ibid

10 Ibid p 21-22

11 Ibid, p 24

12 Ibid, at 22

13 The Basic Education Act, No. 14 of 2013, Laws of Kenya, Section 2

14 Ibid

15 Ibid, Section 4 (a).
The Act provides for ‘sponsors’ who are person or institution making a significant contribution and impact on the academic, financial, infrastructural and spiritual development of an institution of basic education, and their role under Section 27 includes offering financial and infrastructural support, participating in reviewing the syllabus, curriculum, and so forth. It therefore appears that provision of financial support as is done by the World Bank for Bridge International Academies is approved under this provision. However, the Basic Education (Amendment) Bill 2014 seeks to redefine the term sponsor to mean a person or institution that owns land or property on which an institution of basic education is instituted, and who provides foundational objectives to the institution and ensures that the educational and non-curricular objectives of the institution of basic education are met. Under this definition, entities that contribute to the school only through financial donations would no longer be considered sponsors.

Section 28 of the Act reaffirms the right of every child to free and compulsory basic education, and towards the realisation of this right the Cabinet Secretary for Education is mandated to establish primary schools within a reasonably accessible distance within a county. The State’s failure to establish a sufficient number of schools within the Mathare area is therefore contradiction of this provision.

Public schools are prohibited from charging tuition fees; however other charges may be imposed by the schools with the approval of the Cabinet Secretary in charge of education. Regardless of the proviso stating that no child should be prohibited from attending school because of failure to pay these added charges, this calls into question whether basic education is actually ‘free’ in Kenya when the State allows imposition of prohibitive costs. The responsibility of the Government is further highlighted in Section 39 of the Act. The Cabinet Secretary has the duty to provide free and compulsory basic education to every child and also, importantly, the State is obliged to “ensure that children belonging to marginalized, vulnerable or disadvantaged groups are not discriminated against and prevented from pursuing and completing basic education.” The under-regulated low-fee private schools have been found to perpetuate discrimination and segregation is the society, primarily in children from the urban slums, who are already considered vulnerable and marginalized.

The standards and quality of basic education institutions is to be established by the Cabinet Secretary in consultation with stakeholders, and monitored and enforced by the Education Standards and Quality Assurance Council established in Section 64 of the Act.

Section 76 of the Basic Education Act of 2013 provides that a person shall not offer basic education in Kenya unless that person is accredited and registered as provided for under the Act. This would exclude APBET institutions from validity because many of them are not run by accredited, registered persons.

Section 95 (3)(i) and (j) provides that the Cabinet Secretary, upon consultation with the National Education Board, may prescribe regulations on how schools shall be classified, and make different provisions with respect to different classes or kinds of schools, impose conditions and make exemptions. Pursuant to this power, the Cabinet Secretary drafted the Basic Education Regulations in April 2015 and the Registration Guidelines for APBET institutions.

The Basic Education Regulations, 2015

The Basic Education Regulations gazetted on 4th April 2015 by the Cabinet Secretary for Education, Science and Technology apply to both public and private institutions drawing from the provision on application in the parent Act. The issue of teacher training is addressed under Regulation 49 which provides that all persons deployed to teach in basic education institutions of learning and training shall be required to have undertaken a training program approved or recognized by the Cabinet Secretary (CS) and be registered by the Teachers Service Commission (TSC). The regulations define ‘institution of basic education and training’ broadly to include primary, primary and secondary school. Therefore alternative institutions of education should also ensure they have teachers who have undergone the appropriate training.

With regard to the curricula, Regulation 54(1) mandates the management in both public and private schools to ensure that the curriculum and instructional materials used in their institution have been either developed or approved by the Kenya Institute of Curriculum Development (KICD). However, Regulation 55 seems to override regulation 54 and permits institutions, in consultation with the respective parents association to recommend supplementary instructional materials for the pupils. There is no provision requiring the approval of KICD for this supplementary instructional materials and this may compromise the standards of education the children receive.

The mandatory facilities to be required in every institution of basic education and training are set out in Regulation 64. These include:

- (a) outdoor playing facilities and equipment, both for outdoors and indoors with provisions for persons with disabilities;
- (b) administrative offices;
- (c) sanitary facilities segregated by gender and age;
- (d) kitchen and dining room;
- (e) standard classrooms measuring 7m x 8m for 50 learners for primary school or 45 learners for secondary schools or standard classrooms measuring 7m x 6m for 25 learners for pre-primary learners;
- (f) store rooms; and
- (g) a science room or other rooms for specialized subjects.

Drawing from the APBET Policy, APBET schools may be allowed to share the facilities of other institutions subject to their approval. Alternative provision of basic education and training is dealt with expressly in Part V of the Regulations; this is despite there being no mention of APBET institutions in the parent Act. In Regulation 68, APBET institutions are permitted to utilize facilities of other institutions upon request, and only curricula approved by the KICD shall be offered in all APBET institutions.

With regard to financial grants, Regulation 69 provides that “learners under the age of eighteen in (APBET institutions) shall be eligible for capitation grants under the free and compulsory education programme.” Further, under Regulation 75, institutions of alternative basic education shall be provided with grants for infrastructure improvement by the national government through the relevant Ministries. This is the justification.

The regulations also refer to public institutions of alternative basic adult and continuing education, and provide that they may charge such levies as may be approved by the CS in consultation with the County Education Board.
**Registration Guidelines for Alternative Provision of Basic Education and Training, March 2015**

The APBET Registration Guidelines 2015 were developed with the intention of formally subordinating the notion of non-formal schools with that of APBET institutions, contradicting the position in the Basic Education Act which only refers to non-formal schools in limited terms and does not mention APBET institutions.

According to the Guidelines, APBETs are intended to supplement/compliment the government’s efforts to provide education and training for all. They express the hope that registration of APBET institutions will enhance accuracy of Education Management Information System (EMIS) data, which is important for national planning, and will also assist in enhancing the provision and coordination of support to the institutions.

The guidelines give a clearer definition of APBET as “an organised form of learning set up to deliver basic education and training to the disadvantaged persons who due to various circumstances cannot access formal schools.” It also provides that non-formal education is a component within APBET while non-formal education centres are institutions outside the formal education framework where specific categories of children, youth and adult learners acquire relevant knowledge, skills and attitudes.

A registered APBET institution can be de-registered for non-compliance with Basic Education Act, 2013 and any other applicable existing legal provisions, regulations and guidelines provided by the Ministry of Education, or if a petition before a court of law has been heard and determined against the institution.

Regarding curriculum, the registration guidelines require APBET institutions to avail copies of the approved syllabi, and adhere to timetabling guidelines, only departing from these with the approval of the County Director of Education or the sub-county education office. The institutions are further mandated to provide a variety of co-curricular and entertainment activities to enhance holistic development. The learners in these institutions should sit for prescribed national examinations as provided for under the Basic Education Act and the Kenya National Examinations Council (KNEC) Act 2012.

The teachers in APBET schools must meet the minimum entry requirements for teaching training for the level he/she will be teaching. However, at least one third of the teachers at the institution should have the relevant teacher training certificate from a recognised training institution and the rest of the teachers who have not received this certification must be undertaking a three year recognised in-service training. This is not the case in many non-formal schools where the teachers have not undergone any training and are not enrolled in in-service training.

With respect to quality, the Education Standards and Quality Assurance Council (ESQAC) is mandated to carry out standards assessments, quality assure, monitor, evaluate and oversee the implementation of the APBET programmes for quality education. Despite being created in early 2015 the impact of ESQAC is yet to be felt.

APBET institutions which receive funds from the government are to be managed by a Board of Management, guided by the provisions of the Basic Education Act 2013 on governance and management of basic education and training.

With reference to physical facilities, APBET institutions may have classrooms, libraries, and other facilities that are smaller than the standard set for public schools, but shall maintain a spacing of at least 0.3 metre aisles in schools, and comply with the guidelines on health and safety for all learners as per the School Safety Manual published by the education Ministry.

**Challenges in Public Schools**

According to the Fourth State of Human Rights Report by the Kenya National Commission on Human Rights public primary schools in Kenya are struggling under the huge number of children enrolled into primary schools following the introduction of free primary education. The report cites important barriers to accessing quality education including low teacher-pupil ratio, shortage of teachers because of the high enrolment of pupils, insufficient learning facilities and poor learning environment especially in urban slums. It further identifies frequent teacher strikes, high cost of education and poor quality of education as the main challenges facing the realization of the right to education.

These observations are echoed by the Ministry of Education, Science and Technology (MoEST) in its Strategic Plan 2013-2016. The MoEST highlights access and equity as a strategic issue, focusing on the high teacher-pupil ratio, overcrowded class rooms, high dropout rates, inadequate infrastructure, limited availability of teaching and learning materials and gender and regional disparities witnessed in primary school. In response to these challenges, the Strategic Objective One is to increase access and enhance quality in education using specific strategies which include:

- Reviewing and implementing the policy framework on APBET
- Improving and expanding infrastructure in education and training facilities
- Review Free Primary Education Policy with a view to targeting children from poor backgrounds
- Control escalating fees and other levies
- Enhance participation in informal settlements and
- Strengthen public-private partnerships towards offering affordable education and training.

21 Ministry of Education, Science and Technology, State Department of Education, Registration Guidelines for Alternative Provision of Basic Education and Training (APBET), March 2015, p 1
22 Ibid p 2
23 Ibid, p viii.
24 Ibid, p 4
25 Ibid, p4
26 Ibid, p5
28 Ibid
30 Ibid, pg 23
With respect to challenges with financial and human resources, the Strategic Plan acknowledges the inadequacy in both quality assurance and standards in education and education officers in the field, inefficient utilization of teachers, unplanned establishment of new schools (especially through the Constituency Development Fund) which further strains the existing supply of teachers.31 In response to these challenges, the Ministry aims to increase the financing in the Ministry by, among other things, strengthening public-private partnerships towards offering affordable education and training.32

While these initiatives are necessary and commendable, 2 years into the life of the Strategic Plan there is only minimal progress noted, particularly in the area of access and quality, particularly for the most disadvantaged groups in informal settlements who to date are still being served by poorly regulated, low fee complimentary schools.

Hidden costs in what is supposed to be and is advertised as free primary education are also a great barrier to basic education for many disadvantaged families. The CRC echoed this concern in their latest List of Issues, requesting the Kenyan Government to provide information on measures being taken to eliminate the hidden costs of education. Like the CESC, the CRC further probed on measures taken to improve the quality of education and to ensure the enrollment in school of children belonging to disadvantaged and marginalized communities such as children in informal settlements.33

From interviews carried out in with residents of Mathare slum in Nairobi the issue of additional costs being a barrier to accessing public primary schools was still cited as a major challenge. The circulars and directives issued by the Ministry of Education, Science and Technology remain mere pieces of paper that the schools disregard and the residents cannot rely on. The residents reported that the public schools demand a hefty charge before the child is admitted into the school, which covers admission fee, a desk, chair and ‘facilitation fee’ or bribe to the head teacher. This is despite Section 32 of the Basic Education Act 2013 expressly prohibiting the collection of any admission fee in public schools. Once the child is admitted, some public schools charge levies for security, lunch, extra tuition, at extortionate amounts. Additionally, despite the provisions of the Basic Education Act 2013 requiring a receipt to be issued for every extra levy charged,34 parents and guardians rarely receive receipts for these extra money they pay; this alludes to the illegality of such levies. Worse still, management for failing to pay these extra charges and levies, which is in violation of Section 29 of the Basic Education Act which provides that where extra levies are approved by the Ministry of Education ‘no child shall be refused to attend school because of failure to pay such charges’. The government does not appear to be doing much to really enforce the law and directives issued to ensure that basic education remains economically accessible to all children, including the poor.

Public perception of public schools vis-a-vis private schools is another factor contributing to the growth of low cost private schools. There is the general assumption that there is no space in public schools and the quality of education in these schools is poor. This is not always the case. Interviews in Mathare informal settlement revealed that some of the public schools actually still had space to take in more students, and the Head teachers confirmed that the Teacher’s Service Commission would be willing to supply more teachers if only more students enrolled in the public schools. However, most parents preferred to send their children to the low cost complimentary schools, even if it meant having to make sacrifices such as going without meals, or not accessing toilets and sanitation facilities.

Despite public schools asserting that they still had space to accommodate more pupils, the facilities were already overstretched with one public school having 24 teachers for a population of 1094 pupils. This ratio of about 1:45 is still higher than ideal.

Residents of Mathare also mentioned corruption as a major impediment to expansion of access to basic services including education. In several instances bribes had to be paid by a parent to have their child admitted to a public school while on a larger scale billions of shillings intended to be spent on increasing capacity in public schools is misappropriated. The Report of the Auditor General, 2013-2014 expressed an adverse opinion for the Ministry of Education due to material misstatements, citing unauthorized reallocations; irregular expenditure, irregular tendering processes, diverted project funds, under expenditure in school projects, and payments for uncompleted, overdue projects.35 This undercutts the State's capacity to invest in building the capacity of State schools in order to increase access and quality of education.

**Regulation of Private Actors in the Education Sector**

The State position on Public Private Partnerships (PPPs) in education is set out in the Policy Framework on Reforming Education and Training Sectors in Kenya.36 These PPPs will take various forms including direct private investment to establish institutions or investment in particular elements of education. Whereas the Government acknowledges that encouraging private sector involvement in the education sector is complex, it is still determined to encourage growth of private sector education by remove constraints on private participation in education, incentivise investment in private education and create a conducive regulatory framework to realize significant progress in the sector.37 These incentives could include tax and relief and provision of low-interest start up loans and addressing the challenges faced by international education investors with regard to their legal identity as international schools.38 Increasing the presence of private actors in the education sector is intended to release more resources to the State to invest in smaller and better resourced classes in State schools.

This is a dangerous trajectory as it could easily lead to the State abscdoing its duty to provide education for all. Whereas the Government's limited capacity to meet this obligation is conceded, and the creative attempt to meet this need is appreciated, the State must ensure that the entry of private interests in the provision of this public good does not reverse the gains made towards achieving education for all. The State should also take the lead in developing creative partnership models such as provision of capitation grants to learners in private schools, provision of teachers to private institutions, leasing facilities built by private individuals, or leasing out a built up public school to a private individual, as suggested by the Taskforce.39 Chiefly, they should ensure that any parent who turns to a private school does so out of choice and not because they were unable to access free education in public schools.

31 Ibid, pg 27.
32 Ibid, pg 28
33 Committee on the Rights of the Child, List of issues in relation to the combined third to fifth periodic reports of Kenya, CRC/C/KEN/Q/3-5, 15th July 2015, para 15.
36 Sessional Paper No 14 of 2012
37 Ibid, pg 85
38 Ibid.
Role of Development Partners

The International Finance Corporation (IFC) is the member of the World Bank Group responsible for providing funding for private sector entities in developing countries with the aim of ending extreme poverty by 2030 and boosting shared prosperity.40 The IFC has invested 10 million USD into Bridge International Academy with the expected development result of increasing access to basic education and promoting affordability of education by providing education at a significantly lower cost than alternative low cost private schools and public schools.41 The IFC is not constrained to funding only the base of the pyramid but believe that funding the private profit-making sector will eventually have a trickle-down effect that will ultimately reduce poverty.

On the other hand, the UK’s Department for International Development (DFID) spearheads the British government’s work to end extreme poverty42 and is listed as one of BIA’s biggest investors.43 This is ironic considering that in April 2014 DFID published a rigorous literature review on the role and impact of private schools in developing countries where, despite admitting there was limited evidence on the issue, the report conceded that ‘financial constraints are a key factor limiting or preventing poorer households from enrolling their children in private schools. Where children of poorer households do attend private schools, research indicates that welfare sacrifices are made and continued attendance is difficult to sustain.’44

Bridge International Academies

Bridge International Academy (BIA) is a for-profit private chain of nursery and primary schools with over 400 institutions in Kenya, serving informal settlements and poor rural areas. BIA has received a loan from the International Finance Corporation (IFC) and has also received funding from the UK Department for International Development (DFID), and other private philanthropists and institutions.

Moving away from charging ‘just $6 a month’, Bridge International Academy intends to begin charging fees termly from 2016, charging an average of Kshs 2,760 or $27.6 per term. However, this is not the only cost imposed on the parent. The parents are also required to pay a one-time admission fee of about Kshs 700 ($7), a termly fee of Kshs 150 ($1.50) and each child is expected to attend school in full school uniform - the uniform costs depend on the age of the child but on average full uniform for a child in primary will cost about Kshs 2,332 ($23.32) excluding school shoes. This is also exclusive of charges for lunch and remedial tuition. For an area where majority of the people live below the poverty line, this cost is prohibitive and actually does more to deny access to education rather than making it available to those who need it and are unable to afford it.

Ironically, BIA markets itself as targeting families who live on less than $2USD per day, and to date has over 400 schools established in Kenya. This is despite a recent order by the Ministry of Education in Kenya ordering a halt to the rapid expansion of BIA. Currently, the curriculum offered in BIA has not been approved by the Kenya Institute of Curriculum Development and it is therefore an illegality for BIA to continue operating with this curriculum. Education stakeholders and leaders have criticized it as failing to give a sufficient foundation for the children, leaving them ill-prepared for secondary school.

BIA has been circumventing due process, neglecting the rules and regulations in place and establishing their schools without the approval of the Ministry of Education (MoE) and the Institute of Curriculum Development, and resisting efforts by education officials to enforce the regulations against them, at the expense of rule of law and quality education. The MoE has informed BIA severally that they do not meet the requisite standards and they risk closure but regardless of this BIA has continued its expansion program, setting up more schools with the same deficiencies as those sanctioned by the MoE.

In addition, BIA is operating so called APBET institutions outside of the seven municipalities identified as in need of Alternative Provision of Basic Education and Training by the Ministry of Education. The Ministry is also concerned that the development partners such as the World Bank through its private finance arm the International Finance Corporation, and the Department for International Development (DFID) did not consult with or seek the approval of the Ministry before supporting the BIA school chain.

40 http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about-ifc_new
42 https://www.gov.uk/government/organisation/department-for-international-development
43 http://www.bridgeinternationalacademies.com/company/investors/
The Taskforce report on realigning the education sector to the Constitution 2010 highlighted issues and challenges faced by the Government when working with development partners, including the concern that the development partners implement their programmes without involving the Ministry of Education which can cause duplication and inequity. In response to this, the taskforce recommended that all interventions by development partners in the education sector should be coordinated and approved by the Ministry of Education before implementation and frequent joint Monitoring and Evaluation missions should be undertaken, and the findings of these evaluations made public. They further recommended that all partners supporting education should channel their assistance through the financial flow procedures agreed upon after consultation.

**Recommendations**

Remaining cognizant of the place of education as an empowerment right and a public good, the challenges arising with the commercialization of education must be addressed comprehensively. Towards this end, the following recommendations are made:

1. The State should expand the physical facilities and personnel in public primary schools to enable them effectively accommodate more pupils, to increase access to free quality basic education.
2. The State should also fast track the integration of the complimentary or non-formal schools into the formal system by reviewing the outdated 2009 Policy on Alternative Provision of Basic Education and Training and enacting the registration guidelines for these institutions. A reasonable timeline should be given for compliance with the new regulations to ensure that no child’s right to education is infringed, but the rule of law and quality of education is upheld.
3. To ensure that economic access to education is maintained, the State should resume issuance of capitation grants for children in these low fee private primary schools once the schools are duly registered and monitored.
4. The State should take bolder steps to enforce the rules and regulations it issues governing public schools by imposing penalties for heads of institutions found imposing surplus charges. In the public schools, the cost limitations should be adhered to and no school should be allowed to impose exorbitant charges on the children, which limits access to education.
5. The State should expedite the development of the policy to govern and regulate the role of private actors and development in the education sector, and this should be done with comprehensive consultation with stakeholders.
6. Specific timelines and procedures for phasing out complimentary schools should be developed and enacted to ensure they do not supplant the formal education system and also do not perpetuate the inequalities already suffered by children from low income households.
7. It is imperative for the State to also increase the human resource capacity of the Ministry of Education to monitor education providers to ensure they are complying with the law and no child’s right to education is being infringed.
8. The State should further develop a harmonized national plan for school building to ensure equitable distribution of learning institutions and teachers.

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46 Ibid.
47 Ibid.
Dear Committee Members:

This shadow letter is intended to complement the periodic report submitted by the State of Kenya as well as the shadow letter submitted by Ipas Africa Alliance on 31st August 2015 for the Committees consideration during the 55th Pre-Sessional Working Group of the CESCR.

Under Article 12 of the Covenant on Economic, Social, and Cultural Rights (the Covenant), the government of Kenya has a responsibility to take measures to reduce maternal mortality and increase access to health care services for women. Specifically, article 12 protects the right to the highest attainable standard of physical and mental health for all people, including women's ability to obtain necessary reproductive health care services that include safe, legal abortion care.

Ipas Africa Alliance has come upon new information that would be of use to the Committee as it considers Kenya's state party report. In our letter dated 31st August 2015, we notified the committee of the withdrawal of the National Standards and Guidelines on Provision of Safe Abortion. The Ministry of Health's letter dated 3rd December 2013 withdrawing the Standards and Guidelines and the subsequent memorandum dated 24th February 2014 prohibiting training of health care providers on safe abortion has continued to create confusion on service provision as different counties in Kenya are interpreting it liberally and others are interpreting it restrictively as a complete ban on the provision of safe and legal abortion. For instance, County Governments of Busia and Uasin Gishu have imposed a complete ban on the provision of training and services whereas Bungoma County continues to apply the Constitutional standards on safe and legal abortion. The disparities in the interpretation of the memo has contributed to a decline in the number of women seeking pre and post-abortion care services in Busia, Bungoma, Kakamega, Siaya, Trans Nzoia, Uasin Gishu and Vihiga between December 2013 and August 2015. This is further detailed in the graph below collected from sites that Ipas Africa Alliance is working in.

Figure 1: Cumulative Uterine Evacuation Caseload for the 7 countries in the period 2012-2015

Other than the decline in service seeking by women and girls in the seven counties, Ipas Africa Alliance Reproductive Health Coordinators, who work in the community, have shared cases of women and girls who have died due to inability to access safe and legal abortion following the withdrawal of the Standards and Guidelines. Ipas Africa Alliance is ready and willing to share this information with the Committee should you so require it.

In 2012, the Kenya National Commission on Human Rights (KNCHR) published a report on a Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya. KNCHR recommended that the Government puts in place Standards and Guidelines on access to safe abortion as well as training of health care providers and police officers on the Constitutional provisions on safe and legal abortion at the national and county levels. KNCHR further recommended for the integration of safe abortion into the broader health financing and policy strategy of the Government.

Ipas Africa Alliance wishes to share with the Committee the Constitutional Petition No. 266 of 2015 filed at the High Court in Nairobi against the Attorney General.

General of Kenya, the Ministry of Health and the Director of Medical Services of Kenya by an adolescent rape survivor suffering from kidney failure as a consequence of unsafe abortion procured during the period of withdrawal of the Standards and Guidelines. The case seeks the court’s interpretation on the scope of legal abortion in Kenya and a clarification as to the government’s responsibility in ensuring access to safe legal abortion as provided under the Kenyan Constitution.

In light of foregoing, Ipas Africa Alliance hereby requests that this Committee poses the following additional questions to the State of Kenya during the 57th Session of the CESCR:

1. What steps has the Government put in place to reinstate and disseminate the revised National Standards and Guidelines for the Reduction of Maternal Mortality and Morbidity?

2. What is being done to ensure that health care providers receive training on providing comprehensive abortion care services?

3. What measures has the Government put in place to ensure sanctity of policy documents and guard against the arbitrary withdrawal of policies and guidelines that promote the health and lives of women and girls?

4. What measures has the Government put in place to provide remedy and justice for preventable deaths as a consequence of unsafe abortion? We hope that this information will be useful during the Committee’s review of the Kenya government’s compliance with the Covenant.

Very Sincerely,

Liza M. Kimbo  
Director,  
Ipas Africa Alliance
INTRODUCTION
Since the promulgation of the Kenyan constitution in 2010, ESCR are now constitutionally guaranteed. However very few measures have been put in place to effectively fulfil these rights and are mostly framed as directive principles of State policy.

During its 57th session, from 22 February to 4 March 2016, the Committee on Economic, Social and Cultural Rights (the Committee) will review the second to fifth periodic reports of Kenya combined in a single document.

The Kenya Section of International Commission of Jurists (ICJ Kenya), Human Dignity, Save The Children-Kenya, The Elizabeth Glaser Pediatric AIDS Foundation (EGPAF) and KELIN welcome the opportunity to contribute to the Committee’s review of the implementation of the ICESCR by Kenya.1 In this submission, our organizations reply to certain issues raised by the Committee in November 2015. In particular, we bring to the attention of the Committee concerns related to the implementation of articles 1, 2, 3 and 12 of the ICESCR and make recommendations to the State in that regard.

GENERAL INFORMATION
The paragraphs below reply to paragraphs 1 to 3 of the List of issues adopted by the Committee on Economic, Social and Cultural Rights in relation to the combined second to fifth periodic reports of Kenya.2

Positive court orders but non-compliance by the Executive
Kenya, as a state party to the ICESCR committed to taking progressive steps towards achieving the full implementation of rights under this covenant. In doing so, Kenya committed to using the maximum available resources. More so, Kenya committed that its citizens without discrimination of any kind shall enjoy the rights under the ICESCR.

Notably, within the reporting period, Kenya passed the 2010 Constitution3 and included in it a comprehensive section on the Bill of Rights4 that reiterates and strengthens the provisions of the covenant. This Constitution specifically provides for economic and social rights5 and provides that the same shall be progressive6. It guarantees every person the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care and emergency medical treatment; the right to accessible and adequate housing, and to reasonable standards of sanitation; the right to be free from hunger, and to have adequate food of acceptable quality; the right to clean and safe water in adequate quantities; the right to appropriate social security to support oneself and their dependants; and the right to education7.

Additionally, the Constitution places the burden on the State to use the maximum available resources in implementing these rights and the responsibility to show that resources are not available8. In the latter instance the State must show that it has given priority to vulnerable groups within the society9. The Constitution forbids the State or any person from discriminating against another, directly or indirectly, on any ground10. Further, it provides for the enforceability of economic and social rights, by providing that any person can institute court proceedings when their right has been denied, violated, infringed or threatened11.

1 We gratefully acknowledge the technical support and collaboration received from the following individuals: Anita Nyanjonga and Teresa Mutua (ICJ Kenya), Seynabou Benga (Human Dignity), Josephine Gitonga (Save The Children-Kenya), Tamar Gabelnick (EGPAF) and Sandra Ochola (KELIN). They played a significant role in the preparation of this report and drafting to its completion.
3 The Constitution may be accessed at http://www.kenyalaw.org/B18/exists/kenyalex/actview.xql?actid=Const2010
4 Chapter four of the Constitution, 2010
5 Article 43 of the Constitution, 2010
6 Article 21 of the Constitution, 2010
7 Article 43 (1) (a) to (f), (2) and (3) of the Constitution, 2010
8 Article 20(5) of the Constitution, 2010
9 Article 20(5) (b) and 21(3) of the Constitution, 2010
10 Article 27(4) of the Constitution, 2010
11 Article 22(1) of the Constitution, 2010
Indeed, several legislations have been passed in keeping with the provisions of the Constitution and the ICESCR. Among them, the Basic Education Act no 14 of 2013 which among other things, provides for the promotion and regulation of free and compulsory basic education, the Land Act no 6 of 2012 which provides for the sustainable administration and management of land and land based resources, the Matrimonial Property Act no 49 of 2013 which provides for division of matrimonial property without discrimination, the National Social Security Fund Act no 45 of 2013 which provides for the establishment of a fund which will provide basic social security for its members and their dependants, and the Prohibition of female genital mutilation Act no 32 of 2011 to protect women and young girls from the practice of female genital mutilation. However, implementation of these legislations beyond passing of the laws has become a problem. Therefore economic, social and cultural rights remain unrealized as good laws sit in shelves without being implemented.

With the passing of the Constitution, economic and social rights became justiciable, and international and regional treaties that Kenya had ratified prior to the passing of the Constitution form part of the laws of Kenya. Through these provisions, several cases on various economic and social rights issues have been filed in court over time; some of which have had positive rulings. However there has been an unfortunate trend where the State delays, ignores and sometimes refuses to implement Court orders issued against the State in relation to economic, social and cultural rights.

In the cases of Mitu-Bell Welfare Society v. The Attorney General and Satrosre Ayuma and 11 Others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 others the subject matter was about forced eviction of vulnerable and disadvantaged groups and the effects of demolition on their right to property. In both cases, the court highlighted the obligation of the State to promote, protect and fulfil the economic, social and cultural rights of the vulnerable in the community, especially the right to adequate and accessible housing.

The Court encouraged engagement and dialogue between all the parties and asked the State to develop programmes and policy on housing. The court ordered that the squatters’ be compensated for unlawful eviction. Although the State did develop programmes to address the issues of squatters in urban areas such as the slum upgrading, most of these houses have been taken over by the middle class while the squatters have gone back to live in the slums. More so, almost five years later, the squatters in these petitions have not been compensated for the destruction of their property during their eviction.

In Patricia Asero & Others v. Attorney General the Court determined that sections of the Anti-Counterfeit Act of 2008 affected or were likely to affect the accessibility of anti-retroviral drugs to persons living with HIV. The Court determined that this was a violation to their right to life, human dignity and health. The Judge in her ruling ordered that the State reconsider the contested sections 2, 32 and 34 of the Anti-Counterfeit Act 2008 alongside its Constitutional obligation to ensure that its citizens have access to the highest attainable standard of health and make appropriate amendments to ensure that the rights of petitioners and others dependent on generic medicines are not put in jeopardy. However, despite the letter and spirit of the ruling by the learned Judge, the Anti-Counterfeit (Amendment) Act, 2014 did not reflect any aspect of the issues brought out in the case. Most specifically, the definition of ‘counterfeit’ in the Act still includes ‘generics’ (including generic medicines) and therefore potentially risks the access to generic drugs by persons living with HIV. This is a denial of their right to life, dignity and health.

In the case of JAO v. NA the court held that parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of marriage. It held that the applicant was entitled to one half of the matrimonial property.

In Michael Mutinda Mutemi v. Permanent Secretary, Ministry of Education and 2 others the petitioner could not afford to pay secondary school fees for his son which was 50,000 shillings a year; even on application of bursaries and other government aid, he only got 4,000 shillings. Even though the right to education is to be achieved progressively, the court held that the State failed to show concrete policy measures, guidelines and progress it had made towards the realization of the right to education. It held that the State must be seen to take firm steps in achieving the right to basic education in a holistic manner.

Despite the prima facie progress seen above, the State has failed to implement the decisions of the Court. This will act as a bar for judicial officers who are willing to give positive judgments but are fearful that such judgments will be reduced to merely good words, as they may not be implemented to the benefit of the petitioners.

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17 Article 22(1) of the Constitution, 2010
18 Article 2(6) of the Constitution, 2010
21 Kenya Slum Upgrading Programme (KENSUP)
22 See researched story of Abby Higgins and Seattle Globalist on why slum dwellers are rejecting the upgrade programme by the State, accessed at http://www.one.org/international/blog/why-residents-of-kibera-slum-are-rejecting-new-housing-plans/
26 Article 2(6) of the Constitution, 2010
31 Article 22(1) of the Constitution, 2010
32 Article 2(6) of the Constitution, 2010
34 Petition 65 of 2010, accessed at http://kenyalaw.org/caselaw/cases/view/90359
35 Kenya Slum Upgrading Programme (KENSUP)
36 See researched story of Abby Higgins and Seattle Globalist on why slum dwellers are rejecting the upgrade programme by the State, accessed at http://www.one.org/international/blog/why-residents-of-kibera-slum-are-rejecting-new-housing-plans/
38 Sections 3,32 and 34 of the Anti-Counterfeit Act 2008
41 Kenya Slum Upgrading Programme (KENSUP)
42 See researched story of Abby Higgins and Seattle Globalist on why slum dwellers are rejecting the upgrade programme by the State, accessed at http://www.one.org/international/blog/why-residents-of-kibera-slum-are-rejecting-new-housing-plans/
44 Sections 3,32 and 34 of the Anti-Counterfeit Act 2008
Access to justice remains a promise

Despite the Constitutional requirement that the State shall ensure access to justice for all persons\textsuperscript{28}, high litigation costs, prolonged adjudication processes (usually 2-6 years), geographical locations, corruption (leading to lack of confidence in the formal system) and limited knowledge of the system have delayed and denied justice to many Kenyan citizens.

The National Legal Aid Awareness Programme, a government agency was established to institutionalize and coordinate national legal aid provision in the country. However, this body has not been able to reach the indigent Kenyans especially those in far flung areas of Kenya and as a result, its efforts have been limited to Nairobi and its environs.

Efforts to improve access to justice have culminated in the Legal Aid Bill (2013). The Bill introduces various promising strides for the establishment of a national legal aid framework. There is proposed a national legal aid service that would establish and administer a national legal aid scheme and alternative dispute resolution. Presently, legal aid in Kenya is only accorded to those accused of the offence of murder and those unable to afford their own lawyers are assigned lawyers by the Registrar of the High Court in what is termed as ‘pauper briefs’ on a voluntary basis. This Bill will therefore herald a new dawn in accessing justice for victims. However, we raise concerns to the fact that its enactment has dragged for over 10 years.

Protection of communities in mining areas

Despite the introduction of new regulations to ensure public participation in the management of community resources\textsuperscript{29}, there is still no practical engagement with communities to adhere to these regulations. These regulations require that during the process of conducting an environmental impact assessment study, the proponent shall in consultation with the National Environment Management Authority, seek the views of persons who may be affected by the project.

It also specifies the procedure for the same, by stating that in seeking the views of the public, after the approval of the project report by the National Environment Management Authority, the proponent shall: publicize the project and its anticipated effects and benefits by - posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project; publishing a notice on the proposed project for two successive weeks in a newspaper that has a nation-wide circulation; and making an announcement of the notice in both official and local languages in a radio with a nation-wide coverage for at least once a week for two consecutive weeks; hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments; ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the National Environment Management Authority. Regulation 22 of these Regulations\textsuperscript{30} state that upon receipt of both oral and written comments as specified Public hearing by section 59 and section 60 of the Environmental Management and Co-Ordination Act\textsuperscript{31}, the Authority may hold a public hearing.

Increasing industrialization has led to concerns of health of the residents of Owino Oulu Slums located in Mombasa. The burgeoning solar industry in Kenya has increased demand for lead, recovered by recycling car batteries in smelters. Shanty towns across Mombasa, where poor, marginalized workers are desperate for work, are hotspots for such industrial activity. Among them is Owino Uhuru, where a smelter, Metal Refinery EPZ Ltd emitted fumes laden with lead, often at night to avoid detection, and released untreated wasted water that spilled into streams that residents use to wash, cook and clean.

According to the study, Lead Poisoning in Owino Ouru Slums in Mombasa\textsuperscript{32}, residents of Owino Oulu Slums have experienced severe cases of lead poisoning. This was ascertained through medical diagnosis of the children from the slum by the Public Health Department; their blood lead levels were measuring as high as 23 $\mu$g/dl, 17 $\mu$g/dl and 12 $\mu$g/dl. These levels are very high compared to the WHO standards.\textsuperscript{33}

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\textsuperscript{28} Article 48, 50 (9) of the Constitution of Kenya, 2010
\textsuperscript{29} See Legal Notice No. 101, the Environmental (Impact Assessment and Audit) Regulations, 2003
\textsuperscript{30} See Legal Notice No. 101, the Environmental (Impact Assessment and Audit) Regulations, 2003
\textsuperscript{31} Revised in 2012
\textsuperscript{32} See http://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf
\textsuperscript{33} Ibid Page 11
**ARTICLE 1: THE RIGHT TO SELF DETERMINATION**

**External challenges to self-determination - The impact of terrorism on social economic rights**

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. Terrorism clearly has a very real and direct impact on the enjoyment of human rights, and threatens social and economic development. The State therefore has an obligation to ensure the human rights of its nationals by taking positive measures to protect them against the threat of terrorist acts and bringing the perpetrators of such acts to justice.

However, efforts to address the human rights implications of terrorism and counterterrorism measures have tended to focus on the protection of civil and political rights, with little attention paid to their impact on the enjoyment of economic, social and cultural rights. Yet it is clear that terrorism and measures adopted by States to combat it are both influenced by and have an impact on the enjoyment of the economic, social and cultural rights. The realization of economic, social and cultural rights prevents the conditions conducive to the spread of terrorism. Similarly, adoption of specific counter-terrorism measures may also have a direct impact on the enjoyment of economic, social and cultural rights.

Some measures adopted by the State to counter terrorism pose serious challenges to human rights and the rule of law. In some instances, the States has engaged in torture and other ill-treatment to counter terrorism, disregarding the legal and practical safeguards available to prevent torture. Repressive measures have been used to stifle the voices of human rights defenders, journalists, minorities, indigenous groups and civil society.

These sanctions pose a number of serious challenges, in particular related to the lack of transparency and due process, which result in freezing assets, imposing travel bans and other restrictions, which may also have serious consequences for the ability of the affected individuals and their families to enjoy economic and social rights.

**Recommendations for the State:**

- Put in place measures to address the conditions conducive to the spread of terrorism, including the lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, and socio-economic marginalization;
- Put measures to create a conducive environment to foster the active participation and leadership of civil society;
- Ensure that all measures taken to combat terrorism must themselves also comply with States’ obligations under international law, in particular international human rights, refugee and humanitarian laws;

**ARTICLE 2: PROGRESSIVE REALIZATION AND NON- DISCRIMINATION**

**Corruption**

Corruption in Kenya remains a challenge to development. According to the Kenya National Commission on Human Rights report of 2014, corruption in Kenya is high and that During the 2012/2013 financial year, the EACC recovered through court proceedings and out of court settlements, illegally acquired public assets valued at approximately Kenya shillings 567,408,217. The Commission averted the loss of approximately 55 billion shillings worth of public funds through various interventions. Indeed corruption has persisted especially as against those holding public office despite the existence of laws governing leadership and integrity. This is further exacerbated by allegations of bribery with regard to government contracts especially within the top echelons of the current administration, and who continue to hold office despite public pressure for resignation. Recently, the case of the Minister of Devolution, in which having been associated with grand corruption with regard to the National Youth Service Fund, refused to vacate office and only did so due to public pressure. This shows a clear understanding of the holders of such public offices in protecting the Constitution of Kenya. Although the President has made pronouncements against corruption, there still continues to be challenge in the indictment of persons accused of corruption. The legal process has been slow allowing such persons to use the process to evade justice.

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34 Human Rights Committee, General Comment No. 12
36 The Kenya National Commission Report titled The Era Of Fighting Terror With Terror reports that these acts have been well coordinated, systematic and widespread and of which 120 had egregious human rights violations, 25 extra judicial killings and 81 enforced disappearances. See pages 5 and 6 of the report accessed at http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf
37 Civil society organizations and human rights defenders, Haki Africa and Muhuri, labelled as supporting terrorism activities. Their bank accounts were frozen and their names dragged through the mad before courts intervened. See https://www.hrw.org/news/2015/06/10/kenya-end-harassment-rights-groups and petition 19 of 2015 Muhuri and Haki Africa versus The Inspector General of Police, The Cabinet Secretary at http://kenyalaw.org/caselaw/cases/view/108933
38 The government has been unable to full explain the whereabouts of 176 million borrowed from Europe and allegedly lost in the recent financial scam Eurobond Saga and financial see https://www.youtube.com/watch?v=acow6DdKEdc and http://www.businessdailyafrica.com/Treasury-queried-over-secret-US-bank-account/-/539546/2925942/-/14a5mo/-/index.html
Non Discrimination

In addition, discrimination of marginalized communities and women is still abound. Representation of women in Kenya’s parliament has been and remains minimal. Only 9.8% of the tenth parliament was comprised of women, and only 20.7% of the eleventh (sitting) parliament is women — the lowest in East Africa. This is despite the Constitutional provisions for the realization of the affirmative action principle essentially increasing women’s representation. The government is yet to comply with the court decision in this case. Also, the Kenyan community is predominantly patriarchal and despite the development of laws to ensure non-discrimination and protection of women, there still remains the challenge in implementation of those laws.

Discrimination of persons living with HIV

Kenya suffers from widespread stigma and discrimination against persons living with or affected by HIV/AIDS despite a clear legal prohibition on discrimination against persons with HIV and the establishment in 2009 of an HIV and AIDS Equity Tribunal. Stigma and discrimination are recognized by the government of Kenya and civil society actors as significant barriers to access to HIV testing, treatment, and care. The real or perceived stigma in communities and within families has led some HIV patients to hide their medicines, and has promoted others to stop treatment altogether or even throw pills away. Children living with HIV in particular suffer from the impact of stigma as they are more sensitive than adults to negative feedback from others, especially from peers or authority figures. Children are also impacted by stigma and discrimination targeted against adults as they are dependent on parents or healthcare workers for their treatment.

On 17 September 2015, President Kenyatta announced a new presidential campaign against stigma and discrimination, especially against children and young people. President Kenyatta had announced in February 2015 another initiative to reduce stigma against children in schools and to improve access to treatment, which included a directive to collect data on the HIV status of children in school and their guardians. As the names and HIV status of these individuals were to be stored in centralized records, the directive could have endangered the right to privacy of children and caregivers with HIV and increased the stigma and discrimination they face, prompting human rights groups to challenge the directive in court.

Suggested recommendations for the State:

- In consultation with people living with HIV, take additional steps to combat and prevent stigma and discrimination against people living with HIV/AIDS, and provide adequate financial and other support for the HIV and AIDS Tribunal.
- Ensure that actions being taken to reduce stigma against children in schools are carried out in a manner that also protects their right to privacy.

ARTICLE 3: EQUAL RIGHTS OF MEN AND WOMEN

The Constitution of Kenya 2010 provides for the equal treatment of men and women in the acquisition and ownership of land and property within the country. It outlines the discrimination of women in the access and enjoyment of economic, social and political opportunities. However, most women are unable to access and enjoy their land and property rights especially in the cultural land tenure system. In particular, cultural norms give women secondary rights to land and property dictating that women can only live on the land or enjoy property in the lifetime of their fathers, husbands or sons. Women are continually disenfranchised especially where the land is communally owned by a clan or family.

The above is partly attributed to lack of formal legal frameworks to define the nature and scope of rights for that clan or community that jointly owns the land. The Community Land Bill 2015 seeks to establish a legal framework to govern communal land rights. The bill entrenches the right of women to community and customary tenure and provides for non-discrimination in the access and use of community land. It provides that women have the right to equal treatment in all dealings in community land and ensures the participation of women (that have been married into these communities) in decision making in the dealings on the land.

41 Article 27 (8) of the Constitution, 2010
42 Supreme Court Case on the not more than 2/3 Principle at http://kenyalaw.org/caselaw/cases/view/85286/
48 Article 35 Constitution of Kenya, 2010
49 Ibid Article 27
52 Section 42, Community Land Bill 2015.
Despite these important provisions, the Community Land Bill 2015 is yet to pass into law. The Community Land Bill 2015 was among the bills that should have been passed five years after the promulgation of the Constitution in 2010. The State has failed to pass the law or even give an explanation as to what has occasioned the delay. The result is that the occasioned delays continue to affect the rights of women in communally owned land and the administration of communally owned land generally.

**Impact of inequality on HIV and AIDS prevention and treatment**

Inequality between males and females can contribute to a higher risk of HIV acquisition by females and can interfere with their ability to seek testing, treatment, and care. Such inequalities include lower levels of schooling, unequal inheritance practices, unequal economic opportunities, lack of freedom on health decisions within families, early and forced marriage, and economic pressure to engage in transactional sex, and gender-based violence. Such factors may contribute to the fact that women make up almost 60% of the people living with HIV in Kenya, and HIV prevalence among young women (aged 15-24) is 60% higher than among young men.

Kenya has laws that prohibit discrimination, physical abuse, and exploitation of women and girls, but Kenya acknowledges that such laws have not yet overcome longstanding cultural norms and societal practices. Research shows that in Kenya, “Women are likely to be blamed by their intimate partners, families and communities for ‘bringing HIV into the home.’ This will increase the HIV related violence against women, increase evictions, ostracism, loss of property and inheritance and loss of child custody by women living with HIV.”

In addition, UNAIDS reports that over 30% of ever-married Kenyan women between 15-24 years old experienced intimate partner violence in 2014, which has been shown to increase the risk of HIV acquisition by 50%. Indeed, modeling suggests that eliminating sexual violence alone could avert 17% of HIV infections in Kenya.

As Kenya notes in its report to the Committee, paragraph 59, “A systemic key challenge facing implementation of equal rights for women and men is that, despite any clarity in the law, Kenya’s cultural and societal realities still mean that women are de facto discriminated in fields such as inheritance... Married women in Kenya have been at a disadvantage when it comes to matrimonial and family property, due to cultural practices that prioritize men’s claims over land and property over women’s claims.” Kenya reports that the Matrimonial Property Bill, now enacted into law, would help secure women’s access to matrimonial property during and after the marriage if properly enforced.

It is particularly important to protect girls’ equal access to education, including secondary education, to best prevent HIV among adolescent girls. Studies have shown that the longer girls stay in school, the later they are likely to begin sexual relations, get married, or get pregnant; the more likely they are to engage in safe practices when they do become sexually active; and the greater the chance of achieving economic independence - all of which will help protect them from HIV infection. Primary education is free in Kenya, and Kenya has taken steps to make secondary education affordable to more children of poor families. Yet in 2013, only around 44% of girls attended secondary school, and in 2014, 25% of girls 18 and under had begun childbearing.

Further steps to keep girls in secondary school as long as possible will maximize HIV prevention benefits.

**Suggested Recommendations for the State**

- Take further steps to protect women from discriminatory customary practices, including disinheritance and other abusive practices.
- Take additional steps to ensure the full implementation of laws against gender-based violence, within and outside of marriage.
- Take further steps to ensure equal access to education among girls and boys, including through secondary levels.

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55 UNAIDS, People living with HIV: http://aidsinfo.unaids.org/
ARTICLE 12: THE RIGHT TO PHYSICAL AND MENTAL HEALTH

The Kenyan Constitution provides that every person is entitled to the highest attainable standards of health including the right to health services and reproductive care. It also states that no person should be denied emergency medical treatment. Further, health services have been devolved to the county level to enhance access to and improve service delivery. However, citizens are yet to fully enjoy these standards due to human, financial and infrastructural crises within the health sector.

The health sector was allocated 4% of the national budget during the 2014/2015 financial year. This falls short of the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases of 2001, that provides the minimum standard for budgetary allocation for health at 15% of annual budgets of all African Union member states. Though not a legal instrument, the State expressed its political commitment to achieving this target.

The most glaring gap in Kenya’s health system however is that lack of a legal framework to govern the sector. Guidelines for the provision of critical services such as emergency medical treatment are non-existent. The Health Bill 2015, to a large extent, addresses these shortcomings. The bill is intended to establish a unified health system, provide for the regulation of health care service and health care service providers, products and technologies and coordinate the interrelationship between national government and county government health systems. This bill is however yet to be enacted risking the health of many citizens and occasioning further delays in the effective and efficient health service delivery. It also does not take into account the views of civil society that are fundamental in contributing to a more effective and efficient healthcare system. The Reproductive Health Bill 2014, which is yet another critical legislation to the healthcare system is also held up in parliament, since 2011.

Retrogressive legislations continue to exist despite progressive Constitution

The Prohibition of Female Genital Mutilation (FGM) Act no 32 of 2011 prohibits the practice of female genital mutilation, as well as safeguarding against the violation of a person’s mental or physical integrity through the practice of female genital mutilation. An Anti- FGM Board is established among other functions, design programmes aimed at eradication of FGM including designing public awareness programmes against the practice of FGM.

However, this practice is still rampant in parts of this country, 5 years after the passing of the Act. Kenya’s prevalence rates for FGM is approximately 27 percent. In Trans Mara in Narok County for example, the practice is conducted every year during the festive season when schools close. Since this practice is mostly perpetrated at night and in secret, police officers are only informed of it once it has occurred. Attempts by a few police officers to investigate this matter with a view of preventing its occurrence have often been greeted by threats from the community. However, the State responds in transferring the police officers and doing very little about the practice. What’s more is that the communities that practice the outlawed FGM have devised ways of avoiding police detection. For example instead of targeting young girls in school, which is what the police will be looking out for, they will target married women including those with children. Cases have been reported of medical doctors who assist the communities to perform FGM on women after delivery at the health facility.

Stigma and deep rooted negative culture is to blame in the most part for the continued practice of FGM. It is believed that this practice controls their sexuality and guarantees that the girls remain virgins until marriage. Girls who have not been circumcised are not considered fit for marriage in some communities, such as the Maasai, Pokot and Marakwet.

The State and the Anti- FGM Board, mandated by the Act to protect women and girls from FGM through developing programmes on awareness creation and abolition of FGM have failed to perform this role. State response to the outlawed FGM is clearly failing to the detriment of young women and girls in several parts of this country as the State has done very little if anything, beyond enactment of the Act.

62 Constitution of Kenya, article 43
63 See http://www.hapakenya.com/2014/06/12/highlights-kenyan-20142015-budget/
http://dialogues.sidint.net/community/content/majdala-vi-cost-corruption-kenyas-health-sector
65 See Press Statement by KELIN, Kenya Medical Practitioners, Pharmacists and Dentists Union, (KMPDU), Society for International Development and The Health NGOs Network (HENNET) 10 October 2015.
66 Section 3 of the Prohibition of FGM Act no. 32 of 2011
67 Section 5 of the Prohibition of FGM Act no. 32 of 2011
69 Testimony by David Arap Mugun, Chief of Murkan Location in Narok County. https://www.youtube.com/watch?v=DJB6EniocmI
70 See the full clip of investigative journalist, Enock Sikolia of the National Television Broadcast, NTV, titled slaves of culture on December 2015, accessed at https://www.youtube.com/watch?v=rW6nEWaQVEC
71 Section 5 and 27 of the Prohibition of FGM Act no. 32 of 2011
What are the steps that the State is taking, towards implementation, and especially on initiatives geared towards public education and sensitization against the negative effects of the deep rooted culture of FGM? What support services has the State provided for victims of FGM?

**The sexual offences Act**

Kenya has established the Sexual Offences Act as a legal framework to mitigate against sexual and gender violence. However, this is still quite prevalent in Kenya. According to KDHS 2014 approximately 44% of ever-married women have experienced sexual or physical violence by their husband or partner, which is not a significant decrease from 2008-2009 KDHS where 47% of ever-married women reported to having experienced such violence.

This is further demonstrated by the data that about 28% women aged 20-29 have experienced some form of violence in the previous 12 months preceding the survey. The very small difference in a span of 5 years indicates very minimal interventions if at all. Gender based violence which includes both physical and sexual violence, is a manifestation of gendered inequalities that women and girls encounter in their day-to-day lives. The Sexual Offences Act established to manage this menace is greatly hampered by ineffective application resulting to significant gaps access to justice for survivors of gender based violence.

Survivors of sexual and physical violence lack access to needed services and face a number of barriers that prevent them from receiving meaningful assistance from medical or legal professionals. One of the key documents known as P3 forms are largely unavailable in many police stations across the country, to the point that survivors keen to report sexual and gender based violations have to purchase photocopies from private establishments strategically situated outside the police stations. More barriers include lack of comprehensive facilities where victims can report complaints and receive medical treatment, including emergency contraceptives; a lack of awareness among sexual violence victims of the services that are available; difficulties in proving sexual violence; and the high cost of obtaining services after sexual violence.

Further, most health care providers are not adequately trained in providing appropriate medical and gender-sensitive response toward sexual violence. Reporting rates for GBV are very low because many survivors and their families are reluctant to engage in the justice system due to negative attitudes of law enforcement officer, albeit there being ‘Gender Desks’ established after various child rights organizations trained police officers on gender sensitive assessment and reporting.

A national survey conducted in Kenya in 2012 under the support of UNICEF and Center for Disease Control (CDC) shows that that one in every three girl in Kenya experience some form of sexual violence before the age of 18. These violations rarely get addressed because the same survey determined that only 3% of sexually abused girls received professional help in the form of medical, psychological, or legal assistance. Sexual violence against girls and adolescents is also a significant problem in schools and other educational settings. According to the study, those interviewed and who had experienced physical or sexual violence, about 25% of them reported that the first incident took place in school.

**Suggested recommendations for the State**

- The government should enact tangible programs and policies to reduce the incidence of sexual violence including in all sectors and especially ensure proper collection and preservation of evidence, accurate data collection and ensure tools like the P3 form are readily available for all.
- There is need for comprehensive measure to address FGM as a serious violation that continues to happen to the detriment of many girls in this country. There is need for the government to work consistently with the civil society to come up with innovative ways of tackling retrogressive and harmful cultural practices through legal, policy and meaningful dialogues with the custodians of the culture.
- The government and especially the Department of Children Services and the Ministry responsible should ensure that coordination of children services is well organized to ensure reported abuse is promptly addressed. Since the proposed Children’s Act amendments have commenced, there should be strategies to ensure public participation and stakeholders input in enacting the new statute. Despite the office of the Chief Justice's gazettlement of this process, there is no provided timeframe of action and modalities for public participation.
- It is important that there be immediate measures to improve response and services to survivors of gender based violence.
- The government should ensure speedy prosecutions for survivors of sexual and gender based violence (SGBV)

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72 KDHS 2014  
73 KDHS 2008-2009  
74 KDHS 2014  
75 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  
76 KNCHR REPORT 2012  http://www.state.gov/documents/organization/204343.pdf  
77 Ibid  
Pediatric health at risk: Impact of HIV and AIDS

Kenya is one of the countries that is most severely impacted by HIV/AIDS, with a prevalence rate of 5.3% among adults. In the context of HIV/AIDS, Article 12 of the Covenant entails a legal responsibility for each State Party to progressively ensure that quality HIV prevention, testing, treatment, and care services are available to everyone on an equal basis. However, data points to continued challenges in providing HIV prevention and treatment services, especially to women and children. For example, while children make up around 13% of the estimated 1.2 million people living with HIV in Kenya, they accounted for 23% of total new HIV infections in 2014, and 25% of deaths from AIDS-related causes. Such data signifies a need for Kenya to make a more determined effort to improve pediatric HIV prevention and treatment in order to meet its obligations under Article 12.

Looking first at prevention, despite significant progress made by Kenya in preventing new HIV infections among children, it still has the second highest number of annual new HIV infections in children in Africa. The final transmission rate in 2014 was still 17%, whereas the WHO defines “elimination” of mother-to-child transmission after breastfeeding as under 5%. Numerous factors contribute to relatively high levels of new HIV infections among children, beginning with challenges related to primary HIV prevention and family planning among girls and women. Data shows low rates of HIV knowledge, HIV testing, and condom use among 15-24 year olds. Accordingly, Kenya announced in September 2015 a plan to scale up implementation of the HIV curriculum and age-appropriate sexual and reproductive health education in all secondary schools. Among HIV-positive women, reports show lower rates of modern contraception use than among non-HIV positive women, as well as a higher rate of unintended pregnancies.

In order to prevent mother-to-child HIV transmission among pregnant women living with HIV, they must start anti-retroviral treatment (ART) as quickly as possible. They must adhere properly to treatment through the breastfeeding period in order to prevent to their infant, as breastfeeding remains a high-risk period for HIV transmission. The latest WHO guidelines now recommend such women stay on treatment for life for their own health and that of any future children. Yet only 67% of pregnant women living with HIV received antiretroviral medicines in 2014, compared with an average of 75% in sub-Saharan Africa and rates of over 90% in eight other African countries. A recent study shows very low retention of women on ART within a year of initiation in Kenya, though poor record-keeping could also explain some of the low numbers.

Among the remaining challenges Kenya should address to improve PMTCT are insufficient human resources, supply chain capacity, and laboratory equipment. Policies are needed to increase ante-natal care visits, as many pregnant women are not completing the recommended four ante-natal care visits that enable health-care workers to test women for HIV, initiate HIV-positive women on treatment, monitor their adherence, check whether the ART is effectively suppressing the virus, and conduct further testing of HIV-negative women to determine if they have become newly infected with HIV. More effort is also needed to increase institutional birth deliveries, which would help ensure the baby is immediately given preventative treatment and would enable health care workers to better track mother-infant pairs after delivery. Other factors that discourage women from regular adherence are long distances to health clinics, the costs associated with travel or time away from economic activities, disrespectful treatment by health care workers, and stigma and discrimination. Increasing male involvement in PMTCT would also improve uptake and adherence.

For those infants exposed to HIV during pregnancy or breastfeeding, it is critical to quickly test them for HIV and initiate them on medication. Yet progress in diagnosing children with HIV and putting them on treatment has been much slower in Kenya than for adults. HIV tests suitable for infants are usually only available in centralized laboratories, and long turn-around-times on such test results continue to be a problem in Kenya. As it can take weeks or even months to deliver results, it may be too late to save the baby’s life by the time results are received. As well, poor follow-up of mother-baby pairs mean that many mothers or caregivers never receive test results or linkage to treatment for the baby.

Regarding HIV treatment for children, only 41% of children living with HIV were receiving ART in 2014 in Kenya, as opposed to 57% of adults. Without treatment, 50% of children with HIV will die by their second birthday, and 80% will die before they turn five. A recent study showed extremely low retention rates for children one year after initiation on ARVs in Kenya, which again may be explained in part by data collection challenges. Kenya has recognized and pledged to do more to close the treatment gap for children. This will require scaling up early infant diagnosis in decentralized clinics to reduce turnaround times for test results; improving tracking and servicing of mother-infant pairs; increasing efforts to find undiagnosed children with HIV and to retain children of all ages on treatment; and training of health care workers on identifying, testing, treating and caring for children with HIV.

83 See UNAIDS, 2015 Progress Report on the Global Plan towards the elimination of new HIV infections among children and putting them on treatment. However, data points to continued challenges in providing new high levels of new HIV infections among children, beginning with challenges related to primary HIV prevention and family planning among girls and women. Data shows low rates of HIV knowledge, HIV testing, and condom use among 15-24 year olds. Accordingly, Kenya announced in September 2015 a plan to scale up implementation of the HIV curriculum and age-appropriate sexual and reproductive health education in all secondary schools. Among HIV-positive women, reports show lower rates of modern contraception use than among non-HIV positive women, as well as a higher rate of unintended pregnancies.
84 Without treatment, 50% of children with HIV will die by their second birthday, and 80% will die before they turn five. A recent study showed extremely low retention rates for children one year after initiation on ARVs in Kenya, which again may be explained in part by data collection challenges. Kenya has recognized and pledged to do more to close the treatment gap for children. This will require scaling up early infant diagnosis in decentralized clinics to reduce turnaround times for test results; improving tracking and servicing of mother-infant pairs; increasing efforts to find undiagnosed children with HIV and to retain children of all ages on treatment; and training of health care workers on identifying, testing, treating and caring for children with HIV.

86 See UNAIDS: AIDSinfo database: http://aidsinfo.unaids.org/
Kenya has shown strong political commitment at the national and international level to ending AIDS, including among children, adolescents, and young women. In a recent example, the Government of Kenya and UNAIDS launched on 17 September an “HIV Situation Room” to collect and analyze data on HIV service delivery, as well as a new campaign to reduce HIV among young people.\textsuperscript{88} Kenya will also need to follow up on two recent decisions by its High Court to ensure proper care for persons with HIV: one which declared as unconstitutional Kenya’s anti-counterfeit legislation that might have prevented HIV-positive patients from accessing generic—and therefore affordable—antiretroviral drugs; and the second decision that ruled unconstitutional a section of the HIV and AIDS Prevention and Control Act making it a crime to “knowingly or recklessly” put another person at risk of becoming infected with HIV.\textsuperscript{89} This latter provision could, according to the Court, “be interpreted to apply to women who expose or transmit HIV to a child during pregnancy, delivery or breastfeeding” and therefore deter them from seeking testing or treatment.\textsuperscript{90}

Finally, improving prevention and treatment of pediatric HIV will also require increasing domestic financing for health and improving the health care infrastructure. Kenya currently covers 16% of its AIDS response, though it has pledged to raise the amount to 50%.\textsuperscript{91} Under the Abuja Declaration of 2001, African Union heads of state pledged to allocate at least 15% of their domestic spending to the improvement of the health sector, with an emphasis on the fight against HIV/AIDS, tuberculosis and other related infectious diseases. Kenya appears far from meeting this goal, however, with only 4.5% of spending allocated to health care in 2013.\textsuperscript{92} In addition, the recent devolution of primary healthcare to the county level has put an additional strain on an already under-resourced healthcare system, with a risk of insufficient funding and health care worker capacity to implement HIV programs.

**Suggested recommendations for the State:**

- Take all necessary measures to eliminate mother-to-child HIV transmission, including through increasing availability of sexual and reproductive health services and education on HIV/AIDS; encouraging greater frequency and quality of ante-natal care and institutional birth deliveries; and strengthening the health care system’s capacity for testing and treating all pregnant and breastfeeding women living with HIV.

- Increase efforts to expand coverage of, and increase retention on, antiretroviral treatment, in particular to close the gap between pediatric and adult uptake.

- Increase domestic spending on healthcare, particularly on endemic diseases such as HIV/AIDS, and ensure sufficient allocation of resources at the county level to HIV/AIDS testing, treatment, and care.

\textsuperscript{88} UNAIDS, “UNAIDS and Kenya launch data and technology partnership to Fast-Track progress towards ending the AIDS epidemic by 2030,” 17 Sept. 2015.

\textsuperscript{89} See State report by Kenya to the Committee on Economic, Social, and Cultural Rights, July 2013, p.41.


\textsuperscript{92} WHO Global Health Observatory Data Repository: http://apps.who.int/gho/data/node.main.75?lang=en
1.0 PROFILES OF SUBMITTING ORGANIZATIONS

Haki Jamii

Hakijamii is a national human rights organization founded in 2004 and registered in Kenya in 2007 as a non-governmental organization (NGO). Its core agenda is to support and work with marginalized groups, especially in urban areas, to advocate for their economic and social rights. The organization exists specifically to amplify the voice of the over 8 million residents of informal settlements in urban areas in Kenya to effectively and meaningfully participate in and influence public policy decisions and allocation of resources in order to improve their access to basic services. It works with over 100 grassroots community networks with total membership of about 500,000 in 15 towns in Kenya as well as with key national and international civil society organizations and state organs.

FIDA-Kenya

The Federation of Women Lawyers (FIDA) – Kenya is the premier women’s rights organization in Kenya and has in 30 years offered direct FREE legal aid services to over 300,000 women and positively impacted in structural, institutional, and legal reforms within Kenya to ensure gender sensitivity and responsiveness. Established in 1985 during the 3rd UN Conference on women held in Nairobi, FIDA Kenya which is a membership organization of over 1,000 women lawyers and law student is committed to the creation of a society that is free from all forms of discrimination against women in Kenya. As a result of the commendable work in advocating for women’s rights at the community, national, regional and international level, the organization has attained recognition as a critical partner for community, government, civil society, development partners and UN agencies in ensuring structural, institutional and legislative reforms on women rights.

Global Initiative for Economic, Social and Cultural Rights (GI-ESCR)

The Global Initiative for Economic, Social and Cultural Rights is a 501(c)(3) non-profit, non-governmental organization registered in the United States in 2010. It seeks to implement a concerted strategy for economic, social and cultural (ESC) rights advocacy aimed at improving the lives of the world’s poor. The GI-ESCR has a special interest in advancing women’s land and property rights, and has designated this area of work as one of its strategic priorities. These rights have a special transformative potential for women, who represent the poorest of the world’s poor, and who globally have the least access to productive resources. Not only are these rights key to ensuring that women’s immediate material needs are met, but they help to fundamentally reshape unequal gender power relationships. Indeed, for women, advancement on these critical issues is more than about poverty alleviation, it is about uplifting women’s status in a fundamental way and about ending women’s inequality on the basis of gender.

2.0 Women’s Rights to Land and Property in Kenya

2.1 Background:

While women’s rights to land and property are protected under the Constitution of Kenya (2010) and various national legislations, in practice, women remain disadvantaged. The main restriction is customary law and practices, which prohibit women from owning or inheriting land and other forms of property. These customary laws and practices are enhanced by stereotypical practices and socialization of women in believing they are not meant to own or inherit land or any other property. Customary practices in Kenya generally grant women secondary rights to land, namely through their relationships to a male relative, and women are rarely able to inherit land in their own right. In addition, women face serious obstacles in claiming their property rights either because they are unaware of their rights or they are unable to lay claim to this right.

According to the Food and Agriculture Organisation (FAO), women in Kenya are only 5% of registered landholders in Kenya. This situation is a major driver of poverty and gender inequality, and merits special consideration by the Committee as it reviews Kenya’s implementation of the International Covenant on Economic, Social and Cultural Rights.

In 2011, the CEDAW Committee called upon Kenya to establish a clear legislative framework to protect women’s rights to inheritance and ownership of land, and introduce measures to address negative customs and traditional practices, especially in rural areas, which affect full enjoyment of the right to property by women (UN. Doc.CEDAW/C/KEN/CO/7, at para. 42).

In its own previous Concluding Observations (2008) the Committee on Economic, Social and Cultural Rights (UN Doc. E/C.12/KEN/CO/1, at para. 14) recommended that the State party repeal article 82 (4) of the Constitution and ensure that the new Constitution guarantees equal rights of women to matrimonial property during marriage and at its dissolution. The committee also recommended that Kenya raises public awareness of the need to abolish laws and customs which discriminate against women and adopt the Marriage, Matrimonial Property and Gender Equality and Affirmative Action Bills.
Since that time, several legislative advancements have been made. Specifically, the National Land Policy was adopted in 2009. The policy provides for a systematic framework for the management and administration of land and its resources in Kenya. The policy, among other things, provides for the recognition of marginalized groups, informal settlements and small communities, the harmonization of land laws to ensure better and more effective land administration; the repossession of public land that had hitherto been allocated to private individuals and the development of a land use master plan to guide the optimal utilization of land resources.

In 2010, Kenyans overwhelmingly voted for a new Constitution which provide for several gains for women on their land and property rights including:

- Article 2(4) that provides that “any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

- Article 27 (4) prohibits discrimination on any ground including sex and marital status and expressly states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres (Article 27(3)).

- Article 40 provides that every person has a right either individually and or in association with others, to acquire and own property in Kenya of any description and in any part of Kenya.

- Article 61 provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. 61 (c) provides that parliament “shall enact legislation which shall regulate the recognition and protection of matrimonial property and in particular matrimonial home during and on termination of marriage...to protect the dependants of the deceased person holding interest in the land including interests of spouses in actual occupation of the land”.

In 2012, three laws aimed at harmonizing various land laws were adopted; National Land Commission Act No. 5 of 2012\(^2\), Land Act, No. 6 of 2012\(^2\) and Land Registration Act No. 3 of 2012\(^2\). These laws entrench principles of gender equality in access to land. The legislations give breath to Article 68 of the Constitution and overall Chapter Five on land and environment. A significant gain is that the Land Act creates statutory rights to spouses and any other persons who seek to carry out land transaction. The provisions specifically provide that before any land transaction is approved spousal consent must be given. This has saved a number of women who woke up in the morning and their matrimonial home and/or property had been sold by their husbands without the women knowledge. This law also gives room for women to be consulted in case of property transactions. Other legislative reforms, including Community Land and Evictions and Resettlement Bills, are currently under development and debate.\(^5\)

Kenya has equally implemented the Concluding Observations (2008) the Committee on Economic, Social and Cultural Rights (UN Doc. E/C.12/KEN/CO/1, at para. 14 on Matrimonial Property by enacting the Marriage Act No. 4 of 2014\(^6\), The Matrimonial Act No. 49 of 2013\(^6\) and Protection from Domestic Violence Act No. 2 of 2015\(^6\). These legislations are famously referred to as family Laws and they have provided great gains for women in Kenya. Example the Marriage Act now legislates on Customary Marriages (Section 6 and Part V) that previously were not effectively regulated exposing many women to a high chance of being denounced as wives after staying for years and having raised children in that union. Being denounced as a wife also had negative impact on access to property acquired and/or developed during the union.

Definition of contribution to matrimonial property is a big win for women in Kenya. The Matrimonial Property Act Section 2 defines Contribution to include domestic work, child care, companionship, management of family business and farm work. These were roles that ordinarily were not considered as contribution towards acquisition of matrimonial property. This law also defines matrimonial property to include the matrimonial home which prior to the law was excluded (Section 6).

Violence against women is known to grossly impact on women acquisition and ownership of land. The Protection from Domestic Violence provides for protection of spouses and children. This law clearly defines what comprises of domestic violence including economic violence and damage to property (Section 3). This definition is one of the key gains for women. Others include provision of access to protection orders by courts and police being held accountable to prevent Domestic Violence (Section 7 to 8).

These new Acts if properly implemented will ensure the respect of women’s rights in land ownership.

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2 The National Land Commission is the central organ in the implementation of the Chapter Five of the Constitution and generally land reforms in the country.
3 An Act of Parliament to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes
4 An Act of Parliament to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes
6 An Act of Parliament to amend and consolidate the various laws relating to marriage and divorce and for connected purposes in Kenya. Previous Kenya had 4 different laws governing marriages in Kenya. This Act consolidates all forms of marriages in Kenya giving common grounds governing all marriages in Kenya including definition, minimum age and types of marriages.
7 An Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes
8 An Act of Parliament to provide for the protection and relief of victims of domestic violence; to provide for the protection of a spouse and any children or other dependent persons, and to provide for matters connected therewith or incidental thereto
Despite the above discussed progressive legal framework, Kenyan women’s land rights continue to lag behind those of men for reasons including the following:

**Lack of Political Will:** Upon adoption of the new Constitution, Parliament and leadership at hand had the obligation to enact enabling legislation to ensure the people of Kenya fully enjoy all rights bestowed in the Constitution. Unfortunately, parliament has continuously defied the Constitution. Of relevance herein is the inclusion of Section 7 to the Matrimonial Act which section negates the benefits of Article 45 of the Constitution. Article 45 provides that parties to a marriage are entitled to equal rights at the time of the marriage, during and at the dissolution of the marriage. Section 7 however provides that...ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. This section takes back the nation to generations where judicial decisions undervalued and dismissed women contribution in their families and household. Women will once again be exposed to the struggle of trying to give monetary value of their farm work, child care, companionship and taking care of family business in proving contribution to matrimonial property.

The United Nations human rights experts urged Kenya to repeal Section 7 of the Matrimonial Property Act since it effectively denies women the right to marital property upon divorce or death of their spouse, unless they can prove they made a contribution to the acquisition of the property during their marriage. There are significant problems from the standpoint of women’s rights to equality when it comes to the distribution of marital property in cases of divorce, and Kenyan courts have a great deal of discretion in determining how property is actually divided in cases of divorce.

The lack of political will to enact the right laws takes back the country to times when several laws were not gender friendly. This also provides room for cultural barriers to flourish.

**Cultural Barriers:** A complex mix of cultural, legal and social factors and obstacles stand in the way of women realizing equal property rights in Kenya. The deep rooted cultural beliefs continue to give precedence to male ownership of land as opposed to women. The guise of men “protection” actually strips off women their right to property and asserts control over women’s autonomy. This cultural discrimination influences the service by some public officers. Some government officials ignore the law and rights of women and instead apply the prevailing cultural beliefs and make decisions that favour men, some officers simply say they do not want to interfere with culture.

**Lack of Knowledge and poor literacy levels:** Majority of women in Kenya have little awareness of their rights and seldom have the means to enforce them, women have 67% literacy level as compared to men 78%. Majority are also ignorant of laws generally relating to purchase and acquisition of the land or land registration processes. Example when widowed they do not know how to engage with the intricate succession procedures hence left vulnerable and often duped off property left by their husbands or fathers.

**Deficiency in legal system:** also contributes to women not enjoying their land rights. This includes technical language that locks out women in engaging the legal process, expenses for travel, court fees and witness costs. Even where a judgement is achieved it is almost impossible to enforce in a community hostile to women. Women who have tried to fight culture have faced great hostility including physical and emotional violence and some ostracized.

**Under-representation of women in Decision Making:** Lack of and/or poor representation of women in institutions that deal with land violates their Constitutional right. In both elected and appointed land bodies, women are either missing or vastly outnumbered by men. The Constitution under Article 27 (8) provides that the state shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective and appointive bodies shall be of the same gender. Currently Kenyan women are vastly underrepresented in national and local institutions that adjudicate land disputes and therefore their interests are not adequately protected by these bodies. Women have particular crucial stake in decisions based on their greater contribution to agricultural workforce.

### 3.0 Recommendations:

The law reforms in Kenya provides for *formal equality*, there is however need for *substantive equality* for women as a sustainable way of improving women’s enjoyment of their rights.

The Government of Kenya should clearly demonstrate good will to support women rights and repeal any sections of enabling laws that do not comply with the Constitution case in point Section 7 of the Matrimonial Property. The Government needs to appreciate the contribution made by women not only at household level but also at national level. The judiciary should equally be advised by International Laws and practises in providing verdicts in division of matrimonial property.

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12 Ibid.
13 World Bank Definition: Percentage of the population age 15 and above who can, with understanding, read and write a short, simple statement on their everyday life. Generally, ‘literacy’ also encompasses ‘numercacy’, the ability to make simple arithmetic calculations. wdi.worldbank.org/table/2.13
14 The World Bank IBRD-IDA wdi.worldbank.org/table/2.13
15 The National Gender and Development Policy (2000)
There equally has to be good will in enacting legislation to implement the principle that not more than two thirds of any appointive or elective position shall be of same gender. This will ensure inclusion of women in decision making on land matters. The government should also ensure gender equality in land administration bodies, and ensure that these institutions are trained on women’s equal rights to land and property and how to protect them.

One of the questions for women rights activists in Kenya is the acknowledgement of polygamy in the Marriage Act (Customary Marriages – Part V). The Law of Succession Cap 160 section 26, equally recognises polygamy and provides for co-wives and their children. This type of union has an impact on ownership and management of property in marriage and upon death of the husband. Women in such unions face extra barriers to keeping their matrimonial property amidst sharing with another wife.

If polygamy remains legal, the government must enact legislation in enforcing equitable arrangement for all wives involved. To emulate the South Africa Law Commission’s approach “Although customary marriages should be recognised on the basis of Constitutional right to culture, it is necessary to distinguish areas where human rights prevail” 16 Kenya must be committed to advocating a view of women that transcends stereotypical gender roles and advocates for equal rights. Registration of polygamous unions is necessary to protect the women involved. The registration should meet stringent requirements such as written consent by each prior wife and the future wife and a property distribution agreement which outlines the matrimonial property interest that each wife enjoys.

The Government should have deliberate steps to raise awareness amongst women, local communities, judiciary, traditional authorities, local chiefs, land administrative bodies, and other relevant actors about the land and property rights of women, so as to support their equal rights to land and resources. The activities would include government funded refresher courses for government officials tasked with land matters including land adjudicating bodies, Judicial officers and use of community media to educate members of the public on these rights. This will equally increase the knowledge of women on their land rights and empower them to pursue their rights.

To hasten the pace of development, it is important for Kenya government also ensure that women’s human rights and gender issues are integrated in planning and budgeting, in order to strengthen the relationship between men and women, which is the main core in development. KSh 0.5 billion was allocated for the FY 2015/16 for the Women Enterprise Fund this fund does not touch on pertinent issues such as addressing other women related issues such as property and inheritance rights but only on the economic model of the women.

There is need to document and avail disaggregated data on women land ownership in order to secure and entrench access to land. Data collection and establishment of the national bureau of statistics needed for positive intervention has been brought to a halt, such that to date there is no central national bureau of statistics to accurately provide data on gender disparity. The newly formed Ministry of Public Service, Youth and Gender should have a sufficient data bank this will be easier to measure the government’s commitment in addressing women’s problems.

Lastly there are two upcoming laws the Community Land and Evictions and Resettlement Bills. This is a further opportunity for the Government to enhance gender equality. Specific recommendations include;

- The government should ensure addition to the general principle the principle of non discrimination...that no one shall be discriminated directly or indirectly on any ground, including sex, race, pregnancy, marital status, health status, ethnic or social origin colour, age, disability, religion, conscience, belief, culture, language or birth.
- Regarding the application of alternative dispute resolution, the Bill should include a provision requiring the community to employ mechanisms that will deliberately involve women and other marginalized groups.
- The Bill allows evictions without a court order and does not capture humane treatment of evictees to address the issue of harassment, physical and verbal abuse among others which women and children bear the heavy repercussion. There is need to have a more humane process.

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 again 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.

• 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 General 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 property 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, 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 rights and freedoms.

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

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)

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1 See the report of the judicial commission of inquiry into the Goldenberg affair available at http://bit.ly/1E6feU.
3 See Article 40 of the 2010 Constitution of Kenya – Protection of right to property

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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 situate 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?

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.

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
• 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.

What measures has the State put in place to control prices charged by private water services and water kiosks?

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.

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

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.

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.

The price for half liter of water ranges between Kshs 30 to Kshs 100.
- 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 industrialists 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 County that affected the health of the community around that area, and redress for the victims.

- 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?

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

10 See https://centerforgea.com/news/over-3000-changamwe-residents-risk-lead-poisoning
Supplementary Information Concerning Women’s Land Rights in Kenya Submitted to the 57 Session (22 Feb 2016 - 04 Mar 2016) of the Committee on Economic, Social, and Cultural Rights

January 2016

This submission seeks to supplement the government of Kenya report by highlighting existing and proposed legal provisions that adversely affect women’s rights to land, resources, and property, which are critical for the full realization of their rights under the International Covenant on Economic, Social, and Cultural Rights (ICESCR). It is based on analysis and in-country work carried out by Landesa, a leading international land tenure organization dedicated to securing land rights for the rural poor with experience in over 50 countries, including Kenya.

This submission specifically addresses the Committee’s latest Concluding Observations to Kenya concerning gender “disparities in the enjoyment of economic, social and cultural rights, including in access to land” (para. 12, E/C.12/KEN/CO/1 [1 December 2008]); and lack of “guarantees of equal rights of women to matrimonial property during marriage and at its dissolution” (para. 14). While the government report briefly outlines recent land reforms, it remains silent about concrete, concerted efforts to address lingering gender disparities in access, control, and where appropriate ownership of land and natural resources. Neither the state report nor the state replies to the list of issues respond adequately to the Committee requests for sex disaggregated data on the enjoyment of each Covenant right, including those related to access and ownership of land by women (para. 36, E/C.12/KEN/CO/1).

I. Women’s Land Rights are Key to Economic, Social and Cultural Rights

Ensuring women’s rights to the land they till and inhabit constitutes a foundational aspect and often a precondition for women’s ability to realize without discrimination (Art. 2.2) and on equal basis with men (Art. 3) the myriad human rights enshrined in ICESCR. Secure land rights for women have been linked to greater sustainable development, economic livelihood (Art. 1), equality (Arts. 2.2, 3), adequate standard of living (Art. 11.1), housing (Art. 11.1), food security (Art. 11.2) education (Art. 13), health (Art. 12.1), freedom from violence, and participation in decision-making at all levels.1

ICESCR Article 11(2)(a) instructs States to address food security (“freedom from hunger”) by “developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources” including land. Article 1.2 asserts the right of peoples to “freely dispose of their natural wealth and resources based upon the principle of mutual benefit.... In no case may a people be deprived of its own means of subsistence.” Article 11(1) recognizes the right to an adequate standard of living, including adequate food and housing, and to the “continuous improvement of living conditions.” Article 3 explicitly requires states to ensure the “equal rights of men and women to the enjoyment of all... rights” in the Covenant, and Article 2.2 mandates States to guarantee such rights “without discrimination” as to sex, property, or other status.

The Committee has recognized the importance of land rights, particularly for women, in its interpretation of multiple Covenant rights, including the right to housing, food, protection of the family, and equality and non-discrimination. In its General Comment 4 on the right to adequate housing, the Committee stresses that “[w]ithin many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal” and that “the right of all to a secure place to live in peace and dignity, includes access to land as an entitlement.” The Comment further outlines the basic tenets of “adequate housing” that parallel critical aspects of land rights, such as state’s duty to confer “legal security of tenure ... upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;” and “sustainable access to natural and common resources.”

In General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, the Committee specifically “requires that women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so.” In the context of food security, the Committee recognized the importance of “full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land...” and maintaining registries on rights in land (including forests). General Comment No. 7 on housing recognizes that women in particular “suffer disproportionately from the practice of forced eviction” including from land they till and inhabit, and “are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation.” In articulating state’s duty to protect the family under Article 10.3, the Committee requires States parties “to ensure that women have equal rights to marital property and inheritance upon their husband’s death.”

Numerous Concluding Observations have subsequently affirmed the Committee mandate to instruct state parties to ensure legally-enforceable land rights for women facilitated by meaningful participation of rural women in land reforms, effective monitoring mechanisms for the implementation of land reforms, and abolition of all barriers restricting women’s access to and control of land, particularly in rural areas, as well as persistent adverse gender roles that prevent women from inheriting and owning land.

Rights to land and property include the right to own, use, access, control, transfer, exclude, inherit, and otherwise make decisions about land-related resources. Women’s land rights are generally considered secure if they are: 1) clearly defined; 2) socially and legally legitimate and recognized; 3) unaffected by changes in women’s social status (such as dissolution of marriage by divorce or death); 4) long-term; (5) enforceable, and appropriately transferable; and (6) exercisable without an additional layer of approval that applies only to women.
II. Recent and Pending Legal Reforms Still Undercut Women's Land Rights

Despite a slew of progressive new laws concerning land and matrimonial property, women continue to face discrimination in law, practice, and biased social norms that dilute their equal rights to access, control, own, and inherit land and resources. Land in Kenya continues to be titled to men, not women. Only 5% of land titles are registered jointly to women and men, and only 1% of all titles are registered separately to women.11

In its replies to the List of Issues concerning “measures taken or envisaged to enforce the recently adopted laws, including the Marriage Act 2014, the Matrimonial Property Act 2013,” the government merely states that these two laws “make significant gains in securing women’s access to matrimonial property during and after the marriage” and that “[s]impler versions of the two marriage acts have been disseminated” (para 13). Not only has the government yet to embark on nationwide, systemic implementation campaign, the laws themselves contain provisions that continue to undermine women’s genuine and equal enjoyment of their rights under this Covenant.

A. Kenya has failed to implement promises of gender equality related to land rights in Constitution, National Land Policy and Recent Land Laws

Despite strong Constitutional guarantees for women’s land rights, a slew of gender-progressive provisions in the National Land Policy, and the land and matrimonial property laws of 2012 and 2013, respectively, the government has yet to roll out coordinated, concerted initiatives toward their implementation.12 The legislative victories aimed at enhancing women’s access and control of land and resources have not been translated into nation-wide government efforts to, at a minimum:

- register women’s rights to property under the 2012 Land Registration Act or the 2013 Matrimonial Property Act;
- raise public awareness about the women’s land rights embedded in the Land Registration Act and the Matrimonial Property Act;
- register existing customary marriages under the 2014 Marriage Act.

While laws are a critical first step, land rights go beyond women merely accessing or even owning land, but demand a reality in which women are able to manage the land they own effectively and productively. Moreover, given lingering gendered social norms and practices, both men and women must be sensitized about women’s land rights, and women in particular should be sensitized about the importance of owning land themselves and not only through affiliation and lineage.13

Without a sustained, national-level effort to implement women’s land rights provisions in these Acts and to address persistent barriers to women’s land, property, and inheritance rights, Kenya will fulfil neither its obligations under this Covenant, nor the gender equality mandates under its own constitution.

B. While a significant achievement, the 2013 Matrimonial Property Act effectively undercuts spousal equality during marriage and at its dissolution

Several provisions of the 2013 Matrimonial Property Act (MPA) effectively discriminate against women’s equal right to property, including land.

1) Unpaid care work unaccounted for in the absence of default equal ownership of matrimonial property.

The MPA in essence denies women the right to a fair share of the marital property upon divorce or death of a spouse, unless they can prove they directly contributed to the acquisition of property during the marriage. The act reinforces social and legal norms that devalue critical unpaid care work essential to the survival of the family unit. In its 2014 follow up statement to the Committee overseeing the Convention on the Elimination of All Forms of Discrimination against Women, the government noted that the MPA “vests the ownership of matrimonial property in spouses in equal shares regardless of the contribution of either spouse towards its acquisition” (para. 2.3, CEDAW/C/KEN/CO/7/Add.1 [16 June 2014]).

This statement, provided after the State report to this Committee, inaccurately represents the act’s meaning and its adverse impact on women. Section 7 of the MPA codifies discrimination against women in Kenya, as they are the ones most frequently tasked with caretaking and housekeeping – contributions which by definition are indirect and non-monetized.

Section 7 states that “ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.” The spouses may enter into an agreement prior to the marriage to determine their respective property rights (MPA, Sec. 6(3)). Also, Sec. 14(b) establishes a rebuttable presumption of equal ownership of matrimonial property between spouses for property acquired in the names of the spouses jointly.

However the underlying presumption in the MPA, as provided in Sec. 7, is that spouses own matrimonial property according to their contribution, not in equal shares. Section 2 clarifies that contributions can be both monetary and non-monetary, and as such supersedes the Appellate case, Echaria v. Echaria [2007] eKLR, which controversially rejected non-monetary, indirect contributions, most often provided by women, such as care-taking and household keeping.
In practice, however, it remains very difficult for wives to prove their contribution to matrimonial property, both because functions such as childrearing, cleaning, and cooking are difficult to quantify, and because women's names are almost never included on title documents. This could prove extremely harmful for wives upon divorce, or death of the husband.

2) **Matrimonial property limited to property jointly owned and acquired**

The MPA defines "matrimonial property" to exclude assets, including family land, unless they are jointly acquired and titled. This means that land acquired in the husband's name during a marriage will be presumed to be his separate property, and so not part of the estate to be divided upon divorce. This was a significant omission that is likely to have widespread effects, given that land is overwhelmingly titled to men, not women.

Outside of the matrimonial home and the goods belonging to it, matrimonial property consists only of property jointly owned and acquired. Section 6(1)(c) defines matrimonial property to include “any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.” This provision covers, for example, farm land that would be acquired during the marriage for the household, but only if acquired in joint ownership and titled as such.

Previous versions of the legislation included property owned by either spouse if acquired during the marriage; the final version cut out this important proviso.

Adding insult to injury, while the MPA rejects a general presumption of equal ownership, it still saddles spouses with an equal share of liabilities incurred during the marriage. The Act establishes an asymmetrical legal disposition that would not appear to favor wives in many instances: (1) ownership of matrimonial property is through proven contribution; while (2) spouses must share equally in any liabilities incurred during the marriage and for its benefit (Sec. 10(3)(a)).

3) **Spousal consent required, but ignores power dynamics and needed only in monogamous marriages.**

According to the government in its state report to CESCR, the Matrimonial Property Bill “protects property acquired during the existence of a marriage from being disposed of by one party without the consent of the other party. This has been a significant factor in disenfranchising women” (para. 98, E/C.12/KEN/2-5 [26 February 2014]).

While the Act requires spousal consent for transfer of matrimonial property, it falls short of addressing existing power dynamics within the home and the society. The Act assumes equality within the household or the family in which women may freely, without coercion or pressure, consent to such transactions. This assumption stands in stark contrast to a reality, particularly in rural areas, of gender disparities in access to resources, education, and decision-making power. Overall in Kenya, the 2014 Demographic and Health Survey estimates that only about half (54%) of married women participate in decisions pertaining to major household purchases. A mere requirement for spousal consent absent concrete safeguards seems insufficient at best.

Moreover, the Act as passed on 24 December 2013 only requires spousal consent for transactions of matrimonial property in monogamous marriages (Sec. 12(1)). The Act is silent about consent in polygamous marriages, where power dynamics may be even more complicated. This leaves a dangerous gap in protection for wives in polygamous marriages which continue to occur throughout Kenya. According to the 2014 Kenya Demographic and Health Survey, about 14% of rural women in Kenya are in polygamous unions, with rates reaching as high as 32% in the North Eastern region and 19% in Nyanza. As clearly noted by the government, women are frequently disenfranchised through transfers of matrimonial property without their consent; the lack of protection for women in polygamous unions further marginalizes their status.

C. **Cohabitating and informal marriages remain unrecognized by law**

The newly adopted Marriage Act requires all new marriages, including customary marriages, to be registered (Secs. 11, 42, 44; Part IX), and requires all existing marriages to be registered within three years (from May, 2014, with an option for extension by the Cabinet Secretary) (Sec. 96(3)). The Act however does not recognize informal marriages, or marriages through co-habitation.

The lack of formal recognition is problematic for spousal land rights registration, as many of the marriages in customary communities in Kenya are not currently registered, and it is unlikely that they will be in the near future, despite the 3-year (less than 1.5-year, as of the present day) window for doing so, especially in the absence of a massive national registration campaign. Spouse-like partners in unregistered unions or co-habitation arrangements will not be able to prove their interest in matrimonial property, rendering them at risk of losing the land they rely on for food and income upon separation or death of one of the partners. Earlier drafts of the Marriage Act did provide for recognition of marriage through co-habitation, as evident by the government’s report to CESCR, which states: “The Marriage Bill when enacted will also recognise cohabitation marriages or popularly known as come-we-stay marriages, which are otherwise not legally recognized and many women have lost rights within the marriage through these unions” (Sec. 97, E/C.12/KEN/2-5).

D. **Proposed new land amendments would strip current legal safeguards for women’s land rights**

Pending legislation, currently before parliament, would significantly affect the land sector and adversely impact women’s land rights. The Land Laws (Amendment) Bill proposes eliminating the two most fundamental protections for women’s land rights contained in the LRA Sections 28(a) (spousal rights over matrimonial property) and 93 (spousal co-ownership presumption).
i) Gutting spousal rights as overriding interest

Section 16(a) of the Bill would amend LRA Section 28 by deleting paragraph (a) which establishes “spousal rights over matrimonial property” as an overriding interest for registered land. Under this provision of the LRA, a registered transaction may be voided if a spouse with rights to the property does not provide prior consent to the transaction. This proposed amendment would eliminate an important safeguard for spouses under the current legal framework, in the name of reducing property transaction costs. This safeguard is especially important since existing spousal interests in matrimonial property (as pertaining to rural land) are very infrequently registered. The current provision in the Land Registration Act is in keeping both with the Constitution (e.g., Art. 60), the National Land Policy, and the Matrimonial Property Act (Sec. 12).

ii) Abolishing gained interest in spouse’s land

Section 37(b) of the Bill deletes Section 93(2), which establishes that a spouse who contributes through labor to the separately registered land of the other spouse gains an interest in that land and that right will be recognized as if registered. Instead the Bill (in Section 37(a)(iv)) proposes a new section to the LRA, providing that “the spouse whose interest is not noted in the register may apply to the Registrar in the prescribed form to be noted in the register as having a matrimonial interest.”

The requirement for an active registration of spousal interest would in most cases rob women of their gained interest in the land of their husbands. While nearly all land is in fact registered separately—in the sole names of men, in most cases—in practice and according to both the Land Registration Act and the Matrimonial Property Act, wives gain an interest in that land through contribution to its value over time. Without the presumption that wives have acquired an interest in their husbands’ land, transactions are more likely to happen without spousal consent. And with the proposed deletion of Sections 28(a) and 93(2) of the LRA, such transactions could no longer be voided if the innocent spouse did not learn about the transaction until it had been registered.

Section 37(d) of the Bill deletes subsection 93(4) of the LRA, which voids a transaction if a spouse deliberately misled the lender or buyer about the other spouse’s consent to the transaction. The Bill would instead require a non-consenting spouse to apply to the court to stop a transaction before the registration of the change takes place. This change would further diminish women’s land tenure security by allowing for only a brief window of time during which the non-consenting spouse would need to (1) find out about this fraudulent transaction, and (2) act quickly enough (given need for travel, money, possibly an interpreter and lawyer) to apply to the court to stop the disposition. In practical application, the bill would deprive innocent spouses from regaining their right to the land once a transaction is underway.

Finally, section 37(a) of the Bill eliminates the presumption in Section 93(1)(a) of the LRA that spouses will hold land obtained for the “co-ownership and use of both spouses or, all the spouses” as joint tenants, replacing it with the presumption that spouses would hold such land as tenants in common. This would be a very negative change for women. Tenancy in common affords a lower level of protection to wives than afforded under joint ownership, especially for widows, given that tenants in common have no automatic right of survivorship.

III. Proposed Recommendations

The following proposed recommendations to the government aim to align state actions toward greater compliance with Covenant guarantees:

1) Address slow implementation of new Land Rights laws that uphold women’s rights, including through a national-level public information and education campaign about gender equal land rights; targeted training on the same, aimed at county, regional and national-level land sector officials (such as registration officials, members of County Land Management Boards, Cabinet Secretary and National Land Commission staff), the judiciary, and customary justice institutions such as Councils of Elders; a national-level campaign to register women’s rights to land, both separately and jointly with spouses.

2) Amend the Matrimonial Property Act to: i) create clear presumption of equal ownership for matrimonial property; ii) define matrimonial property to include property owned by either spouse if acquired during the marriage and for purposes of the marriage; and iii) require spousal consent for transactions of matrimonial property in polygamous marriages (currently only required for monogamous marriages).

3) Amend the Marriage Act to recognize de facto, or “come-we-stay” marriages, as contemplated in earlier drafts of the Marriage Bill.

4) Eliminate gender-biased provisions from the Land Laws (Amendment) Bill, or reject the bill in its entirety.

5) Establish and enforce adequate remedies for land disputes involving women, including the provision of free legal aid and counsel, simplified court procedures, and waiver of fees.

6) Collect comprehensive data on the de jure and de facto enjoyment of women’s secure rights to land.
Landesa is an international nonprofit organization dedicated to securing land rights for the rural poor. Landesa has worked in over 50 countries and has contributed to over 110 million families gaining legal land rights, using a combination of robust research, collaborative law and policy design, dedicated advocacy, and tailored evidence-based interventions. www.landesa.org

Landesa Center for Women’s Land Rights champions legal norms, policies, and systemic innovations to secure women’s land rights; delivers tailored technical expertise; and nurtures a network of land rights professionals and organizations to strengthen women’s land rights locally, regionally, and globally.

Endnotes

2 CESC R Committee, General Comment No. 4: The right to adequate housing (art.11(1) of the covenant), at para. 8(e).
3 Ibid. at paras. 8(a)-(b).
4 CESC R Committee, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the covenant), at para. 28.
5 CESC R Committee, General Comment No. 12: The right to adequate food (art. 11), at para. 26.
6 CESC R Committee, General Comment No. 7: The right to adequate housing (art. 11(1) of the Covenant): Forced evictions, at para. 11.
7 CESC R Committee, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the ICESCR), at para. 27.
8 See e.g., Tanzania (2012).
9 See e.g., Uganda 2015; Kyrgyzstan (2015); Madagascar (2009); Cameroon (2012).
10 Landesa (2013), Women’s Land Tenure Framework for Analysis: Land Rights, at http://www.landesa.org/resources/womens-land-tenure-framework-for-analysis/. Note also that land rights perceived as secure afford some of these guarantees, even in the absence of formal rights recognition. For example, if a family has lived in a rural area for years without formal documentation, yet they have no threat of being asked to leave, they are said to have perceived tenure security.
13 Ibid.
16 Goitom; Federation of Women Lawyers (FIDA), Kenya, Women’s Land And Property Rights In Kenya, FIDA Kenya website (last visited Nov. 14, 2013).
18 Goitom; Federation of Women Lawyers (FIDA), Kenya, Women’s Land And Property Rights In Kenya, FIDA Kenya website (last visited Nov. 14, 2013).
20 See also MPA 12(5), which seems also to apply to monogamous marriages as indicated by the word “both”.
23 The three bills are (1) The Community Land Bill (various dates); (2) The Land Laws (Amendment) Bill (11 August 2015); and (3) The Physical Planning Bill (11 August 2015).
24 Under the Land Registration Act, this interest through contribution of one spouse to the separately held land of the other spouse is characterized as an interest “in the nature of an ownership in common.” (Land Registration Act, 2012, Sec. 93(3)) Under the Matrimonial Property Act, this interest through contribution is not specifically considered to be in the nature of an ownership in common, but is rather characterized as “a beneficial interest in the property equal to the contribution made.” (Matrimonial Property Act, 2013, Sec. 9).
Introduction
This stakeholders’ report is a joint submission of the above-mentioned organizations. The report highlights key concerns related to economic, social and cultural rights in Kenya.

The data and information in this submission was obtained by Franciscans International (FI), Edmund Rice International (ERI), the Office of Justice Peace and Integrity of Creation Franciscans Africa (JPICFA), the Centre for Social Justice and Ethics of the Catholic University of Eastern Africa, Kenya Movement of Catholic Professionals- Pax Romana ICMICA, Kenya Christian Professionals Forum, the Justice and Peace Commission of the Archdiocese of Nairobi and Pearls and Treasures Trust.

The focus of this submission is on issues pertaining to the right to food, education, water and sanitation, and health in Kenya.

Right to Food
Our organizations are concerned by the fact that although the Government acknowledges that 80% of the population depends on agriculture it continues to spend less than 10% of the GDP on the agricultural sector. Despite the government’s commitment, following the Maputo Declaration, to increase expenditure on agriculture to 10% of the GDP, a recommendation to that effect at the 2nd review of Kenya under the Universal Periodic Review (UPR) did not receive favor from the government. This failure to foster an enabling environment has directly impacted the livelihoods of the Kenyan people.

We also note that Kenya experienced an increase in the number of people facing extreme hunger from 0.85 million in August 2013 to 1.3 million in February 2014. Starvation-prone areas are characterized by low population densities and extensive geographical dispersion, with long distances between service delivery points and an under-developed road grid. Furthermore, the legal and institutional framework does not emphasise crop diversification and agro-ecological practices. The State has often been found to be unprepared, exemplified by incidents of mass starvation which occur within arid and semi-arid regions. This is a failure of early warning mechanisms and immediate responses to them.

We commend the efforts to operationalize the right to be free from hunger and to have adequate food of acceptable quality through the Food Security Bill 2014. However, the Bill is silent on agroecology, an area that is generally seen as vital to future food production. The UN Special Rapporteur on the Right to Food identifies agroecology “as a mode of agricultural development which not only shows strong conceptual connections with the right to food, but has proven results for fast progress in the concretization of this human right for many vulnerable groups in various countries and environments. Moreover, agroecology delivers advantages that are complementary to better known conventional approaches such as breeding high-yielding varieties. And it strongly contributes to the broader economic development.”

Questions to the government
- What strategies has the government put in place to increase the percentage allocation of the GDP towards agriculture?
- What steps have the government made in encouraging crop diversification, with an emphasis on orphan crops and agro-ecological practices?

Right to Education
The field partners acknowledge the effort by the government of Kenya to improve access to education. However, several challenges persist with regard to the access and the quality of education.

There is a lack of statistics on children out of school and especially for children with disabilities. Child labor, insecurity and harmful cultural practices remain prevalent and the quality of education in most public schools remains poor. Other notable challenges include an absence of a concrete system to ensure equity between schools, as there has been an emerging trend for a number of public secondary schools to charge high fees, further complicating the creation of Kenyan educational system that is truly accessible to all in equal measure.

Another challenge that the government is facing is in protecting teachers and students from insecurity derived from political instability and social unrest. Students in northeastern Kenya have been particularly affected by a shortage of teachers, as this area is increasingly being avoided as it is perceived as dangerous. Consequently there have been reports of undertrained teachers and understaffed schools in this region, which is inherently affecting the quality of education.

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Questions to the government

- What steps is the government taking to guarantee access to quality education for all, including children with disabilities?
- What actions is the government taking to improve the standard of education, particularly through appropriate training and remuneration of teachers, as well as ensuring a fair distribution of staff across the country and between schools?

Right to Water and Sanitation

It is reported that over 60% of the urban population in Kenya relies on water vendors, water kiosks or unprotected water sources that pose health risks, often in the form of water borne diseases. In low income communities, with an average monthly income of US$ 70 per household, it is estimated that a family of five spends up to 10% of their monthly income on water.

The majority of households in the northeastern part of the country have no toilet facilities. Despite high levels of access in Nairobi province, sanitary conditions in slum areas are very poor due to overcrowding.

Questions to the government

- What concrete measures has the government taken to make safe drinking water and sanitation services accessible and affordable to all its citizens?

Right to Health

Finally, our organisations are concerned that the government is spending less than 15% of the GDP on health despite its commitments under the Abuja declaration. The limited expenditure in the health sector translates into poor infrastructure, under staffing and unmotivated staff. A similar recommendation at the UPR did not receive favor from the Government of Kenya.

Questions to the government

- What measures is the Government envisaging to conform to the commitments under the Abuja declaration?

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5 Ibid.
Preliminary parallel Report

Kenya's support to privatisation in education: the choice for segregation?

Preliminary parallel Report submitted by the Economic and Social Rights Centre (Hakijamii), the Global Initiative for Economic, Social and Cultural Rights, the East African Centre for Human Rights (EACHRights), the CRADLE, Kituo cha Sheria, and the Kenya national Union of Teachers on the occasion of the examination of the report of Kenya during the 56th session of the UN Committee on Economic, Social and Cultural Rights

I. Introduction

1. This report has been compiled by the following organizations:
   • The Economic and Social Rights Centre (Hakijamii) is a National Human Rights Organization that partners with civil society organisations and marginalised community groups to advocate for the realization of economic and social rights especially for the urban poor.1
   • The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) is an international non-governmental human rights organization which seeks to advance the realization of economic, social and cultural rights throughout the world, tackling the endemic problem of global poverty through a human rights lens. The vision of the GI-ESCR is of a world where economic, social and cultural rights are fully respected, protected and fulfilled and on equal footing with civil and political rights, so that all people are able to live in dignity.2

2. This report has received support from the East African Centre for Human Rights (EACHRights), the CRADLE, Kituo cha Sheria, and the Kenya national Union of Teachers.

3. This report is a preliminary report to the UN Committee on Economic, Social, and Cultural Rights based on a research conducted by the above organisations about the impact of the growth of the role of private actors in education in Kenya on the realisation of the right to education. It focuses in particular on the impact in non-formal settlements on segregation and discrimination and the right to free quality education. It will be followed by an additional submission deepening these preliminary findings with empirical research and covering other impacts.

II. General legal framework on the right to education and the role of private actors applicable in Kenya

4. Basic education in Kenya is recognised as a human right in article 43 (f) of the constitution of Kenya which acknowledges that everyone has the right to education. Specifically, children’s right to education is entrenched in article 53 (1) which provides that every child has the right to free and compulsory education, and is not subject to progressive realisation – contrary to article 43.

5. Article 2 (6) of the Constitution of Kenya recognises that “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”. The international Convention on the Rights of the Child (ICRC), was ratified by Kenya on 30 July 1990, and is thus legally binding in domestic Kenyan law.

6. The Basic Education Act, 2013 repeals the previous education Act, enacted in 1980 (last revised in 2012). The Basic Education Act sought to streamline the provision of education, in institutions of basic education, in line with the constitution that was adopted in 2010.

7. Privatisation in education is a growing global phenomenon threatening the right to education in many countries. An increasing body of research is examining the impact of these developments on human rights and social justice. In 2014 Mr Kishore Singh, the UN Special Rapporteur on the right to education (SR RTE) presented a report to the UN General Assembly3 which examines State responsibility in the face of the explosive growth of private education providers, from a right to education perspective, and lays out some of the principles applicable.

8. Based on our work analysing the situation with regards to privatisation in education in seven other countries, and following extensive consultation with education civil society organisations at the domestic, regional and international level, and with human rights and education academics and experts, we have developed the following draft analysis principles, which set out how international human rights law applies to privatisation in education, drawing in particular on articles 28 and 29 of the ICRC and article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Private actors in education: draft human rights analysis framework

While private providers of education are permitted, States must ensure that the involvement of private actors in the provision of education:

1. Does not lead to the creation of extreme disparities in access to quality education or discrimination of any kind, and does not lead to segregation or division in societies in general or education in particular;
2. Provides for a true alternative choice to quality free education, and does not replace the public system, as the State retains the responsibility to offer quality, free education for all;

3. Does not lead to the marketisation of education such that education is no longer directed to the full development of a child’s personality, talents and mental and physical abilities, but instead only to profit-making and achieving measurable outcomes - which would be contrary to the aims of education recognised in human rights law;

4. Maintains the highest quality standards and is adequately regulated, both in law and in practice, with adequate inspection staffing, effective accountability mechanisms, and without corruption; and

5. Is the result of a participatory policy formulation process and continues to be subject to democratic scrutiny and to the human rights principles of transparency and participation.

9. This report focuses on the first two areas of this framework: segregation and discrimination and the right to free quality education. Subsequent reports will explore the other dimensions, and deepen this one with empirical data.

III. Privatisation in education in Kenya

10. Ignorance was identified at the time of independence in 1963 as one of the critical challenges facing the new nation of Kenya, alongside poverty and disease. Since then, successive governments have made deliberate efforts to encourage participation of the private sector in providing education as a means to achieving literacy levels in the country.

11. Prior to 1990, the number of private were negligible. The 1980s was however characterised by dwindling participation in formal schools, which was aggravated by the structural adjustment policies (SAPs) that were designed to be economic recovery programs. One of the visible outcomes of the SAPs in the education sector was less public expenditure on education. As a result, cost sharing in education was introduced. This resulted in many disadvantaged children, especially girls, from the rural communities, the urban poor and children with disabilities, not accessing formal education due to prohibitive costs associated with schooling. This was also an era characterised by widening social and economic disparities that evidenced increasing levels of poverty.

12. It is on this basis that the Kenyan government justified its support the growth of the private sector in provision of education.4 The Policy For Alternative Provision of Basic Education And Training quotes:

"in an effort to reach the spiralling numbers of non-enrolled children, the ministry of education in collaboration with development partners sought to provide broad policy frameworks to ease participation of a variety of service providers. These providers were registered under different government departments...and sought to provide school age children with education...these providers were instrumental in initiating low cost schools...they came to be categorized as non-formal schools."

13. While the development of private schools in the 1980s-1990s was propagated by the cost sharing policy that followed the structural adjustment plans pushed by the World Bank, forcing many students out of the formal school system due to cost factors, a more tremendous growth of private schools has been observed since the introduction of the free primary education (FPE) program in 2003. This massive increase in development of private schools has been mostly attributed to the massive influx of students into public schools and resultant deterioration in quality due to overstretched facilities.5

14. The high escalation in number of private schools has most severely been felt in informal settlements where there is exceptionally high use of private schools. Kenya’s urban informal settlements experience severe shortage in supply of basic services. Government schools are not sufficiently available, the few available schools are found only at the periphery of these areas, making them inadequately available and inaccessible by most children. Failure by the State to provide sufficient number of public primary schools has led to tremendous growth of private low cost schools which have developed to fill in the demand gap.6 Since the introduction of free primary education, more children from urban informal settlements have been attending private primary schools. In urban areas such as Nairobi, Eldoret and Mombasa, more than 50% of children attend so called “low-fee” private schools.5

15. A research conducted in 2003 in Kibera, the largest informal settlement in Kenya, recorded a total of 76 private primary and secondary schools.8 These total figures should be compared to a mere total of only five government schools serving the area, and which are all located on the peripheries of the slum. A further study of the area by the researchers four years later revealed that the number of private schools had increased substantially to a total of 116 in 2007, which is an increase of 52.6% in a span of 4years.8 During the same period, no new public schools were built in the area by the state.

Table 1. Proportion of schools, public and private, serving Kibera informal settlement.
16. In Mathare urban informal settlement, in Mabatini Ward, a total of 26 private primary schools serve the majority of the children population in the area, whereas only one public primary school is available.\textsuperscript{10}

Table 2. Proportion of schools, public and private, serving Mathare informal settlement

17. More generally, at the national level, the number of private primary schools has grown tremendously since the 1990’s; from 385 in 1998 to 1441 in 2002. After the re-introduction of the free primary education system in 2003 followed the highest recorded increase in number of private primary schools, recorded at 1624 in 2003 and later at an all-time high of 8917 in 2013. On the other hand, the increase in number of public primary schools has been minimal, from 16,971 in 1998, to 21,205 in 2013, an increase of 24.9%. In the same period, private schools increased by 2216% (see Table 3).\textsuperscript{11}

Table 3. Numbers, of primary school institutions, both public and private, between 1998 and 2013\textsuperscript{12}

18. Nevertheless, these statistics do not account for private informal schools, including in particular the “low-cost private schools”. Low-cost private schools are schools that target relatively poor households by offering education at a low cost, but also often low quality. Low-cost private schools have developed as a response to the demands of the immediate situation for a functional or compensatory education rather than as a projected deliberate educational planning. They have played an increasing role, and for instance, it is estimated that at least 52% of children in Kibera informal settlement in Nairobi attend private low-cost private schools.\textsuperscript{13} There could be about 2,000 non-formal schools in Kenya, with over 500,000 pupils, who are not counted in statistics. The proportion of private education is thus probably much higher than the official statistics show.\textsuperscript{14}

IV. State support towards privatisation in education

19. The growth of private education in Kenya is not only the result of a spontaneous movement. It also grew thanks to the State’s direct and indirect support to private sector, especially to low-cost private schools. Support from the State may be provided in various forms ranging from technical support through recruitment of teachers to direct financial grants to some of the registered private low cost schools.

20. Support to and institutionalisation of private education takes place in particular through the legal framework provided for non-formal schools. The Basic Education Act recognises two types of basic educational institutions: public schools, which are schools established, owned or operated by the Government; and private schools, which are those established, owned or operated by private individuals, entrepreneurs and institutions.\textsuperscript{15} All schools, whether public or private, must register with the ministry of education.
21. However, the Policy For Alternative Provision Of Basic Education And Training (APBET) creates de facto another type of school, the “alternative” or “non-formal” schools, which are private. The policy defines non formal schools as “institutions that resemble formal schools in that they aim at transmitting a formalized curriculum leading to formal school examinations. They however differ in school practices, management, financing, staffing conditions, registration, operating environment and school structures.” Under this policy, non-formal schools have less stringent requirements in terms of quality, infrastructures, teachers’ conditions, etc., than public schools, both in law, and as it is tolerated in practice. The APBET policy also creates a public private partnerships in education, as private non-formal schools registered under the ministry of education can receive funding from the government.

22. Although the APBET policy dates from 2009, and the Basic Education Act, 2013, does not provide a framework for alternative schools, it seems to still be applicable, according to a recent presentation from the minister of education.

23. While the recognition of and support to alternative private schools flows from a commendable effort by the government to include children who would otherwise not be able to attend school into the formal education system, the policy has largely been abused. In the country’s major urban informal settlements where demand for basic education is high because public schools are unavailable, private individuals who are keen on making quick money from some of the country’s poorest pockets have used the policy to provide poor quality basic education in poorly structured schools in the name of “non-formal schools”. The vague definition of non-formal schools and tolerance from the authorities also allow for large commercial education actors to register as non-formal schools and benefit from the lower legal requirements it offers – although it’s not clear why large-scale organised companies like Bridge International Academy (see box) should not rather be registered as private schools.

24. The existence of these schools is also an incentive for government to not improve the public education system, and maintain the status quo. As mentioned above, in informal settlements such as Kibera and Mathare, public education has almost not been improved in the last decade, despite the fact that these areas are largely under-served. Instead, non-formal private schools, sometimes with the direct support of the government through public-private partnerships, have been providing sub-standard education to these areas. While the Government may provide temporary support to selected not for profit community-based non-formal schools, with the aim to phase them out and progressively integrate them in the formal public education system, the non-formal education policies promoted by the State Party do not provide any vision or timeline for improving and formalising alternative schools. Rather, it entrenches the existing system, although it is the source of violations of the right to education (see below part V.B).

25. Besides, the organisation of the public education system is also conducive to privatisation in education. Although the Basic Education Act indicates that education should be free in Kenya, section 29 indicates that “other charges may be imposed at a public school with the approval of the Cabinet Secretary in consultation with the county education Board provided that no child shall be refused to attend school because of failure to pay such charges”. As a result, most schools charge fees ranging from a few hundreds to a few thousands Kenya Shillings per term, and these fees are generally made mandatory in practice, as children are expelled from schools if their parents cannot pay. These charges not only mean that free education is an illusion in Kenya, but also that they drive parents to low-fee informal schools, which may sometimes be cheaper than the public schools. In addition, they also constitute, in themselves, a form of privatisation of education in Kenya.

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**Bridge International Academies, World Bank funding, and its impact on access to the right to education in Kenya**

Bridge International Academies (BIA), a for-profit fee-charging chain of private primary schools operating in Kenya, serving informal settlements and poor rural areas. It has recently received monetary support from the World Bank, through its private sector investment arm, the International Finance Corporation (IFC), which invested $10 million. Bridge has also attracted more than US$100m from international investors, including Bill Gates, Facebook founder Mark Zuckerberg, eBay founder Pierre Omidyar, education company Pearson, and the UK’s Department for International Development.

BIA uses highly standardised methods, called “school in a box”, and barely trained, unqualified, poorly paid teachers, who are given a tablet to deliver and control a totally scripted curriculum to students, written on a tablet. Teachers in Bridge schools are expected to all read aloud to the students, almost word-for-word, the content delivered on the tablet at the same time in each school every day.

The school chain claims to provide affordable education by charging ‘just’ $6 a month, per child. However, for families in vulnerable areas where BIA operates, who earn an average $75 or less, sending an average of three children to these schools, means sacrificing other essential survival rights such as food and water, and it is enough to entrench inequalities and create deep educational segregation.

Meanwhile, the World Bank has no active or planned investments in either Kenya’s public basic education system. The International Development Association (IDA), the arm of the World Bank that provides concessional loans and grants to the world’s poorest governments, has no active commitments to basic education in Kenya and has not financially supported Kenya’s public basic education system since 2010.
In response to the World Bank’s support to for-profit, low-cost and low-quality education models such as BIA, and its lack of support to public education, 119 civil society organisations from around the world, including 30 organisations in Kenya and Uganda, published a statement in May 2015, asking the World Bank to ensure it fulfils its mission to truly help the poor: see http://bit.ly/WBprivatisation.

26. It is also important to note that public foreign donors also play a role in supporting privatisation in education in Kenya. For instance, the World Bank has developed a “private school support program” in Kenya. The World Bank, through a $10 million loan from the International Finance Corporation, also funds Bridge International Academies (see box). In May 2015, a group of 119 organisations across the world, including 18 Kenya organisations published a statement to denounce the Bank’s political and financial support to Bridge Academies, highlighting that on the other hand the World Bank currently does not provide any funding to the public education system in Kenya. Similarly, the British Department for International Development (DFID) also funds Bridge International Academies, thereby supporting the development of private actors in education, whereas the public education system urgently needs to be strengthened to be able to provide quality education to all without discrimination (see box above).

V. Impact of privatisation in education on segregation and discrimination in Kenya

27. This section gives a preliminary overview of the impact of the privatisation in education described previously on the right to education by focusing on the impact on segregation and discrimination. Future reports will deepen the issue, and cover impacts on other aspects of the right to education.

A. Legal framework

28. The constitution of Kenya strongly prohibits any form of discrimination. Section 10(2) which lists the national values and principles of governance which “bind all State organs, State officers, public officers and all persons” includes as one of them “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised”.

29. Section 27 of the constitution specifies what the right to “equality and freedom from discrimination” entails. It includes “the full and equal enjoyment of all rights and fundamental freedoms” (Section 27(2)), the prohibition of both direct and indirect discrimination (Sections 27(4) and (5)), on various grounds, including “social origin” (Section 27(4)). In addition, the State of Kenya is required to “take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination” (Section 27(6)).

30. The Basic Education Act reinforces the protection against discrimination in Kenya with regards to the right to education. Article 4 of the Act lays out the principle of “equitable access for the youth to basic education and equal access to education or institutions” (Article 4(b)), as well as of “protection of every child against discrimination”, by any institution, public or private, “on any ground whatsoever” (Article 4(f)). It specifically insists on the elimination of gender discrimination (Article 4(p)) and “non-discrimination, encouragement and protection of the marginalised, persons with disabilities, and those with special needs” (Article 4(s)).

31. Equality and non-discrimination are immediate and crosscutting obligations in the ICRC (and the ICESCR), which require States parties to respect and ensure the rights set out in the ICRC without discrimination. International human rights bodies have stressed the importance of non-discrimination.

32. The States Parties’ obligations with respect to non-discrimination under both the ICRC and the ICESCR are immediate (as opposed to being subject to progressive realisation) and require States to pay particular attention to vulnerable or marginalised groups. Non-discrimination also applies to the distribution of government funds and resources for education.

33. In General Comment 5 the CRC elaborated:

This non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes.

34. Following its General Day of Discussion on private actors and the ICRC, the CRC adopted the following recommendation relating to non-discrimination:

Likewise, the general principle of non-discrimination as enshrined in article 2, … assume[s] particular importance in the context of the current debate, with the State party equally being obliged to create standards consistent and in conformity with the Convention. For instance, privatization measures may have a particular impact on the right to health (art. 24), and the right to education (arts. 28 and 29), and States parties have the obligation to ensure that privatization does not
35. The CRC also addressed this issue in its General Comment 16 (on the ICRC and private actors) where it stated that States must ensure that the provision of essential services by private actors ‘does not threaten children’s access to services on the basis of discriminatory criteria’.29

36. General Comment 20 of the Committee on Economic, Social and Cultural Rights (CESCR) also specifies that any kind of discrimination, whether direct or indirect, formal or substantive is prohibited. Applying the obligation not to discriminate, as well as the principles of equal opportunity and effective participation in society for all, the CESCR emphasised in its General Comment 13 that the State has an obligation to ensure that privatised education ‘does not lead to extreme disparities of educational opportunity for some groups in society’.29

37. The issue has also been addressed by the CRC in its general observations. Most recently, in the case of Morocco, the CRC expressed concern that the fast development of private education ‘has led to the reinforcement of inequalities in the enjoyment of the right to education’.30 It has also recommended that Lebanon place stronger emphasis on public education so as to ‘prevent any risk of discrimination’.31

38. Socio-economic segregation is directly linked to discrimination. In a recent list of issues, the CRC explicitly expressed its worry about segregation on a socio-economic basis. It requested Chile to explain the impact of privatization in education and its measures “to put an end to segregation in the education system and guarantee the right to equality and non-discrimination in terms of access to education and within schools”.32

39. As stated by the SR RTÉ, ‘[p]rivatization in education cripples the universality of the right to education as well as the fundamental principles of human rights law by aggravating marginalization and exclusion in education and creating inequities in society’, and it ‘favours access to education by the privileged’. High levels of privatisation in education have been shown to affect particularly marginalised and vulnerable groups, such as girls, as shown in a recent submission made to the CEDAW.33

B. Situation in Kenya

40. The growth of private schools in Kenya creates or deepens inequalities. Children from high income families attend expensive high quality schools which are known to perform well, while children from the poorest and most vulnerable families are relegated to public and low cost private schools which are grossly under resourced. This in turn increases inequality in accessing education and also deepens cycles of poverty and exclusion by entrenching social classes through segregation.

41. Schools fees, even when relatively low, cannot be afforded by part of the population. As a result, the introduction of fee-charging private schools results in a stratification of the children, whereby the relatively richer go in different schools from the poorest. There are, schematically, three types of schools in Kenya, whose distinction is the source of segregation.

- Formal private schools, including “elite, proprietor-owned schools, charging high fees and providing in return high-quality education to pupils from middle-income and upper-income families.” They “recruit their intakes from much wider geographic catchment areas than most public schools – but from much narrower socioeconomic catchments”, and “achieve outstanding results” in national examination.34
- Low-cost private schools, which provide sub-standard education, charge moderate fees, and take children from relatively poor and lower-middle class households.
- Public schools, which charge low or no fees, whose quality varies, and which accept all children, often the poorest.

42. Beyond the obvious stratification that happens between medium/high-fees formal private schools, low-fee private schools, and public schools, even small changes in fees lead to micro-segregation, amongst the poor. This is particularly visible in informal settlements in Kenya.

43. In May 2015, 119 organisations, including 17 Kenyan organisations, presented a statement where they denounced World Bank funding to the chain of low-fee private schools Bridge International Academies.35 The statement demonstrates that even if private schools such as Bridge Academies charged $6, such schools are not accessible by at least 50% of the population.

44. Indeed, according to the most recent Demographic and Health Survey in Kenya released in 2015, women from poor families record higher birth-rates compared to their counterparts from wealthier families.36 The poorest families in Kenya today have three times as many children as a wealthy one. Nationally, women from the poorest families were found to have an average of 6.4 children although those aged 19 to 49 had an exceptionally higher fertility rate at an average of 9.4 children each.

45. Data from the latest 2012/2013 household survey in Kenya show that half of the households in Kenya earn KES 7,000 ($75) or less.37 Thus, for half of Kenyan households, even assuming a cost of $6 a month, sending 3 children of primary school age to a private school chain such as Bridge International Academies would cost at least 24% of their monthly income. Taking into account more realistic monthly cost for such chains of about $17 that include school meals, sending their children to these schools would cost half Kenyan households at least 68% of their monthly income. Private schools costing $6 or above are therefore not accessible by the poorest, who put their children in cheaper private schools, or public schools, creating a stratification in the education system.
46. This stratification phenomenon clearly appears in informal settlements. In these areas, as discussed previously, generally a majority of people attend non-State schools. A recent study from the Africa Population and Health Centre (APHC) in six informal settlements in Kenya found that households income in informal settlements varies greatly, from 2,371 KES ($25) to 25,081 KES ($267) a month. In addition, households level of education also differ widely, with, in average, 53% of the households heads who have not completed more than primary education, although the situation can change from a settlement to another (see Table 4). Overall, therefore, most households are poor and have a low level of education, but within this broader category or poor uneducated households, there are significant differences between households. Said differently, some people living in slums are extremely poor and uneducated, while others are just poor and have limited education.

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<th>Table 4. Distribution of household heads in six informal settlements by level of education</th>
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<td>Nairobi (combining 2 settlements)</td>
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47. At the same time, school charges (including fees, levies, meals) also vary enormously, from 467 KES ($4.5) per year in some government schools to 20,900 KES ($210) per year in some private schools (see Table 5).

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<th>Table 5. Average school charges in grade 3 in six informal settlements, by type of school (in KES)</th>
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</tbody>
</table>

48. The result of this situation is that the wide disparities in income and education are directly reflected in the schools parents put their children in. The APHRC’s study shows that in the six informal settlements they studied, children from relatively richer households were more likely to go to formal private schools, in a statistically significant manner, than children whose parents were poorer: in the settlements studied, nearly 40% of children of the top 20% wealthiest households went to formal private schools, whereas only 52% went to public schools. Conversely, the bottom 40% poorest households overwhelmingly put their children in public schools (71%), and only 14% put their children in formal private schools (see Table 6). Similarly, children who have one parent who has been to secondary schools are above are more likely to go to a formal private school than children whose parents’ education is below secondary.
Table 6. Segregation in informal settlements

Association between background characteristics and school type attended in six informal settlements, with over-representations circled in red (in %)\textsuperscript{41}

<table>
<thead>
<tr>
<th>Background</th>
<th>School Type</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Public</td>
</tr>
<tr>
<td>Sex of Child:</td>
<td></td>
</tr>
<tr>
<td>Boy</td>
<td>62.2</td>
</tr>
<tr>
<td>Girl</td>
<td>63.9</td>
</tr>
<tr>
<td>Orphan Status</td>
<td></td>
</tr>
<tr>
<td>Both Parents</td>
<td>74.6</td>
</tr>
<tr>
<td>Single parent</td>
<td>71.2</td>
</tr>
<tr>
<td>None Orphan</td>
<td>61.3</td>
</tr>
<tr>
<td>Sex of HH head</td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>59.6</td>
</tr>
<tr>
<td>Female</td>
<td>71.9</td>
</tr>
<tr>
<td>HH head education</td>
<td></td>
</tr>
<tr>
<td>Below secondary</td>
<td>64.2</td>
</tr>
<tr>
<td>Secondary or above</td>
<td>61.5</td>
</tr>
<tr>
<td>HH size</td>
<td></td>
</tr>
<tr>
<td>1-3</td>
<td>57.4</td>
</tr>
<tr>
<td>4-6</td>
<td>63.2</td>
</tr>
<tr>
<td>7+</td>
<td>69.5</td>
</tr>
<tr>
<td>HH wealth status</td>
<td></td>
</tr>
<tr>
<td>Bottom 40%</td>
<td>70.5</td>
</tr>
<tr>
<td>Middle 40%</td>
<td>57.9</td>
</tr>
<tr>
<td>Top 20%</td>
<td>52.5</td>
</tr>
</tbody>
</table>

49. Thus, the poorest and least educated parents tend to put their children in public schools, relatively wealthier and more educated parents are relatively more likely to put their children in low-cost or formal private schools, and the top 20% wealthiest and the most educated households living in these settlements are much more likely than the others to put their children in formal private schools. This is how a sorting between children on the basis of their socio-economic status is taking place, a micro-segregation between the poor themselves, whereby the poorest are put together in public schools, and the poor that can afford it put their children in different, private, schools, according to how much they can afford.

50. The situation is similar in rural areas. Although the proportion of private schools is relatively lower in rural Kenya, a study has found a similar segregation dynamic taking place between public and private schools. This phenomenon has also be found to be increasing between 2004 and 2007 (see Table 7).\textsuperscript{42}
Table 7. Type of school attended according to level of wealth (assets) with striking figures in red

<table>
<thead>
<tr>
<th>Type of school</th>
<th>Level of wealth (measured according to assets)</th>
<th>2004</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>All 1 (Poorest) 2 3 4 (Least poor)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>Not enrolled 8.2 10.2 10.0 6.1 6.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Public 87.0 88.3 89.7 86.3 83.9</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Private 4.8 1.5 0.3 7.3 9.7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>Not enrolled 7.7 11.1 7.7 7.4 4.6</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Public 80.3 85.6 85.6 82.7 70.0</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Private 12.0 6.3 6.7 9.9 25.4</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

51. Other studies have shown a similar dynamic at the scale of the country. Some researchers note that following the introduction of Free Primary Education in 2003, “enrollment of less educated households (primary education or less) in the public sector increased significantly whereas more educated households left the public sector” (see Table 8). Thus from 2003, although access was broadened, this has contributed, according to analysts, “to increased segregation between public and private primary schools”.

Table 8. Segregation of education in Kenya after the 2003 Free Primary Education (FPE) Policy

<table>
<thead>
<tr>
<th></th>
<th>NER</th>
<th>GER</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>All</td>
<td>71.2</td>
<td>71.6</td>
</tr>
<tr>
<td>No education</td>
<td>62.1</td>
<td>65.4</td>
</tr>
<tr>
<td>Some primary</td>
<td>74.6</td>
<td>77.2</td>
</tr>
<tr>
<td>Completed prim.</td>
<td>67.4</td>
<td>72.6</td>
</tr>
<tr>
<td>Some sec.</td>
<td>77.0</td>
<td>71.7</td>
</tr>
<tr>
<td>Some tert.</td>
<td>63.1</td>
<td>47.2</td>
</tr>
<tr>
<td>Private schools:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>All</td>
<td>3.8</td>
<td>8.9</td>
</tr>
<tr>
<td>No education</td>
<td>1.9</td>
<td>2.7</td>
</tr>
<tr>
<td>Some primary</td>
<td>2.6</td>
<td>5.1</td>
</tr>
<tr>
<td>Completed prim.</td>
<td>2.7</td>
<td>8.8</td>
</tr>
<tr>
<td>Some sec.</td>
<td>6.4</td>
<td>16.4</td>
</tr>
<tr>
<td>Some tert.</td>
<td>20.9</td>
<td>42.2</td>
</tr>
</tbody>
</table>

52. In addition, segregation may take place on other grounds. Generally, private schools, in particular for-profit commercial schools, have little interest to enrol marginalised groups who require extra-teaching support, or, unless they are required to do so through adequately enforced regulation. Though evidence is scant, a study has shown for instance that in Kibera, children with disabilities constituted 11% of the school population in a primary school, while they constituted less than 1% of the children enrolled in non-formal schools in the area.

53. While such segregation is itself a major human rights concern, and constitutes a human rights violation by Kenya to the extent that the authorities have not responded adequately to this phenomenon, it is also leads to additional issues. Firstly, such segregation can affect the already fragile social cohesion in society. As researchers have noted, a key reason why relatively richer households are moving their children out of public schools towards private schools is the “peer-effect”: better-off households have exited public schools as a result of poor children entering such schools, following the introduction of the FPE policy in 2003, while private schools “increasingly became a preserve of the a affluent”.
54. Secondly, another impact of this education system is that it maintains or deepens inequality, and thus is a source of discrimination. It keeps the poorest students, who have the most challenging socio-economic environment to learn, together, and without proper support, further reinforcing the initial inequality, rather than remediying it.

55. Thirdly, Segregation lowers the general quality of education. It also affects privileged children, who miss on an important part of a quality education. As the Kothari Education Commission in India put it, such segregation in education

  *is bad not only for the children of the poor but also for the children of the rich and the privileged groups [...] By segregating their children, such privileged parents prevent them from sharing the life and experiences of the children of the poor and coming into contact with the realities of life [...] [and also] render the education of their own children anaemic and incomplete.*  

56. As shown by the Organisation for Economic Cooperation and Development (OECD) through its studies in a number countries, segregation also has negative impact on the overall quality of an education system. The highest performing education systems across OECD countries are those that combine quality with equity.  

57. Thus, calling for low-cost schools to stand as an alternative advances the legality of dual education systems that stratify society according to socio-economic canons. In other words, it is a promotion of a system that legitimizes inequality.

**VI. Impact on the right to free quality education**

**A. Normative framework**

58. According to the Committee on Economic, Social and Cultural Rights (CESCR), interpreting article 13 of the ICESCR:

  *First, it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances; States parties recognize, for example, that the “development of a system of schools at all levels shall be actively pursued” (art. 13 (2) (e)). Secondly, given the differential wording of article 13 (2) in relation to primary, secondary, higher and fundamental education, the parameters of a State party’s obligation to fulfill (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, States parties have an enhanced obligation to fulfill (provide) regarding the right to education, but the extent of this obligation is not uniform for all levels of education. The Committee observes that this interpretation of the obligation to fulfill (provide) in relation to article 13 coincides with the law and practice of numerous States parties.*

59. It should also be noted that Article 13 (3) of the ICESCR protects the liberty of parents and legal guardians to choose for their children schools ‘other than those established by the public authorities’, thereby assuming that there is a system of public schools available, which private schools provide an alternative too in order to ensure parents can offer ‘the religious and moral education of their children in conformity with their own convictions’. The SR RTE made it explicitly clear by emphasising that:

  *education must be safeguarded as a public good. Drawing upon the adverse impact of privatization in education and the consequent growing disparities in education, Governments should ensure that private providers only supplement public education, the provision of which is the Government’s responsibility, rather than supplant it. [...] It is important to ensure that States do not disinvest in public education by relying on private providers.*

60. Article 28 of the ICESCR require States parties to ‘make primary education compulsory and available free to all’ and to progressively introduce free secondary education.

61. The Committee on the Rights of the Child has also provided guidance on the implementation of the ICESCR in the context of privatisation in General Comment No. 5:

  *The Committee emphasizes that enabling the private sector to provide services, run institutions and so on does not in any way lessen the State’s obligation to ensure for all children within its jurisdiction the full recognition and realization of all rights in the Convention (arts. 2 (1) and 3 (2)).*

62. The CRC additionally addressed the issue of privatisation during its Day of Discussion on ‘The private sector as service provider and its role in implementing child rights’ in 2002. The Committee made a number of recommendations including:

  *The Committee further recommends that, in order to ensure economic accessibility, policies on services, in particular health care and education services, be so formulated as to reduce the financial burden on low-income groups, particularly the poor, for example by reducing and eliminating user fees for those groups that cannot afford them, especially the poor.*

63. UN treaty bodies, including the CRC, have made a number of observations on the impact of privatisation and fees on the realisation right to education, with a direct link between the right to free education and the right to non-discrimination. For instance, with regards to Colombia, the Committee noted that the legislative provision that allows costs to be levied by schools upon those who can afford to pay ‘has created a discriminatory educational system marked by arbitrary fees and social exclusion.’

64. Building on these principles, the SR RTE cautioned in his last annual report that privatisation ‘throws overboard the fundamental principle of equality of opportunity in education, which is common to almost all international human rights treaties’. Access to education based upon the capacity to pay fees, which is a consequence of privatisation, ‘flies in the face of prohibited grounds of discrimination’.
65. Similarly the CESCR’s concluding observations have highlighted the negative and discriminatory impact of tuition fees. Despite the existence of scholarships and bursaries in Canada, the Committee expressed ‘concern about the discriminatory impact of tuition fee increases on low-income persons.’ It connected the importance of free education with the realisation of the right to non-discrimination, including discrimination on socio-economic grounds. In the case of Nepal, the CESCR was concerned that ‘in practice primary education is not completely free due to various fees charged to parents, such as for school supplies and uniforms.’

66. Further, in its review of the Republic of Korea, the CESCR clearly highlighted that access to education should not be based on financial capacity or, in the case of higher education, solely based on ability. It expressed its concerns with the ‘high associated costs of education required to be paid by parents,’ ‘the deepening inequality in education,’ and ‘the fact that the chances of entering a high-level university for students are often determined by their parents’ ability to afford after-school tutoring or private education.’ The CESCR recommended that the Republic of Korea ‘ensure that education is equally accessible to all and without discrimination, on the basis of ability, not financial capacity.’

67. In relation to primary education, the CESCR in General Comment 13 says that the State’s obligation to fulfil the right to education amounts to an obligation to directly provide education in most circumstances and suggests that its obligations in relation to primary education may be of a higher order and entail more immediate obligations. General Comment 13 states:

“First, it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances; States parties recognize, for example, that the “development of a system of schools at all levels shall be actively pursued” (art. 13 (2) (e)).”

68. While the CRC permits (as does the ICESCR) the provision of education (to unspecified levels) by non-State providers, as provided in Article 29(2), the liberty to establish educational institutions is constructed negatively, as something that should not be affected by the fulfilment of the right to education. The responsibility is thus on the State to fulfill the right to education. The UNESCO Convention against Discrimination in Education takes a similar approach in its Article 2 which provides that the establishment or maintenance of private educational institutions does not constitute discrimination when it is to provide educational facilities in addition to those provided by the public authorities. It should also be noted that in its indicators on the right to education, the OHCHR suggests measuring child enrolments in public education institutions as an indicator of compliance with human rights standards.

69. A former Special Rapporteur on the Right to Education, the late Katarina Tomasevska, emphasised that:

“[i]nternational human rights law defines free and compulsory education as a government obligation, thus implying that it should be a free public service, while permitting private education for those parents who desire and can afford it, bearing in mind most private schools charge for their services.”

70. Thus, it is permissible, and even required, to allow the development of private education, but the State retains the positive obligation to fulfil the right to education, and the obligation to provide primary education for all is an immediate duty of States.

71. Finally, States have an obligation to ensure that the maximum available resources are devoted to achieving education outcomes, and thus have the burden of demonstrating that any State resources diverted to private providers of education cannot be better utilized by allocating them to the direct provision of public education.

72. The rights protected under article 43 of the constitution are subject to progressive realisation. However, according to article 20, “it is the responsibility of the State to show that the resources are not available, and “in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals”. The constitution also asserts that “the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation” of the rights guaranteed under Article 43.

73. Furthermore, article 53, which concerns children’s rights is not subject to progressive realisation. Therefore, according to its own regulations, the right to free and compulsory basic education is not limited by the State party’s resources. The State has an immediate duty to ensure that every child in Kenya has access to free and compulsory basic education.

B. Situation in Kenya

74. A growing preference and inclination towards private schools in Kenya has been propagated by an apparent failure by the public system to meet the needs of parents at all income levels.

75. In 2003, the public education sector experienced a massive explosion of student enrolment in primary schools as the government introduced the Free Primary Education (FPE) program. Enrolment increased from 6.0 million in 2002 to 7.2 million pupils in 2003. Latest statistics show that as at 2013, enrolment had risen to roughly about 10.2 million pupils.

76. Although enrolment has increased, evidence also exists that government allocation of per-capita grants to schools has declined. The government currently allocates a capitation grant of 1500 Kenya Shillings per child under the Free Primary Education program implemented in 2003, representing a decline from the 2774 Kenya Shillings the government had spent on each primary school child in 1997 (EYC, 2004).
Despite this great milestone that was achieved in the education. The available facilities have to date had to cater for all the students who continue to enrol since 2003, with very minimal growth in infrastructure, as detailed in the tables below.

### Table 9. Number primary education facilities 2004-2008

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Schools</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pre-primary</td>
<td>32,879</td>
<td>34,043</td>
<td>36,121</td>
<td>37,263</td>
<td>37,954</td>
</tr>
<tr>
<td>Primary</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public</td>
<td>17,804</td>
<td>17,807</td>
<td>17,946</td>
<td>18,063</td>
<td>18,130</td>
</tr>
<tr>
<td>Private</td>
<td>6,839</td>
<td>7,546</td>
<td>7,983</td>
<td>8,041</td>
<td>8,076</td>
</tr>
<tr>
<td>Totals</td>
<td>24,643</td>
<td>25,353</td>
<td>25,929</td>
<td>26,104</td>
<td>26,206</td>
</tr>
</tbody>
</table>

### Table 10. Number of primary school teachers by qualification and sex 2006-08

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>P1</td>
<td>52,616</td>
<td>40,659</td>
<td>93,275</td>
</tr>
<tr>
<td>P2</td>
<td>6,541</td>
<td>4,877</td>
<td>11,418</td>
</tr>
<tr>
<td>P3</td>
<td>778</td>
<td>920</td>
<td>1,698</td>
</tr>
<tr>
<td>Total</td>
<td>89,607</td>
<td>72,465</td>
<td>162,072</td>
</tr>
<tr>
<td>UNTRAINED</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>K.C.E/K.C.S.E</td>
<td>338</td>
<td>115</td>
<td>453</td>
</tr>
<tr>
<td>K.J.S.E</td>
<td>42</td>
<td>21</td>
<td>63</td>
</tr>
<tr>
<td>C.P.E/Others</td>
<td>254</td>
<td>151</td>
<td>405</td>
</tr>
<tr>
<td>TOTAL</td>
<td>634</td>
<td>287</td>
<td>921</td>
</tr>
<tr>
<td>GRAND TOTAL</td>
<td>90,241</td>
<td>72,752</td>
<td>162,993</td>
</tr>
</tbody>
</table>

The influx of students to public primary schools and overstretched facilities in these schools resulted in a high number of student transfers to private schools. This trend has especially informed parents’ perception of poor quality in public schools due to the infrastructural constraints they face. This perception has also contributed to the rise and increased enrolment in private schools.

The worst case scenario has been experienced in the densely populated urban informal settlements. The perceived need by parents to transfer children from public schools in search of ‘better quality’ education has over the years created a much ready market for low cost education. Public schools and basic services are either inadequate to cater for the huge populations or are completely unavailable. Research shows that because there are too few government schools in urban slums to accommodate all of the children in their areas, and also because quality is perceived to be better in private schools, the gap in supply and quality has led to the proliferation of low cost non-government schools whose direct fee-charges are generally higher than those of government schools. In large urban informal settlements such as those in Nairobi, Mombasa and Eldoret, more than 50% of the children attend low fee non-government schools which have mushroomed tremendously to cater to a growing demand among those seeking ‘quality’ education, and which the State has not provided.

The situation of the Mathare Valley informal settlement, in Nairobi, illustrates this situation. The population in Mathare is unknown, and has been estimated between 600,000 and 800,000, although the population of the informal settlement alone may be around 180,000. In any case, the slum itself only has only one government school available (see map below), Kiboro primary school, which was originally a community school started by residents, and later upgraded and taken over by the authorities. All other 40+ schools in the area are private schools. As a result, residents, in particular those living in the north and east of the area have no choice but to send their children to a private school. Contrary to arguments sometimes put forward, private schools in slums like Mathare Valley therefore often do not serve to fulfil the freedom element of the right to education by providing an alternative able to ‘ensure [parents] the religious and moral education of their children in conformity with their own convictions’. Parents putting their children into these schools is not a choice of parents that expresses a preference for private providers, it is rather a default option reflecting on the failure of the Kenyan State to fulfil one of its core obligations with regards to the right to education.
Further, the trend towards preference for private schools is also advised by the existing trends of transition of students from primary school to secondary schools. Due to a variety of factors, available data reveal that students from private primary schools are 10 times more likely to secure places in prestigious national secondary schools as their public school counterparts, although the government has put in place a system of quota and incentives to give higher chances to pupils from primary schools to be accepted in secondary schools. This shows a trend whereby students from private schools tend to pre-empt spaces in top performing national public secondary schools. The risk then is that students from private schools increasingly dominate the high end national public secondary schools. This leads to a situation where parents do not enjoy a real choice when choosing to take their children to private schools, their decisions also being affected by their chance to reach secondary schools.

VII. Recommendations for list of issues

82. Given the analysis above, we recommend that the CESCR ask the following question to the State Party:
   a. Why are private school chains, such as Bridge International Academies, registered as non-formal schools, whereas they appear to offer formal education?
   b. How does the state supervise, monitor and evaluate the implementation of basic education by private non-formal schools to ensure it complies with the Convention on the rights of the child? Is the ministry of education well equipped in terms of data and technical capacity to carry out this function?
   c. If the Government intends to progressively replace non-formal education by formal quality free education, why does it continuously support non-formal schools without a plan to lead to formalisation? Otherwise, what are the plans from the Government to phase out non-formal education, and how is this intention materialised in laws and policies?
   d. What steps are being taken to ensure that public primary education is strengthened to reach out to marginalised groups, such as in non-formal settlements, and to ensure that public education is free and of good quality to avoid forcing parents having to resort to private schools? Specifically, does the government have plans to allocate resources to improve the public education access and quality in informal settlements?
10. House Survey conducted by Mathare Community groups, 2014
11. Data from Kenya economic Surveys, 2002-2015
12. Data collected from the Kenya economic surveys, 2002-2014.,
16. Legal Notice N° 39, The Basic Education Act, 8th April 2015, part V.
18. Interview with drafters of the Act. See also e.g. the guiding principles, on Section 4 of the Act.
19. Interviews in public schools and with parents.
22. Article 2 ICRC; article 2(1) ICESCR.
23. CRC General Comment 5, UN Doc CRC/GC/2003/5, para 12.
25. Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, UN Doc CRC/C/GC/16, para. 34.
26. CESC, General Comment 13, para. 30.
27. CRC, Concluding Observations: Morocco, CRC/C/MAR/CO/3-4 (2009), para. 60.
39. Adapted from ibid., p. 271.
41. Ibid.
42. Adapted from ibid., p. 6.
51 CESC, General Comment 13, para. 48 – emphasis added.
52 Committee on the Rights of the Child, General Comment 5, CRC/GC/2003/5, para 44.
56 Ibid., para. 45.
59 CESC, Concluding Observations: Republic of Korea, E/C.12/KOR/CO/3 (2009), para. 76.
60 CESC, General Comment 13, paragraphs 48, 51 and 52.
61 Emphasis added. CESC, General Comment 13, paragraph 48.
62 See also ICESCR, Article 13(4) and CESC General Comment 13, paragraph 59.
63 UNESCO Convention against Discrimination in Education, 1960. It can also be noted that in Africa, the African Commission on Human and Peoples’ Right also considers the African Charter on Human and People’s Rights to requires States ‘to respect the liberty of parents and guardians to establish and choose for their children schools, other than those established by the public authorities’, clearly emphasizing the primacy of public schools.
66 CESC, General Comment 13, para. 51.
72 Adapted from APHRC, Quality and Access to Education in urban informal Settlements in Kenya (October 2013), available on http://aphrc.org/publications/quality-and-access-to-education-in-urban-informal-settlements-in-kenya
75 Map from Geonames, http://www.geonames.org/maps/google_-1.266_36.854.html
I. Reporting Organization

Cultural Survival is an international Indigenous rights organization with a global Indigenous leadership and consultative status with ECOSOC. Cultural Survival is located in Cambridge, Massachusetts, and is registered as a 501(c)(3) non-profit organization in the United States. Cultural Survival monitors the protection of Indigenous Peoples’ rights in countries throughout the world and publishes its findings in its magazine, the Cultural Survival Quarterly; and on its website: www.cs.org. In preparing this report, Cultural Survival collaborated with Maa Civil Society Forum, Indigenous Concerns Resource Center, and with a broad range of Indigenous and human rights organizations, advocates, and other sources of verifiable information on Kenya.

II. Introduction and Background

“In Kenya, the peoples who identify with the indigenous movement are mainly pastoralists and hunter-gatherers, as well as some fisher peoples and small farming communities. Pastoralists are estimated to comprise 25% of the national population, while the largest individual community of hunter-gatherers numbers approximately 79,000...They all face land and resource tenure insecurity, poor service delivery, poor political representation, discrimination and exclusion. Their situation seems to get worse each year, with increasing competition for resources in their areas.”

To date, Kenya has passed no specific legislation on Indigenous Peoples and has yet to endorse the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and ratify International Labour Organization (ILO) Convention 169. The principle of Free, Prior and Informed Consent (FPIC) remains one that Indigenous Peoples in Kenya are advocating for.

For the Maasai people of the Rift Valley in Kenya, being evicted from their homeland has become all too common. Over the years, the government of Kenya has dispossessed over 4,000 families in the Naivasha region. Without alternative land to settle on or compensation for the losses they incurred during forced evictions, these families’ fates are uncertain. In the 1980s, the Maasai were evicted from their land to facilitate the creation of the Hells Gate National Park. Discoveries of massive potential for geothermal energy within the park made their land and homes an international point of interest for both local and international power-generating companies. Kenya Wildlife Services (KWS), which “owns” and manages Hell’s Gate Park, leased part of the land to the state-owned Kenya Electricity Generating Company, KenGen, and an independent power producer by the name OrPower to undertake extractive processes for the generation of geothermal energy. Now the Maasai, who are sandwiched between Mt. Longonot, Hells Gate Park, and Lake Naivasha, are being forced out again. The Olkaria geothermal plant, funded by the World Bank and its affiliate banking institutions, and supported by the UN Environmental Program, is in its fourth phase of the development. With each new phase, the Maasai have been evicted from their homes—without their Free, Prior and Informed Consent. To date, the Maasai have received no compensation for the devastating loss of their land, livelihoods, and cultural heritage.

II. Introduction and Background

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III. Threats to Physical Security Violent

On July 26, 2013 hundreds of mercenaries hired by KenGen in collaboration with the provincial administration, accompanied by armed police officers, stormed a Maasai settlement in Narasha, Naivasha and burned over 61 homesteads. During the raids, 500 lambs, 200 calves and food storages were burnt. Two men were shot and wounded and had to receive hospital treatment. Over 2000 people were left homeless. Narasha has been home for the Maasai but a land deal perpetrated by the former government regime has perpetually been bent on taking their land and evicting them. The land in question was sold to KenGen for the production of geothermal power with funding from the World Bank.

IV. Rights to Land and Resources

The Maasai seek compensation for past evictions, and assurance against potential future evictions, by provision of alternative land. Evictions for the next stage of geothermal development would displace over 3,500 families, removing them from the communities’ two churches and Maasai cultural center, and would take over 1,000 children out of school in Narasha and Olomayiana.

The World Bank reports that it has invested $409 million in geothermal development since 2007; in 2013 it announced plans to raise another $500 million for geothermal projects in the Rift Valley and other parts of the world. None of this budget has been allocated to fairly compensate the Maasai community, whose land has been usurped to make room for the projects. The evictions violate international human rights law, including the UN Declaration on the Rights of Indigenous Peoples, ILO Convention 169, and the African Charter on Human and Peoples’ Rights. The Maasai have resorted to the courts to stop further evictions, arguing that the government of Kenya is in violation of international law by forcibly and continuously removing them from their ancestral lands around Mt. Longonot in the Naivasha Administrative Districts and the Narok North Administrative Districts within the Rift Valley Province, without proper prior consultation or adequate compensation.

The area is important to the Maasai both for its history and their dependency on the land for their livelihoods and culture. Mt. Longonot is central to the Maasai religious and traditional practices, and further dispossession will separate the community from historical prayer sites, places of ritual, and other cultural ceremonies. These sites were used regularly for local ceremonies, and annually for cultural festivities involving Maasai from the whole region.

Furthermore, geothermal resources in Olkaria have been exploited with no regard for the health or environment of the local communities. Despite being touted as a green energy, KenGen’s Environmental and Social Impact Assessment shows that geothermal power plants release certain pollutants into the environment including noise pollution, hydrogen sulphide gas, and trace metals like boron, arsenic, and mercury. Toxic wastes from the power station in Naivasha have been emitted into the air and disposed in local waterways in violation of applicable international environmental standards.

Despite these hazards, KenGen failed to conduct adequate consultation with the local community, which first expressed its dismay at the assessment in 2012. The Maasai have not been able to raise money to conduct an independent study on the harmful effects of the plant, but have noted increase of gastronomic and skin diseases, stillbirths in cattle, premature death of livestock, and increased rate of premature delivery in pregnant women. The company’s environmental impact assessment notes potential health risks associated with the plant and recommends safe distances in the Narok district. However, since there was no effective consultation with community members, people were never informed of these health risks.

Outside of the Narasha area, Maasai pastoralists in Kedong, Akira and Suswa are glaring at massive evictions arising from a group of concessions awarded to several companies including Hyundai, Toshiba, Sinopec and African Geothermal International (AGIL) for the purposes of developing geothermal projects on the Maasai lands.

According to the local communities—who claim ancestry to the land and have filed cases in Kenyan courts—African Geothermal International (AGIL) and Marine Power along with Akira I and Akira II have disregarded court injunctions instituted by the Maasai, proceeding to deploy their heavy machinery to their proposed project sites without due diligence or consultations with the local communities. The concession areas, which cover hundreds of thousands of acres, are home to thousands of Maasai pastoralists.

The communities feel that their rights have been grossly violated because each of the companies have failed to adhere to the Maasai Bio-cultural Community Protocol, which was developed in line with the UNEP model and based on the Convention on Biological Diversity, that require all external actors to respect Indigenous Peoples’ customary laws, values and decision making processes; particularly those concerning stewardship of their territories and lands.

The companies have also disregarded a current dispute between Kedong Ranch Ltd and the Maasai community along with key provisions from the Constitution of Kenya (2010). Article 40 of the Constitution provides for the protection of the right to property (of any kind) without discrimination and just, prompt and full compensation where acquisition is of national interest. The right to a clean and healthy environment is equally guaranteed under Article 42 in addition to the right to a cultural heritage.

While the Maasai are not against infrastructure development for the country, they are equally distressed over the companies’ similar dismissal of the principle of Free, Prior and Informed Consent (FPIC) as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). By forcefully evicting the Maasai from their land while denying them the opportunity to participate in and benefit from the development projects, the companies are also in contravention of the Nagoya Protocol on Access and Benefit Sharing.

On top of these concerns, the Maasai decry the use of armed police to enforce the evictions, the destruction of their property, and the outright dispossession of their grazing land which is the only source of their livelihoods.

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6 See World Bank response to community Maasai complaints dated 3/12/2009
8 See World Bank response to complaints lodged by Olkorianai Maasai Cultural Center dated March 26th 2012
9 See Marine Power ESIA 2012
10 See letter from Nature Kenya on the violation of social and nature safeguards
Access to Education (Articles 13, 14)

The right to education is not included in the Kenyan Constitution, and while the country has guaranteed free and universal education, there is a lack of implementation. Schools and students often lack the resources needed to learn, including books, classrooms, and supplies. Oftentimes, secondary and higher schooling are too expensive for Indigenous people, particularly the costs of supplies. For example, 86% of Samburu families do not have the money to send their children to school or buy the necessary supplies. The Kenyan government established a Constituency Bursary Fund to help those who cannot afford school supplies, but there are not sufficient funds to truly make an impact. Even if they are able to attend schooling, a study found that Indigenous Peoples have obstacles, “such as being caned, being abused, instant physical punishment from teachers and prefects”. Classrooms are crowded and there are a lack of available teachers- the average student-to-teacher ratio of Kenya is 47 to 1. Furthermore, the “lack of appropriate and relevant education for Indigenous children hampers the primary education as well as higher education”, particularly for hunter-gatherers and pastoralists. Indigenous students are often told in school that they should give up their language and beliefs and are ostracized for their traditional clothing. One NGO has tried to address this problem by creating a schooling system that incorporates afternoon and evening classes so as to accommodate the students’ schedules, but this is far from a comprehensive solution.

III. Concluding Observations of CESCR from 2008

1. The Committee is concerned that disparities in the enjoyment of economic, social and cultural rights, including access to land, have led to inter-ethnic tensions and post-election violence during which at least 1,500 persons were killed early in 2008. It is also concerned that perpetrators of such violence have still not been brought to justice. (art. 2, para. 2)

The Committee recommends that the State party address disparities in the enjoyment of economic, social and cultural rights, including access to land, which particularly affect poor people in urban areas and minority and indigenous communities in rural areas, e.g. by adopting the Draft National Land Policy, establishing land inspectorates to monitor discriminatory allocation of land, and implementing the recommendations of the Ndung’u Commission of Inquiry into Illegal/Irregular Allocation of Public Land. It also recommends that the State party establish a tribunal on post-election violence to bring perpetrators to justice, as well as a Truth, Justice and Reconciliation Commission to address broader historical injustices, and that it foster dialogue and promote comprehensive reconciliation among its different ethnic groups.

The Committee recommends that the State party consider ratifying ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.

IV. Kenyan Report

The state party report does not adequately address Indigenous rights nor answer questions around securing Indigenous Peoples’ rights to lands and resources.

V. Legal Framework

ICESCR Article 1(1)

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

ICESCR Article 15(1)(a)

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

VI. The CESCR Committee General Comments

General Comment 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)

16 http://docstore.ohchr.org/SelfServices/FilesHandler.
36. States parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by Indigenous peoples. The strong communal dimension of Indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories. 37. Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts. States parties should respect the principle of free, prior and informed consent of Indigenous peoples in all matters covered by their specific rights.

VII. Other UN Body Recommendations

Follow up to 2010 (First Cycle) UPR Recommendations

Recommendation nº35: Ensure that public policies for combating poverty are in accordance with the rights recognized in the International Covenant on Economic, Social and Cultural Rights and that they are not negatively affected by commitments that might be undertaken in the context of trade and investment agreements (Recommended by Bolivia).

Kenya has ratified the ICESCR and is therefore bound to its articles. In this regard, Kenya should recognize the indigenous pastoralist tribes’ right to free, prior and informed consent regarding any infrastructure or development project that would affect their lands, natural resources, property, cultural expression, and sacred sites; as well as require all development projects, including the road construction, oil and geothermal exploration and exploitation, and tourism development projects underway or planned meet the highest international standards and best practices in regard to their environmental and social impacts.

Recommendation nº64: Better educate security and law enforcement authorities at all levels about the basic rights of the citizens, take each reported case seriously and impartially investigate and punish those found guilty of such actions (Recommended by Finland).

Recommendation nº24: Take effective measures against police violence, in particular by ensuring comprehensive investigations and the prosecution of alleged offenders within the police and security forces (Recommended by Austria).

The National Police Service is established by the National Police Service Act of 2011. The Service holds a constitutional duty to train its staff to respect human rights, fundamental freedoms and dignity of the human person. The Police must comply with constitutional standards of human rights and fundamental freedoms. National trainings should take place for all police officers, judges, prison guards and other enforcement officers, especially those working in districts populated by indigenous and other marginalized minorities. Investigations need to take place into the police violence against the Samburu and Maasai people, and those responsible for the extrajudicial killings need to be punished.

Recommendation nº100: Follow up on the recommendations made by the Representative of the Secretary-General on the human rights of internally displaced persons, particularly those relating to the need to adopt measures for reconciliation and to implement a comprehensive strategy for the internally displaced (Recommended by Mexico).

Recommendation nº128: Continue to devote great attention to the situation of the most vulnerable groups (Recommended by Senegal).

Recommendation nº33: Continue to take all efforts necessary to implement the recommendations of United Nations special procedures who have visited the country, and request international assistance to that end, if deemed necessary (Recommended by Bolivia).

Many important recommendations from the Special Rapporteur have not been implemented, such as; constitutionally recognizing indigenous peoples, the creation of effective mechanisms to address historical injustices and settle current land and natural resource disputes resulting from dispossession of lands traditionally owned by pastoralists and hunter-gatherers, the Government should adopt the current draft ASAL policy and fully implement it with the participation of pastoralist communities.

Recommendations during the second cycle:

“101.114. Implement the recommendations and decisions of its own judicial institutions and of the African Commission on Human and Peoples’ Rights, particularly those relating to the rights of Indigenous Peoples (Bolivia);” 16

“Strengthen effectively the protection of the rights of indigenous peoples, including to their ancestors’ lands.” (Cape Verde)

“Continue implementing the legislation on the protection of the rights of indigenous peoples and their lands, as well as the anti-

16 http://docstore.ohchr.org/SoT5Services/FilesHandler.ashx?enc=6QkG1d%2fPPRlCAqhlh9i7y9yhu22L%2bcWBEro6ezgoYNishm1ABMVpBXJ0K9E2qAqqYmpsh7KgboWHKC9Fr4cs3cNvYpqMn3gZsOEmgs93TT10h52idNO44HmMQIX0zgcopFULL
discrimination laws, especially with regard to religion and physical conditions such as albinism.” (Holy Sea)

“Continue to uphold the rights of indigenous peoples and minorities, including vulnerable groups.” (Senegal)

“Ratify Convention No. 169 of the International Labour Organization.” (Chile)

**Human Rights Committee**

Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012:

“The Committee recommends that, in planning its development and natural resource conservation projects, the State party respect the rights of minority and indigenous groups to their ancestral land and ensure that their traditional livelihood that is inextricably linked to their land is fully respected. In this regard, the State party should ensure that the inventory being undertaken by the Interim Coordinating agency with a view to obtaining a clear assessment of the status and land rights of the Ogiek community be participatory and that decisions be based on free and informed consent by this community”17

**VIII. Questions**

1. What is the government of Kenya doing to promote Indigenous rights and protect land rights?

2. How is the government of Kenya implementing the World Conference on Indigenous Peoples Outcome Document from 2014?

**IX. Recommendations**

We respectfully request that the Committee pressure the Government of Kenya to comply with the following actions:


2. That the government of Kenya recognize Indigenous Peoples in the national constitution.

3. That the government should stop operating with impunity and in disregard of the law and contrary to the provisions of the Kenyan constitution and other International human and people's rights instruments.

4. That the current deployment of armed police to enforce the evictions of Maasai communities be stopped immediately.

5. That the companies mentioned be held in contempt for disregarding court orders.

6. That plans for compensation be put in place, including a clear and documented plan on access to benefit sharing be put in place to ensure the affected families’ livelihoods are sustained.

7. That the following international donors and companies be held accountable for losses suffered by the Maasai and demand that they put in place safeguards and develop consultative and inclusive forum with the Indigenous inhabitants of the land:
   - Sinopec-China
   - KEC-India
   - Hyundai-South Korea
   - Toshiba, Toyota, Tsusho, and JICA-Japan
   - AGIL
   - Marine Power

8. That other bilateral donors that support the projects being undertaken hold consultative meetings with the Maasai community before any further investments are made.

9. That the current ESIA reports which excluded livestock, homes and cultural rights should not be used and instead a team that includes Indigenous People be reconstituted to undertake another Environmental and Social Impact Assessment.

10. That the selective and non-consultative process of compensation process that is currently being used by KenGen should be transparent and that all deserving community members be treated equally and in consultation on the identification of suitability of alternative resettlements to their pastoralist life.

FAILURE TO REFRAIN FROM AND PREVENT FORCED EVICTIONS

In its concluding observations to Kenya in December 2008, the Committee stated its concern regarding forced evictions from forests, slums and informal settlements and on road reserves. The Committee therefore recommended “the State party consider including a provision in its new draft Constitution to ensure that evictions are only used as a last resort, adopt legislation or guidelines strictly defining the circumstances and safeguards under which evictions must take place, in accordance with the Committee’s general comment No. 7 (1997) on forced evictions, and ensure that each victim of forced evictions is provided with adequate alternative housing or compensation and that he or she has access to an effective remedy.”

Amnesty International acknowledges that part of the Committee’s above recommendation has been implemented. The adoption and coming into force of Kenya’s 2010 Constitution has been a significant development since the country’s previous periodic report submitted to the Committee in 2006. Kenya’s 2010 Constitution recognizes a number of economic, social and cultural rights including the rights to health, education, water, sanitation and housing. Article 43 (lb) of the Constitution of Kenya states: “Every person has a right to accessible and adequate housing and to reasonable standards of sanitation”. The High Court of Kenya has, in at least three different cases, interpreted this right in Article 43 to include a prohibition on forced evictions. In some instances, the Court has also recommended that national guidelines be developed to ensure that any evictions from settlements do not violate the constitutional rights of the residents. In a 2013 ruling concerning a case of forced evictions in Nairobi, the High Court of Kenya directed the government to develop an appropriate “legal framework for evictions based on internationally acceptable guidelines”. The court also called on the Kenyan parliament to enact legislation following consultation and public participation that would address the issue of forced evictions and security of tenure.

However, forced evictions in Kenya continue and the above-mentioned court rulings that have upheld the right to adequate housing and ordered governments to provide remedies to victims of forced evictions, are yet to be implemented.

SELECT CASES OF FORCED EVICTIONS

Amnesty International has documented a number of forced evictions carried out by state authorities, often to make way for infrastructure development projects, and by private entities during the period of review. The evictions have been carried out in the absence of due process requirements as outlined in international human rights standards including the lack of adequate notice, genuine consultation and legal remedy including adequate compensation. Thousands of people have been left homeless and vulnerable to other human rights abuses as a result of the evictions. Below are a few examples of forced evictions carried out in the present reporting period.

In October and November 2011, state authorities carried out mass forced evictions in five informal and formal settlements in Nairobi. Officers from the regular and administrative police and the General Service Unit, acting with officials from the Kenya Airports Authority (KAA) and the city council carried out demolitions of homes and other buildings and evicted residents in Kyang’ombe informal settlement on 22 October, Kenya Ports Authority (KPA) settlement on 29 October, the non-slum settlement of Syokimau on 12 November, and a settlement in Embakasi where Maasai manyattas were demolished on 17 November. All demolished settlements are located close to the Jomo Kenyatta International Airport. Evictions also took place in Mitumba informal settlement, located near Wilson Airport on 19 November, and in settlements close to the Moi Airbase in Eastleigh on 22 November. Thousands of people were affected by the evictions. KAA officials maintained that evictions close to the airports were necessary because the settlements were in restricted flight paths and around restricted airport areas, and needed to be demolished to avert potential air disasters in the future. No reason was given for demolitions in areas close to the Moi Air base. In Kyang’ombe, thousands were forcibly evicted at night despite an existing temporary injunction from the High Court preventing demolitions and evictions taking place pending a hearing regarding ownership of the land on which the settlement was located. Residents told Amnesty International that a car drove around the community throwing eviction notices out of the windows some three months prior to the evictions. These notices were in specific reference to the need to move from the flight path of the airport. However, residents were not clear about the geographical scope of the flight path and whether the notice applied to some people or everyone in the settlement. Community leaders wrote to the KAA requesting clarification on the boundaries of the flight path, but received no response.

On 28 January 2012, an eviction in Mukuru Kwa N’jenga led to the deaths of three people. One woman was electrocuted by a live power cable which fell during the eviction, whilst another woman was shot. A child was killed when protestors demonstrating against the eviction fled from police. No notice was issued to residents before the January 2012 eviction, and many residents were away at work when the demolitions began. Some of the affected residents had previously been forcibly evicted from Kyang’ombe informal settlement in December 2011. In response to the Mukuru eviction, Prime Minister Raila Odinga issued a statement calling for evictions in the country to be halted until there was a government policy in place to ensure that forced evictions did not take place. Despite this statement, state agencies have continued to threaten and carry out forced evictions.

On 10 May 2013 approximately 200 men arrived at City Carton, an informal settlement near Wilson airport, accompanied by 170 police officers who used tear gas and fired ammunition during the demolition. The men, who were reportedly hired by an agent of an institution that claims to own some or all of the land on which the City Carton settlement was built, proceeded to use hammers, crowbars and machetes to demolish most of the homes in the settlement. On 17 May at least 100 men returned to the settlement to demolish the remaining houses and fence off the area. According to the police officers, the demolition was authorized by an order of the Milimani Law Courts. However, the court order, which Amnesty International obtained after the eviction, did not authorize the demolition of
homes but only allowed the confiscation of movable property from two people against non-payment of rent. The demolition of homes in City Carton was a criminal act carried out by private individuals in the presence of police. It resulted in the forced eviction of an estimated 400 families from their homes. While some of those forcibly evicted sought housing in other settlements in Nairobi, hundreds of people - those with no alternatives - are now still living over two and half years later along a dirt track beside the demolished area in temporary shelters constructed from bamboo and cardboard. Lacking access to adequate water and sanitation facilities, the forcibly evicted families are living in extremely precarious circumstances that pose serious risks to their health and safety.

After the forced eviction, City Carton residents appealed to the High Court of Nairobi for remedies against the forced eviction. The High Court in October 2014 confirmed that the demolition amounted to a forced eviction and awarded Ksh 84 million as compensation to the affected families. However, the affected families are yet to receive their compensation or any temporary assistance from the state while the case is going through the appeals process.

In January 2014, hundreds of homes belonging to Sengwer, an Indigenous People living in Embobut Forest in the Cherengany Hills area of Kenya, are alleged to have been burnt in order to evict the inhabitants. The World Bank, which had financed a project which provided (inter alia) capacity-building support to the Kenya Forest Service (KFS) - the agency that carried out the evictions - issued a statement in February 2014 to express its alarm at reports of evictions and “strongly encourage the Kenyan authorities to thoroughly investigate claims made by civil society, including the affected communities, that the evictions are not following the legal process”. Community members who were evicted allege that they were given no advance notice of the evictions. The KFS has not issued any communication to indicate that an investigation was carried out or that officers responsible for the evictions were subject to administrative or criminal investigation. On 18 February 2015 the High Court of Eldoret, ruling on a separate contempt of court issue, stated that the evictions had been unlawful.

Community members who experienced the evictions, interviewed by Amnesty International in March and December 2015, stated that the evictions had a significant negative impact on their right to health (ability to source traditional herbal remedies only available in the forest). Community members who have returned to the forest, insisting that they cannot live anywhere else, told Amnesty International that their children have to walk up to four hours to get to school because the state does not provide any services in the forest.

On the night of 17 May 2015 scores of families living in Jomvu, an informal settlement along the A 109 highway in Mombasa, awoke to the sound of a bulldozer and the arrival of armed police. Even as they desperately tried to salvage their belongings, the bulldozer demolished their homes and small businesses. It was a terrifying ordeal, which left many people homeless. The demolitions were carried out by the Kenya National Highways Authority as part of preparations for a highway expansion project. The highway expansion project involves widening part of the road to ease traffic congestion. It has been financed by the African Development Bank, the German Development Bank, the European Investment Bank, the EU-Africa Infrastructure Trust Fund, and the Government of Kenya. According to eyewitnesses, the bulldozer systematically demolished shops and homes that bore yellow crosses. Those operating the bulldozer and the police did not inform Jomvu residents about the purpose of the demolition or on whose orders they were acting. The demolition stopped at around 4am, although not all of the marked structures had been demolished. While leaving the area and declaring their intention to return the following day, those carrying out the demolitions advised people whose houses or businesses had been marked to demolish their structures by themselves. Many people started tearing down their homes and shops soon after the bulldozer left the area, in order to try and save valuable building material for later use.

The demolitions at Jomvu constitute forced evictions and a violation of international human rights law. They rendered more than a hundred people homeless and destroyed livelihoods. Following Amnesty International’s research and advocacy, the Kenya National Highways Authority expressed regret for the forced evictions and agreed to provide remedies to all those affected. At the time of preparing this submission, affected families in Jomvu were still waiting to be provided with effective remedies.

**ABSENCE OF LEGISLATION THAT EXPLICITLY PROHIBITS FORCED EVICTIONS**

Article 21(2) of the Constitution mandates the state to adopt legislative and any measures necessary to create an enabling environment for the progressive realization of economic and social rights. In a recent ruling concerning a case of forced evictions in Nairobi, the High Court of Kenya directed the government to develop an appropriate legal framework for evictions based on internationally acceptable guidelines. The ruling also urged the Kenyan parliament to enact legislation following consultation and public participation that would address the issue of forced evictions and security of tenure. However, despite these requirements and the recommendation by the Committee for the same, the government of Kenya is yet to enact the necessary legislation.

In its report to the Committee, the government of Kenya has pointed out that they have a draft Eviction and Resettlement Bill 2012 which provides guidelines on how evictions are to be carried out. Amnesty International welcomes this development. However, the organization notes that although the Ministry of Land, Housing and Urban Development has produced draft bills on this issue since 2011, there has been little discernible progress in terms of ensuring that the draft bill is finalised, shared for public consultations and introduced in parliament with a view to expediting its adoption as law.

Amnesty International understands that the Ministry of Land, Housing and Urban Development is no longer promoting the Evictions and Resettlement Bill but has drafted a Land Laws Amendment Bill 2015 which includes guidelines on evictions and resettlement. Civil society organizations that Amnesty International met have expressed concerns that the Land Laws Amendment Bill 2015 dilutes protections against forced evictions. Another bill that could further the realisation of the right to adequate housing and increase protection against forced evictions is the Community Land Bill which aims to provide legal recognition and protection of community land rights; previously only recognized under customary law. The bill is currently in its second stage of reading before the National Assembly. However, civil society organizations have raised concerns about flaws in the bill including on weak provisions on consultation and participation.
FAILURE TO PROVIDE EQUAL ACCESS TO ESSENTIAL SERVICES IN INFORMAL SETTLEMENTS

Amnesty International’s research in 2009 and 2010 highlighted the lack of adequate sanitation within informal settlements and slums in Nairobi, reflecting decades of neglect because of the government’s failure to recognize these areas for city planning purposes and the non-enforcement of applicable domestic law and regulations. During the research many women emphasized how the lack of toilets/latrines and bathroom facilities combined with the lack of effective policing, left them at high risk of sexual and other forms of gender-based violence.

The majority of Nairobi’s residents live in informal settlements and slums and most do not have access to public water supplies which are available to other residents of the city. The longstanding government view that informal settlements are illegal mean that local authorities have not been held responsible for providing access to water and other essential services. The majority of slum residents use shared pit latrines, if these are available, and mostly only during the day. Women interviewed by Amnesty International said that one pit latrine would be shared by up to 50 people living in different households. Most women interviewed by Amnesty International had to walk more than 300 metres from their homes to use the available latrines. Most latrines are full and rarely emptied, and pose serious health problems to residents. The common use of “flying toilets” in informal settlements is a result of the inaccessibility of toilet facilities. Because many of the settlement areas do not fall within the boundaries covered by formal urban plans, public government or local authority facilities for pit emptying services are in general, rarely used in the settlements. The poor state of the roads into settlements and other factors, such as the long distances to the official dumping site have also contributed to the high cost of latrine emptying services, acting as a further disincentive to maintaining services.

Under Kenyan law the primary responsibility to ensure adequate access to sanitation at a household level rests with the private individuals and companies that own the houses and structures inhabited by most people living in the settlements. The Public Health Act and relevant provisions of the applicable Building Code make provisions regarding minimum standards which include sanitary requirements. The local authorities and public health officials are required to supervise the compliance of these standards by individual private developers. Section 126A of the Public Health Act provides for the power of “every municipal council and every urban and area council” to make and enforce by-laws in relation to buildings and sanitation. However, Amnesty International found that these laws and regulations were not enforced in four settlements it visited in 2009. This was partly because the settlements fall outside areas covered by urban plans and as a result, proper sanitation infrastructures, including settlement connection to public sewer lines were not ensured.

The absence in practice of any official supervision of existing laws and standards means that private developers, including landlords and structure owners, often construct houses without complying with sanitation requirements. Structure or house owners focus primarily on maximizing incomes by renting out a high number of structures or houses and paying little attention to the availability and adequacy of sanitation facilities. Residents told Amnesty International that a single structure owner would usually own tens of houses but not pay attention to the needs of families for toilets and shower spaces. Most residents, usually tenants, can do nothing about the poor sanitation or the fact that structure owners are not complying with existing laws and standards because City Council and public health authorities will not act, as they still consider slums and informal settlements irregular.

The scarcity of essential services has a particular impact on women and girls as set out below. This is particularly the case in relation to the absence of adequate sanitation in most informal settlements. Women interviewed by Amnesty International described the ever-present risk of sexual and other forms of gender-based violence because of the long distances they have to travel to reach toilets and other sanitation facilities. For the significant majority of those interviewed, the lack of adequate access to toilets and bath facilities meant that they would not dare use the limited available facilities because they were far away. Inadequate and inaccessible toilets and bathrooms, as well as the general lack of effective policing and insecurity, make women even more vulnerable to rape and other forms of gender-based violence.

Ibrahim Sangor Osman & 1222 Others v the Minister of State for Provincial Administration and Internal Security and 10 Others (2010) (www.kenyalaw.org/Forum/?p=348); Susan Waithara and 4 Others v the Town Clerk, Nairobi City Council and 2 Others, 2011 (http://kenyalaw.org/Downloads_FreeCases/80847.pdf)
Satrose Ayuma and Ors. vs. The Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme and Ors. in the High Court of Kenya at Nairobi, Petition No. 65 of 2010 para 109.
High Court of Eldoret, David Kiptum Yator et al v. the Honourable Attorney General et al. pp 61
Satrose Ayuma and Ors. vs. The Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme and Ors. in the High Court of Kenya at Nairobi, Petition No. 65 of 2010 para 109.
RECOMMENDATIONS

In seeking to ensure the State fulfils its obligations with regard to the right to adequate housing, Amnesty International recommends that the Kenyan authorities:

• Adopt and enforce a national-level moratorium on mass evictions until adequate legal and procedural safeguards are in place to ensure that all evictions comply with international human rights standards and national laws.

• Prioritize the enactment of legislation that explicitly prohibits forced evictions, clearly lays down legal and procedural safeguards against forced evictions and complies with Kenya’s constitutional and international human rights obligations to guarantee the right to adequate housing.

• Develop comprehensive guidelines based on the UN Basic Principles and Guidelines on Development-based Evictions and Displacement, and other international human rights standards for officials in charge of carrying out evictions.

• Implement judicial orders that provide remedies to victims of forced evictions as a matter of priority.

• Take concrete steps towards guaranteeing security of tenure for all, especially residents of informal settlements.

• Ensure equal protection under the law to all the people living in informal settlements including by applying and enforcing legislation requiring landlords to construct toilets/latrines and bathrooms in the immediate vicinity of each household.

• Provide assistance to structure owners who are unable to meet the costs of construction of toilets/latrines and bathrooms.

• Ensure local municipalities are legally responsible for the provision of essential services, including water and sanitation, to all city residents without discrimination including those living in informal settlements.
“WE MUST LEARN TO LIVE TOGETHER AS BROTHERS OR PERISH TOGETHER AS FOOLS”

MARTIN LUTHER KING JR.
Write nouns or adjectives in the following:

- boy
- crying
- this
- house
- school
- she
- my aunt
- those
- good apples
- our dogs
- the man
- sick
- the boys
- playing
- flower
- where
- my pen
- tomorrow
Kenya National Commission On Human Rights (KNCHR)

Alternative Report to the United Nations Committee on Economic, Social and Cultural Rights
## INTRODUCTION

1. The Kenya National Commission on Human Rights (KNCHR) is an independent Human Rights Institution with ‘A’ status accreditation. It was established in 2003 by statute with the mandate of protecting, promoting and monitoring the exercise of human rights in Kenya. The commission was subsequently re-established Pursuant to the provisions of Article 59 of the Constitution and Act No. 9 of 2011.

2. KNCHR, present this submission for consideration as part of the reports that the committee could rely on during the session. The submission includes recommendations of some key steps which in our view the State should take to further ensure respect for, protection and promotion of human rights.

3. The Submission is drawn largely from reports and studies which KNCHR has undertaken. This includes investigative reports on violations, advisories made to State organs, assessments of the extent to which the State is fulfilling its human rights obligations, reports and briefings to international human rights mechanisms and the National Assembly and other mechanisms.

4. Below are the key issues that the commission considers key in ensuring that the rights of Kenyans are promoted and protected:

## REPORTING ON THE SUBSTANTIVE PROVISIONS

5. Kenya ratified the United Nations Covenant on Economic, Social and Cultural Rights on 1st of May 1972; the state was last reviewed by the ECSR Committee during its 41st session in 2008. Between the last review and the current review Kenya underwent through Constitutional Reform and Legislative reform with the Promulgation of a new Constitution on 27th August 2010.

6. The New Constitution ushered in a new era in terms of the protection and promotion of rights: The Constitution in Article 2(5) and 2(6) Provides that all the Conventions and treaties that had been ratified by the state before the coming into force of the Constitution would be applicable in Kenya.

7. Article 2(5) of the Constitution on the other hand recognizes that the Conventions and Treaties that have been ratified by the state will form part of the Kenyan law and will be applicable in Kenya as long as it does not run contrary to the Constitution.

8. The Constitution of Kenya in Chapter Four entitled the bill of rights makes provision for the Economic, Social and Cultural rights in Articles 43 and 44 of the Constitution; the effect of these provisions is that these rights are now Justiciable.

### Article 1. RIGHT TO SELF-DETERMINATION

#### Legislation

9. Kenya is a democratic sovereign state. The Kenyan Constitution affirms fundamental national principles and values of unity, participation of the people, equality, equity, inclusiveness, human dignity, sustainable development, and protection of fundamental freedoms, non-discrimination and protection of the marginalised and vulnerable people.

10. The Constitution of Kenya sets various timelines for the enactment of various legislations to achieve the various facets of Article 43 of the Constitution.

11. The Fifth Schedule of the Constitution 2010 provides for particular laws to be enacted within set timelines. It is worth noting that some of the proposed timelines have been postponed for various reasons, the timeline for enactment of all the legislations under schedule 5 of the Constitution has been extended to 27th of August 2016.

12. The process of developing specific legislation and policies and the implementation program to give effect to the Constitution is underway at national and county levels by the National Assembly, County Assemblies and Ministries.

13. The Constitution in Article 6(1) and 6(2) Provides for the establishment of governments at national and county governments in order to devote services closer to the people. The devolved governance aims at giving Kenyans a greater say in determining the development initiatives in their local areas. Kenya is yet to realize this object, as little effort is being demonstrated at national and county levels.

14. The system of devolution is aimed at providing greater citizen involvement in how development, economic, social and cultural rights as well as political engagements are undertaken. Unfortunately, there have been challenges in respect to fiscal accountability regarding allocation of funds and the duplication of roles of various funding initiatives at national and county levels.

#### Internal and External Challenges on Self-Determination

15. In the period under review Kenya faced a challenge from a group known as the Mombasa Republican Council (MRC) seeking secession of parts of the Coastal region from the rest of the country. In seeking to secede from Kenya the Members of MRC used violence in pursuing their objectives; the violence resulted in the loss of lives and property.

16. In response to the threat caused by the MRC the state applied the provisions of the Prevention of Organised Crimes Act (No. 6 of 2010) to ban the MRC claiming that it was an organized group seeking to cause chaos and destruction of property. The MRC

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1 See Article 10 of the Constitution of Kenya
2 Gazette Notice No. 12585 of 18 October 2010.
responded to the ban by the state by challenging the ban. Although the High Court reversed the order banning MRC, finding that it was a political group, it also clarified that the Constitution did not contemplate secession and instead asserted the unitary and indivisible sovereignty of Kenya.

17. Despite the court victory for the MRC, there have been reports on the use of excess force by the Government in its response to the MRC’s insurance due to the notion held by the state that MRC was linked to the Al-Shabab terror network; This notion was however dispelled when the Courts overturned the Government's designation of the group as a “terror group” since the group was registered as per Kenyan law.

18. The Government’s reaction should be aimed at addressing the genuine concerns raised by the MRC which include marginalisation, economic development, education and infrastructure development. Some of the key complaints raised by the MRC were political and economic discrimination, land allocation, land tenure and rampant forced evictions in the area.

19. Further, in its final report, the Truth Justice and Reconciliation Commission found out that land-related injustices at the Coast are one of the key reasons for under-development in the area, that caused the emergence of the Mombasa Republican Council, thus recommended for investigations into and recovery of illegally or irregularly acquired land, its adjudication and registration by the National Land Commission.

Proposed Recommendations

a). The State should address the concerns raised by members of Mombasa Republican Council.

b). The State should fully implement the TJRC Report that will address the concerns of the

c). Mombasa Republican Council

d). The State in dealing with the insurgent group must do so within the confines of the law and must ensure that their Constitutional rights are safeguarded

e). The State must pursue a programme of inclusion that will ensure that all citizens will participate in and be part of all the processes targeting them

Article 2. PROGRESSIVE REALIZATION OF RIGHTS

20. The Constitution provides that the right to adequate standard of health, accessible and adequate housing, adequate food, clean and safe water, social security and education are subject to progressive realization requiring the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under article 43.

21. On two different occasions, the court pronounced itself on this issue noting that right to housing is, by consensus, amenable to progressive realization. The High Court however stated that:

“...the argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the State feels it is ready to meet constitutional obligations. Article 21 and 43 require that there should be ‘progressive realization’ of social economic rights implying that the State must begin to take steps, and I might add, be seen to take steps towards realization of these rights.”

22. And on a different occasion it said:

“...three years after the promulgation of the Constitution the right to adequate housing cannot be aspirational and merely speculative.”

23. The above position illustrates the state’s position in respect to allocation of resources to the obligations set by the Convention; the levels of allocation of funds has slightly improved over years but at a rate that is not in consonance with the Committees position on the allocation of the maximum available resources to these rights. To give effect to Article 43 of the Constitution, the Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill 2015 has been drafted by the Senate which seeks to establish a framework for monitoring and enforcement of economic and social rights to ensure county governments adhere to Article 43 of the Constitution.

24. The bill among other things requires county governments to undertake baseline surveys, prepare strategic plans and periodically report on progress made in the realization of economic and social rights. Due to the absence of a comprehensive legal framework, the rights guaranteed in Article 43 of the constitution are unlikely to be realized fully.

Proposed Recommendations

a). The state should adopt rights based indicators and benchmarks to monitor the Progressive realization of the rights recognized in ICESCR.

b). The state should increase national and county budgetary allocation and spending on social services such as housing, health and education so as to achieve, in accordance with article 2, paragraph 1, of ICESCR.

c). The state should prioritize development of policies and laws that will facilitate the national and county governments to comprehensively meet their obligations to respect, protect and fulfil economic, social and cultural rights.

3 Randu Nzai Ruwa and 2 Others v. the Internal Security Minister and Another, Misc. Application No. 468 of 2010 4Note 3 above
4 See the Truth Justice and Reconciliation final Report
5 Mitubell Welfare Society v AG [2013] eKLR
6 Ibid
Article 3. NON-DISCRIMINATION AND EQUALITY

Non-Discrimination on Various Grounds
25. Article 27 of the Constitution 2010 guarantees that a person may not be discriminated on grounds including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The Kenya 2030 Vision has outlined strategies aimed at moving the country towards substantive equality measures to support regions and groups which have been historically disadvantaged on account of region or status.

Rights of Indigenous Groups
26. The Constitution makes specific mention of groups which are liable to be discriminated on account of their vulnerability, including children, women, persons with disabilities, minorities and marginalised groups.

27. The African Commission on Human and Peoples’ Rights (ACHPR) made a ruling against the State in 2010 (Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya). The African Commission recommended that Kenya recognises the rights of ownership and ensure restitution of ancestral land to the Endorois community. The state was further asked to ensure unrestricted access for the community to Lake Bogoria for religious, cultural and grazing purposes, and pay adequate compensation and royalties.

28. The ACHPR in April 2013 held an implementation hearing with the State and the community, resulting in further direction on the implementation of the case. The Truth Justice and Reconciliation Commission (TJRC) in its final recommendations also called for the implementation of decisions relating to minority and indigenous communities – one of which is the Endorois case.

29. The state in an attempt to implement the Endorois decision has put in place a task force on the implementation of the judgement, which include relevant state and non-state actors. The task force is currently compiling its report to present to the president for further action.

Proposed Recommendations
a. The state should put in place an Anti-Discrimination Legislation to ensure that no one in Kenya is discriminated on the basis of the prohibited grounds provided for under the Convention and amplified by the Constitution.

b. The state should put in place measures to ensure the decision of the African Commission on Human and people's rights in Centre Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya) for is implemented.

Discrimination Based on Sex
30. The Constitution also offers better clarity on matters of personal law such as marriage, divorce and inheritance. Specifically, it provides that: “Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage”.

31. While Parliament may still legislate for marriages in terms of different religious or customary traditions, such marriages have to abide by the provision relating to equal rights. Some of the key legislations meant to protect women against violence within the context of marriage, gender based violence and the rights of women during and after the dissolution of marriages are the Protection Against Domestic Violence Act, (No 2 of 2015), Marriage Act, (No. 4 of 2014), Matrimonial Property Act, (No. 49 of 2013).

32. However the fact that the law in Kenya allows polygamy is an affront to the principles of equality between men and women especially due to the fact that upon the demise of a man the woman and children are left vulnerable.

33. Protecting the right to equality for both women and men has also been enhanced following the establishment of the National Gender and Equality Commission (NGEC) by the National Gender and Equality Commission Act (No. 15 of 2011). This constitutional Commission’s mandate includes ensuring that the State puts in place policies, programmes and measures for gender equality and freedom from discrimination in private and government institution, and further, to audit realisation of the equality and non-discrimination principles.

34. The greatest challenge to attainment of equity is the aspect ones culture. Most Kenyan cultures do not equate women to men, thus promulgating the vices of a patriarchal society at the expense of women. The Constitution aims at transforming the culture to an understanding where all persons are equal as regards the realisation of their human rights.

35. The Prohibition of Female Genital Mutilation (FGM) Act was enacted in 2011 and a national policy and action plan on FGM was developed. However, the law is still weak in protecting girls and young women against FGM as it is yet to be aggressively applied. Unless the perpetrators of FGM are arrested and prosecuted, the law will remain ineffective in protecting women and girls from FGM.

36. Despite the fact that Anti-Female Genital Mutilation Board has been set up and it has been trying to address the vice; the Board lacks capacity to discharge its mandate due to limited resource allocation and inadequate support from the key players such as the county governments, politicians and religious leaders.

37. Access to medical care, psychosocial support and justice for women victims of the 2007/8 PEV has also remained a challenge A report by the Kenya Human Rights Commission (KHRC), reveals that the Government has failed in its obligation to survivors of sexual violence in ensuring that perpetrators of sexual based violence are punished and that adequate support is afforded to survivors of sexual violence in the form of medical and psychosocial care.

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9 Article 45 (3) of the Constitution
Proposed Recommendations

a. The state should put in-place appropriate measures to ensure that the harmful traditional practices of female Genital Mutilation is eradicate; it should also increase budget allocation to the Anti-Female Genital Mutilation Board.

b. The state should increase public education and advocacy around the subject of Female Genital Mutilation with the aim of changing public belief on Female Genital Mutilation.

c. The state should increase its support to the National Gender and Equality Commission to enable it discharge its functions as enshrined in the Constitution.

d. The state should consider supporting and establishing Gender Recovery Centres across the Country that will provide comprehensive support to the victims of Sexual and Gender based Violence Victims.

Representation of Women

38. The Constitution directs that not more than two-thirds of any elected body should be made up of more than one gender, has faced some challenges. Kenya’s 10th Parliament was unable to pass legislation to determine how that rule would be realised. The Attorney General sought an interpretation by the court of the law In the matter of the Principle of Gender Representation in the National Assembly (2012) Advisory Opinions Application 2 of 2012, the Supreme Court ruled that the gender rule is progressive and can only be achieved by August 27, 2015.

39. The Political Parties Act, 2011 provides that the registrar of political parties should only register political parties that have complied with the gender rule. However this has not automatically translated to enhanced women participation in political parties as the registrar did not do much to ensure that the Constitutional threshold was met.12

40. It is important to note that there was no woman who was elected as a governor or senator in the March 4th, 2013 Elections. Although 160 women vied for parliamentary seats, only 16 were elected. The total number of women in the 11th Parliament now is 86-16 elected, 47 women county seats and 23 nominated.13

Proposed Recommendations

a. The government should ensure that there is equitable representation of both genders in both elective and appointive positions in particular with regard to the Supreme Court directive in the matter of the Principle of Gender Representation in the National Assembly (2012) Advisory Opinions Application 2 of 2012.

b. The state should ensure that in appointive position there is parity between men and women in compliance to the Convention and the spirit of the Constitution.

Refugees

41. Due to the proximity of Kenya to various countries and the fact that for a very long time Kenya has been a haven of peace; it has received a huge influx of refugees from its neighbouring countries. As at June 2015 the total refugee population in Kenya stood at 552,272.14

42. Refugees due to their status face serious challenges such as Lack of documents for refugees and asylum seekers; this has had the effect of preventing them from accessing registration essential services including medical care, enrolling their children in schools, accessing livelihood opportunities, contracting marriage, obtaining employment, housing and or requesting the issuance of official documents and permits thus forces them to remain in camps.

43. Due to heightened insecurity situation in Kenya the state through the Department of Refugee Affairs issued a directive on 18th December, 2012 instituting a strict encampment policy and ordered the relocation of all the refugees living in urban areas to the already congested refugee camps in Dadaab and Kakuma.

44. In Kituo Cha Sheria v. Attorney General (2013), a petition was filed before the High Court on 22 January 2013 challenging the government encampment policy. The judgment was delivered on July 26, 2013 in which the directive was quashed on the grounds of unconstitutionality.

45. Despite the fact The Refugee Act 2014 elaborates the rights of refugee women and children and the government’s responsibilities to them. Which responsibilities include the provision of appropriate protection and assistance to refugee children or children in need of refugee status; facilitation for family tracing and reunification; and the protection of children whose family members cannot be found in the same way as children who are temporarily or permanently deprived of family.

46. Minimal progress has been made by the government on setting up mechanisms for family tracing and reunification of children in displacement situations as provided for in the Children Act 2001 and the Refugee Act 2014.

47. Kenya enacted the Basic Education Act 2013 which regulates primary education in Kenya. The Act states that non-Kenyan citizens have to pay tuition fees. Education therefore for the refugee children outside refugee camps may be inaccessible due to prohibitive costs violating their right to education.

Proposed Recommendations

a. The state should not issue inflammatory statements alluding to the fact that the refugee camps are training camp for the militant organizations.

b. The State should enhance security in the refugee camps while respecting the human rights of refugees and the general public.
c. The State should promote an inclusive approach to the development of any repatriation plans for refugees; desist from promoting involuntary return whether through the suspension of registration or other forms of coerced return and should promote the recognition of alternative legal statuses for refugees in Kenya.

d. The state with the help of UNHCR should ensure that refugee children access basic education in the camps that is relevant and quality.

e. The state should respect the international norm of non refoulement and also the high court decision on encampment policy of refugees.

f. The state should upscale its efforts to ensure that the tracking and reunification programme takes root; this will enable families to be re-united.

Citizenship and National Documentation

48. Accessing the National identity document in Kenya has been a historical challenge since there are a lot of bureaucratic procedures to be followed before on obtains a National Identification; in some instances Registration of persons was suspended in the Northern part of Kenya to guard against non-Kenyans registering as such. These acts by the state has led to many Kenyan citizens who have come of age not being registered; this has had the effect of denying them other rights such as the right to vote among other rights.

49. Communities such as the Nubian Community have been treated as stateless persons because they have been denied identity cards on the guise that they are not Kenyans. The Kenya Citizenship and Immigration Act (No. 12 of 2011) was enacted in 2011 with the hope of resolving Kenya’s statelessness problem by providing for mechanisms to ensure that persons who for one reason or another did not take up citizenship following the country’s independence may do that now.

50. Unfortunately, the process of obtaining identification documents by persons of Somali origin and other minority groups such as the waata has been strenuous on the individuals as the vetting procedure is long and technical, there are allegation of bribery and corruption in the process.

51. The situation was made worse during the recent security threat relation to Operation Linda Nchi 2014. The security initiative profiled specific communities, prejudiced some individuals who did not have proper identification and subjected to grave human rights violations.

Proposed Recommendations

a. The state should put in place measures to ensure no one in Kenya is discriminated on the basis of prohibited grounds provided for under the convention and amplified by the constitution.

b. The state should put in place mechanisms to ensure full implementation of the Kenya Citizenship and Immigration Act (No. 12 of 2011)

Internally Displaced Persons (IDPs)

52. The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (No. 56 of 2012) establishes a rights-based response to internal displacement.

53. This law stresses Kenya’s international human rights obligations by explicitly giving effect to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Great Lakes Protocol on the Protection of and Assistance to Internally Displaced Persons, as well as the United Nations Guiding Principles on Internal Displacement.

54. The Draft National IDP Policy aimed at dealing with issues affecting displaced persons and affected communities was approved by cabinet in October 2012 but is yet to be tabled in parliament for debate and approval.

55. The Great Lakes Protocol on the Property Rights of Returning Persons specifies that Kenya has an obligation to assist IDPs and/or resettled IDPs to recover, to the extent possible, their property and possessions which they left behind or were disposed of upon their displacement. The minimal funds (ex gratia payments) that were being issued to the victims through Operation Rudi Nyumbani were too meagre to be considered as a comprehensive compensation.

56. The State established an initiative to support displaced persons and affected communities either to return or resettle indifferent locations. Currently there are more than twenty IDP resettlement sites across the country majority concentrated in the Rift Valley region.

57. As much as the government has tried to address the protection needs of IDPs and affected communities, still there exist about thirty satellite IDP camps across the country and unaddressed needs of the integrated IDPs. Slightly more than 500 families several who sought refuge in Uganda as a result of the 2007/8 post-election violence have been repatriated, although there still remain some who are yet to return.

58. The major impediment is the lack of political will to comprehensively address internal displacement in the Kenya; with likely increased displacements as a result of development based projects such as the Lamu Port and South Sudan Ethiopia Transport (LAPSET) Corridor project, Coal mining in Kitui among others.

59. Lack of comprehensive consultative processes on issues affecting displaced persons and affected communities are evident on government led programmes in achieving durable solutions to displacement in Kenya. Such example is the IDP resettlement/or relocation programing that affect the IDPs and host communities directly whereby most families were relocated, returned or resettled without consultations. In most IDP settlement sites, the houses constructed by the government remain unoccupied citing insecurity and lack of infrastructure such like health facilities, schools, water, electricity and markets.

15 UPR 2011-2012, op.cit., p.32
Proposed Recommendations

a. There is need to adopt the national policy on IDPs to address accountability on assistance to IDPs by the multi-national companies related displacement and complementary procedures as may be caused by their activities which the legislation does not address.

b. The state should also ratify the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa to enhance its partnership with the African Union to ensure that in case the government of Kenya is not able to deal with arising political instability or any other event causing displacement, there is option of receiving assistance from the African Union member states an issue not explicitly provided by the national legislation. The state should adopt a broader and more flexible approach to durable solutions which includes but not limited to land based solutions with a greater emphasis on livelihoods, documentation and access to basic services.

c. The state should establish an IDP compensation fund for purposes to facilitate compensation to deserving cases.

d. The state should undertake a comprehensive audit on all government implemented programmes to ascertain the level of durable solution realized on internal displacement and also collect high-quality data on the number of IDPs and their situation as a prerequisite for promoting a common understanding of displacement and effective responses.

Recognition of the Youth

60. The Youth have a vital role in shaping the present and future of the country’s social, economic and political development. The formulation of the National Youth Policy and the establishment of the Youth Council are important advances towards enhancing youth development in Kenya.

61. The National Youth policy spells out the strategic areas that must be addressed in order for Kenya’s young people to effectively play their role in nation building. These strategic areas are: employment creation, health, education and training, sports and recreation, the environment, art and culture, the media and participation and empowerment.

62. Perhaps one of the greatest challenges that the youth face is unemployment which the state has tried to address by establishing a revolving Youth Fund and the reservation of 30% tenders in state institution for youth, Persons with disabilities and Women. Whereas the ideas as conceptualized by the state are noble the challenges in the implementation of these initiatives are enormous and has had a negative effect of denying the would be recipients access to the funds; the challenges include corruption, nepotism and pilferage of funds meant for the youth and women.

63. There have been allegations that the tenders reserved for youth, Women and the disabled are awarded to businesses that do not necessarily belong to these special interest group the awarding of the tenders has been linked to due to corruption and nepotism therefore making the initiative counterproductive to its intended purpose.

Proposed Recommendations

a. The state should streamline its programmes on the Youth fund, Women Fund and the reservation of tenders for special groups so that they may benefit the intended beneficiaries.

b. The state should address the rampant corruption in the programmes that it has initiated targeting the youth, women and special interest groups.

c. The state should re look at its educational curriculum in order to make it responsive to the market demands and make it relevant to the skill set demanded by the market.

Sexual Orientation and Gender Identity

64. The KNCHR report on the Inquiry on Sexual and Reproductive Health Rights in Kenya (2012) revealed that lesbians, gays and bisexual people still suffer human rights violations including discrimination and stigma, exclusion from decision making processes, limited access to sexual reproductive health services, lack of protection from STIs and HIV and AIDS as well as lack of recognition from the society of their existence. The State is in the process of preparing the 4th National Health Action Plan for 2014. The Plan seeks to pay particular focus on MARP’s (Most at Risk Persons) population which include the MSM community. The State has embraced public participation in the process and engaged organisations working on MSM populations in the consultative process.

65. On 17th June 2011, a Resolution was submitted to the United Nations by South Africa requesting a study on discrimination and sexual orientation passed, 23 to 19 with 3 abstentions. The resolution called on the UN High Commissioner on Human Rights to draw up the first UN report on challenges faced by LGBTI people worldwide. Kenya was one of the countries that opposed the resolution.

Proposed Recommendations

a. The state should consider the enactment of legislation on equality and nondiscrimination with provisions on sexual orientation and gender identity as protected grounds;

b. The state should develop of comprehensive policy guidelines on the health rights of LGBTI persons and their access to HIV/AIDS prevention, care and treatment measures, well informed and unbiased mental health services, and provision of reproductive health services;

c. The state should develop a policy on treatment of transgender and Intersex conditions.

96 Ibid. p. 48
97 Ibid. p. 49
98 UPR 2011-2012, op.cit., p. 36
99 UPR 2012-2013, op.cit., p. 55
100 UPR 2010-2011, op.cit., p.23
ECONOMIC RIGHTS

Business and Human Rights

66. This role of business has also been recognized by the Government through Kenya Vision 2030 which commits to ensuring that a conducive environment for business is created, maintained and continuously improved; further the Vision has committed to support the growth of infrastructure for Small-Medium Enterprises given that they are Kenya’s main employment sector.

67. The UN protect, Respect, Remedy Framework which clarifies the roles and responsibilities of governments and business in relation to human rights under three pillars: the State duty to protect; the corporate responsibility to respect and access to remedial mechanisms for victims of corporate related human rights violations.

68. The Guiding principles are grounded in recognition of: State’s existing obligations to respect, protect and fulfill human rights and fundamental freedoms; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and the need for rights and obligations to be matched to appropriate and effective remedies when breached.

69. These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

Communities in Extractives Areas

70. Minerals, oil, gas and other precious stones continue to be discovered in Kenya. In some areas prospecting is still at the initial stages; in some Companies have finished prospecting and are awaiting the go ahead from the state to start the extraction activities. Companies such as Titanium base have already started mining the Minerals and have already processed and exported them.

71. For a very long time due to the fact that Minerals and other natural resources had not been discovered the legal regime governing the extractive industry remained outdated and did not for example provide for means of protecting local communities in the face of extractive activities: due to this realization the state proposed to enact the Mining Bill 2014 to give effect to Articles 60, 62 (1) (f), 66(2), 69 and 71 of the Constitution in so far as they apply to minerals.

72. The Bill has been passed by Parliament and is awaiting Presidential Assent. As Kenya’s mining sector expands, the Government is tasked with developing measures that protect the welfare of communities and the people of Kenya as a whole.

73. The Government has commenced consultations to put in place a policy and legislative frameworks and National Action Plan on Business and Human Rights that allow for adoption of good practices that ensure local communities are not disadvantaged in terms of revenue sharing, employment, compensation and relocation.

74. However the Government rarely consults the communities in mining areas and in particular the indigenous people living in the mining areas. Further, the laws are not clear on revenue sharing agreements and how the community will benefit from the natural resource. The media has, on numerous occasions highlighted how the inhabitants of a region rich in resources may not benefit directly due to corruption and economic exploitation by private mining companies.

75. It would be important for the state to enact the Access to Information Legislation to ensure that communities can access information held by the companies and the state in respect to the extractive activities in their areas and that might affect them; this will also help in clarifying to the communities the kind of benefits secured for them in the mining agreements and leases.

Proposed Recommendations

a. The state to fast track the enactment of the Access to information Legislation
b. The state should put in place a public participation policy
c. The government should develop national policy, legislative frameworks and National Action Plan on Business and Human Rights to govern business in the country in line with the United Nations guiding principles on Business and human rights.
d. The state should ensure that the Communities are Consulted and that they consent to the extractive activities being conducted

e. The state should ensure that there guidelines on compensation of communities that are likely to be affected by the extractive activities

Combating Corruption

76. The ICESCR Committee in the last review recommended that the State party intensifies its efforts to prosecute cases of corruption and review its sentencing policy for corruption-related offences. It also recommended that the State party train the police and other law enforcement officers, prosecutors and judges on the strict application of anticorruption laws; conduct awareness-raising campaigns, and ensure the transparency of the conduct of public authorities, in law and in practice.

77. The state has made certain steps towards effecting the recommendation: introduction of the Anti-Corruption and Economic Crimes Act 2003 and Amended in 2011, establishment of the Ethics and Anti-Corruption Commission (EACC), training of AntiCorruption Prosecutors; Increase in budgetary allocation to the Ethics and AntiCorruption Commission among other Measure aimed at tackling Corruption.

78. Despite the robust measures that have been put in place Corruption cases and allegations continue to rise: One of the main reason for this is that there seems to be an effort to tackle low level corruption while the high level corruption is glorified and the suspects not charged in courts as the low level perpetrators; this has created a culture of impunity around the Corruption Question.

79. The interference with the Ethics and Anti-corruption commission by the executive has also contributed significantly in the continued corruption; in many instances the members of the Ethics and Anti-Corruption Commission have been edged out of office in the guise that they lack the passion and will to fight and deal with corruption.

80. The members of the EACC are often edged out especially when the commission has starts tackling high level corruption; the Process of appointment to the commission takes inordinately long time therefore slackening the pace of dealing with corruption.

81. Despite the fact that most corruption cases have been investigated in Kenya; the outcomes of the investigations have largely remained unknown; the case in point is the Triton Case, Anglo leasing, Goldenberg Scandal, NYS Scandal and many others. The state and Ethics and Anti-Corruption Commission will need to ensure that the cases that have been investigated are concluded and the suspects arraigned in court to face charges.

82. In March 2005, during the address of the state of the nation, the president read and handed over the names of alleged corrupt state officials including the cabinet secretaries for investigations and prosecution. Since then several cases have been investigated, and files forwarded to courts for prosecution while others have been dropped due to lack of sufficient evidence.

**Proposed Recommendations**

a. The state needs to increase budgetary allocation to Ethics and Anti-Corruption Commission to enable it improve the capacity of its staff in terms of the staffing and training levels.

b. The state needs to restate its position and commitment to fighting corruption.

c. The state should not interfere with the affairs of the EACC.

d. The state should ensure that all cases of corruption are fully investigated and action taken on Perpetrators.

e. The government should conduct widespread public awareness campaigns for the citizens to understand that corruption undermines the effective protection and promotion of human rights and therefore develop a culture that discourages corrupt practices.

**Access to Land**

83. The land policy and legislative framework has in the past been managed within multiple laws and regulations. Kenya also has a new land policy, which together with the Constitution forms the bedrock of new land laws that have been passed since 2010. These new laws include: the Land Act (No. 12 of 2012) and the Land Registration Act (No. 3 of 2012).

84. In February 2013, the National Land Commission was made operational. The Commission is tasked with various duties, but faces various challenges. Kenyans may not be conversant with the operations of the Commission which poses a threat to how citizens may access to the services offered by the institution. Secondly, there has been recent strife between the Commission and the Ministry of Lands. The contention relates to understanding the mandates and the supremacy of the two institutions.

85. Finally, a key aspect in the judicial arena involves the establishment of the Land and Environment Court to focus specifically on land and environmental issues by the Environment Land and Court Act (No. 19 of 2011). This avenue has offered redress for various land matters between citizens. Unfortunately the judicial system is faulted for being expensive and too technical for the ordinary citizen. Further, the judiciary is weighed down by a backlog of cases thus cases take several years to conclusion. The deeply entrenched vested individualistic interests have denied the much needed political and business support for land reforms to take place. Most powerful people in this arena, especially the recipients of the past land regime see the reforms as a hindrance to personal power and wealth.

**Proposed Recommendations**

a. The state should fully implement the developed five-year National Strategic Plan to guide implementation of the National Land Policy that focuses, the devolution of land management, land registration, natural resource management, national land information management system and resolution of land-related disputes.

b. The state should increase the Number of Judicial officers manning the Land and Environmental Courts to ensure that the land disputes are expeditiously concluded

c. Fast track the enactment of Community Land Bill.

d. The state should fully implement the recommendations of the Truth Justice and Reconciliation Commission as it relates to the land question.

**Article 6. RIGHT TO WORK**

86. It is estimated that youths aged 15-19 and 20-24 years have unemployment rates of 25 percent and 24 percent, respectively. This is about double the overall unemployment of 12.7 percent for the entire working-age group. Based on the 2009 census, the open unemployment rates declined for youth, but among youth aged 15-19 and 20-24 years these rates were about 15.8 percent and 13.1 percent, respectively; relative to a total unemployment rate of 8.6 percent.

87. The importance of this right is affirmed by the fact that Kenya has ratified 49 International Labour Organization (ILO) Conventions, including seven of the eight Fundamental Conventions; three of four Governance Conventions (Priority); and 39 of the 177 Technical Conventions.

88. The country’s long-term development blueprint, the Kenya Vision 2030, identifies work as a critical component of the

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22 The Standard Digital, “Unemployment and hopelessness among youth bad for the economy”, May 5th 2013, Kenya
economic pillar, stressing that social cohesion may not be attained when significant segments of the population remain in abject poverty. Vision 2030 includes equity as a recurrent principle in economic, social and political programmes. Special attention has been given to investment in arid and semi-arid (ASAL) regions, communities with high incidence of poverty, unemployed youth, women and all vulnerable groups.

89. The increase in the generation of jobs is attributed to improved economic performance coupled with increased access to cheaper credit from financial institutions, and from the Women Enterprise Fund and the Youth Development Fund. The main challenges at the Women Enterprise Fund level included: inadequate WEF field personnel, inadequate field facilitation, low loan amounts, delays in disbursements and a multi-layered Fund structure.

90. At the lender level, high cost of loan administration, competition with commercial bank products, poor dissemination of information, misconception about the purpose of the Fund, high default rates, high den and limited scope of coverage, lack of distinct product branding, bureaucratic processes.

91. Limited business monitoring and delays in funds disbursement from the central government, were the main challenges. Lastly at the borrower level the challenges included: inadequate loan amounts, limited and shrinking markets/competition, lack of business knowledge, diversion of the funds, low literacy among segments of women borrowers, lack of loan securities, lack of individual choices in group lending and domestic interference.

92. Formal and informal employment can provide a mechanism of ensuring that the youths are empowered so that they are engaged and involved in developing the economy. The government conceived the idea of institutional financing as a way of addressing

93. The concept is based on the premise that micro, small and medium enterprise development initiatives are likely to have the biggest impact on job creation. The Youth Enterprise Fund has been met with a lot of criticism as to the mechanism of how the funds are being disbursed. There is a growing demand from interested youths that the Government should devise some mechanism to ensure adequate, fair and effective distribution of the funds right to the grass root level.

94. The Government alone cannot ensure creation of 500,000 jobs every year hence there is a need to involve development partners and the private sector in the process of resource mobilization for the implementation of youth employment Marshall Plan.

**Proposed Recommendations**

a. The state should adopt effective measures to reduce unemployment. Furthermore, it should ensure that the economic, social and cultural rights of temporary workers are effectively respected.

b. The State should take effective measures to increase the rate of employment, particularly in rural areas, and to overcome the difficulties in framing and implementing its employment policies.

**Article 7. RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK**

95. The Constitution of Kenya establishes every worker’s rights to: fair remuneration; reasonable working conditions; membership of a trade union; and to strike. The Employment Act (No. 11 of 2007) complements the Constitution by detailing the fundamental rights of employees as well as providing for basic conditions of employment: it forbids forced labour; provides for equality of opportunity in employment; outlaws discrimination; legislates for equal remuneration for work of equal value; and protects against sexual harassment.

96. Due to unemployment and poverty, there has been migration of Kenyan citizens to foreign countries in search of a means of livelihood. Migrant workers have travelled to various countries, but of interest are the Kenyans who travel to the Middle East to work as domestic workers.

97. There have been numerous media reports of cases where the Kenyan citizens are either ill-treated, denied medical attention, physically, verbally and sexually assaulted, receive no or unreasonable compensation or killed in the Middle East. One of the key factors leading to situation is the presence of fake recruitment agencies that are not concerned with the welfare of the Kenyan worker but with their own economic benefit.

98. KNCHR receives complaints from relatives of migrant workers alleging that the latter are being ill-treated and seek the Commission’s intervention to protect the person’s welfare. In order to protect its citizens, the Ministry of Foreign Affairs is discouraging Kenyans from such migration and has engaged the Government of the Kingdom of Saudi Arabia over the issues.

99. In September 2014, the Labour Cabinet Secretary suspended the recruitment and movement of domestic workers to the Gulf Region and Middle East. The minister said the move would enable the government put in place adequate structures for the effective management of labour migration and protection of migrant workers. The ban on migration has been criticized by the Kenya Association of Private Employment Agencies (KAPEA) stating that the government should have given notice of the same and that genuine agencies should not be prejudiced in the government’s response to the case situation.

100. There is an on-going battled between the Government and other concerned parties at an attempt to balance the interests of the migrant workers, diplomatic relations and legitimate recruitment companies. The Government is negotiating bilateral agreements with various countries in the Middle East and considering establishment of vibrant consular offices in the countries so as to provide access to justice and protection of the rights of migrant workers in the respective countries.


Proposed Recommendations

a. The Government should ensure that the development partners enhance and continue to support the various youth unemployment intervention measures already established to ensure that they become sustainable.

b. The state should review all relevant legislation to ensure just and favourable conditions of work for all workers, including the minimum wage, working hours and rest days, and improve data collection, particularly on zero-hour contracts.

c. The state should take the necessary steps to ensure that the minimum wage applies to all employees and ensures a decent living for workers and their families.

d. The State should ensure that employees are guaranteed and paid a salary at least at the level of the national minimum wage and take urgent steps to strengthen the capacity of

Article 8. RIGHT TO FORM AND JOIN TRADE UNIONS


102. The strike was over a memorandum of understanding (MOU) that the teachers reached with the then Ministry of Education representatives in 1997, involving salary increment and other allowances to harmonise their salaries with those offered to civil servants.26 However 15 years down the line, the State is yet to harmonise teachers’ salaries or make good the contents of the said MOU.27

103. The Registrar of Trade Unions has on several occasions declined to register trade unions where the substantial interests of members of the proposed unions were already represented by already existing unions.

Proposed Recommendations

a. The state should allow the Workers unions to operate without interference with their operations

b. The State should take legislative and other measures to ensure that all workers, including foreign and migrant workers, can join trade unions.

c. The State should take effective measures to ensure that workers are protected from any retaliatory actions following their involvement in trade unions.

Article 9. RIGHT TO SOCIAL SECURITY

104. This refers to a variety of public-spending programs designed to provide income and services to individuals in the event of retirement, sickness, unemployment, or disability; these are generally designed for basic poverty alleviation for the most vulnerable members of the society. The State recognises how essential it is to ensure vulnerable groups like children, older persons and persons with disabilities do access amenities of life such as food and shelter.

105. The Constitution in particular identifies persons who are vulnerable as ones that should receive social protection from the State on a priority basis. The National Social Protection Policy has sought to respond to this constitutional imperative through the use of various instruments to deliver social protection to the poor and vulnerable. Government should allow a multi-faceted approach that encourages the private, public and civil sectors to contribute towards the realisation of the right to social security.28

Rights of Persons with Disability

106. Article 54 (1) (c) of the Constitution 2010 provides that a person with any disability is entitled to reasonable access to all places, public transport and information. Persons with disabilities face numerous challenges in accessing essential services such as buildings, communication and transport facilities.29

107. The Persons with Disabilities Act 2003 establishes the National Development Fund for Persons with Disabilities. The Fund was operationalized in 2010. The Government has used the project to disburse funds to persons with disabilities, organisations and institutions that provide services to persons with disabilities.

108. In 2010, the Ministry of Gender, Children and Social Development began an Economic Empowerment Project which disburse funds to groups of persons with disabilities for promoting the economic independence of persons with disabilities. In April 2011, the Ministry began a cash transfer system for persons with severe disability for ten households in every electoral constituency.

109. In 2012, the system was expanded to target seventy (70) households per constituency. Despite the resources made by the Government, the challenge remains as the amounts are inadequate to meet the needs of PWDs, especially for women whose children have severe disabilities.


111. The Government should ensure the representation of PWDs particularly in the Senate, Legislature and County Assemblies, as it is only through political and economic participation that PWDs can secure their rights.30

26 UPR 2011-2012, op.cit., p. 32
27 Ibid
29 Ibid, p. 38
30 Ibid, p. 38-39
Proposed Recommendations

a. The state should elevate as a matter of priority and within a specific time frame the process to review the Persons with Disabilities Act 2003 and bring it into line with the human rights-based approach to disability;

b. The state should take steps to promote the employment of persons with disabilities, as well as to protect them from discrimination in the workplace. The Committee also recommends that the State party ensure effective compliance by public institutions with the 5 per cent quota accorded to persons with disabilities.

Protection for Elderly Persons

112. One of the Key mechanisms through which the government can prepare Kenyan for old age is through appropriate policy interventions. 31 In its Policy Framework and Plan for Action on Ageing, the African Union observes the need for Governments, NGOs, private sector and the society in general to be prepared to deal with a future situation in which the number of older people is forecasted to grow at a very rapid rate. 32

113. The United Nations General Assembly Proclamation on Ageing, paragraph 2 recommends that appropriate national policies and programmes for the elderly should be considered as part of a government’s overall development strategy. The government developed the program PesakwaWazee but the initiative has been marred by corruption and lack of accountability.

114. The State has to date rolled out cash transfer programmes to cover older persons, orphans and vulnerable children (OVCs), and persons with severe disabilities. During the last four years, money has been allocated on an annually increasing basis to each of these groups to be transferred to individual households across the country. The cash transfer program should be expanded to include all PWDs and not just the seventy targeted households per county. 33

NSSF & NHIF

115. The social security system under Kenyan laws is ‘employment centered’. Furthermore, the social security protection envisaged under Kenyan laws does not recognize or make any provision for vulnerable groups such as refugees, asylum seekers, internally displaced persons 34.

116. The State should place a policy framework that would recognize and provide for the right to social security for all Kenyans especially the poor, the unemployed, older persons, persons with disabilities, refugees and other marginalized groups. 35

117. State agencies strive to ensure that minimum work standards apply within the informal sector. The situation of workers in informal employment is gradually being improved through their inclusion in social protection schemes and health schemes. For example, now, even workers with minimal earnings can become members of the National Hospital Insurance Fund (NHIF).

Proposed Recommendations

a. The state should streamline and address the concerns of corruption and delays in disbursement of the cash transfer programs

b. The state should increase budgetary allocation to the social cash transfer programs

c. The State should take steps to ensure universal social security coverage, and extend the coverage of social security to all workers in the private sector, as well as persons with disabilities in line with general comment No. 19 (2007) on the right to social security.

d. The state should ensure universal health insurance coverage of its Citizens.

Article 10. PROTECTION OF THE FAMILY

118. The Government is committed to promoting the welfare of the family, which is critical in the realisation of the economic, social and cultural rights for individuals.

Protecting the Rights of Women

119. The Government drafted three family law bills – the Marriage Bill 2012, the Matrimonial Property Bill 2012 and the Protection against Domestic Violence Bill 2012 – to give effect to the constitutionally guaranteed rights of the family. The Bills are expected to be enacted into law in the 11th Parliament.

120. While there has been an attempt to establish gender desks in some police stations, they have proved ineffective in dealing with cases of violence against women as they are not manned by skilled personnel. There is also no adequate gender based violence recovery centres throughout the nation, and the ones that exist are unable to provide effective redress to gender based violence. In fact, services for victims of gender-based violence are mainly provided by non-state actors. 36

121. The state in acceding to the treaty had placed a reservation on Article 10 on maternity leave; the law in Kenya namely the Constitution and the employment Act now reflect the provisions of the convention on this issue.

32 Ibid
33 UPR 2011-2012, op.cit., p. 39
34 UPR 2012-2012, op.cit., p. 71
35 Ibid, p. 72
Combating Under Age Marriage and Female Genital Mutilation (FGM)

122. The Prohibition of Female genital Mutilation Act was passed in 2011 and a National Policy and Action Plan on FGM were developed. However, the law is still weak in protecting people against FGM as it is still yet to be aggressively applied. Unless perpetrators of FGM are arrested and prosecuted, the law will remain ineffective in protecting women and girls from FGM.38

123. Under age marriage remains a challenge arising mainly due to poverty and lack of economic opportunities for girls especially in rural areas, cultural and religious beliefs and practices.

Counter Trafficking Measures

124. In Kenya the problem of trafficking in persons particularly affects the country as a major host for asylum seekers and refugees and a travel hub within the East African region. Women and children are particularly vulnerable to this vice. Trafficking undermines the quality of life of the victims, many of who are already vulnerable or in difficult circumstances and often subjects them to a life of servitude, exploitation, violence and other forms of abuse.

125. The State is yet to launch and implement its national plan of action, convene the Counter Trafficking in Persons Advisory Committee, take tangible action against trafficking complicity among law enforcement officials, including police, labour inspectors and children’s officers.

126. The State’s efforts remain uncoordinated and lacked strong oversight, creating an environment conducive to trafficking. Further, while the Act provides for the protection of trafficked persons found in Kenya, there are no victim shelters where such persons can be accommodated. Victim support services such as provision of psycho-social support are also not available.37

Protection of Vulnerable Children

127. Every child is guaranteed the right to a name and nationality at birth, basic nutrition, shelter, and healthcare, protection from abuse, neglect and harmful cultural practices, violence, inhuman treatment, and hazardous or exploitative behaviour. Every child also has the right to parental protection and care. One of the Government’s initiatives to protect vulnerable children includes the provision of Cash Transfers for OVCs. The State should show an account of the initiative.

Proposed Recommendations

a. The state should remove the reservation placed on Article 10 on the rights of women to maternity leave
b. The State should take urgent steps to address child labour, including through ensuring effective enforcement of legislation protecting children from economic exploitation and exposure to hazardous or abusive work.
c. The State should ensure that all cases of domestic violence are investigated and that perpetrators are promptly prosecuted and sentenced
d. The state should upscale its efforts to eradicate Female Genital Mutilation and further support the Anti FGM Board.

Article 11. RIGHT TO ADEQUATE STANDARD OF LIVING

Tackling Poverty

128. Article 204 of the Constitution establishes that Equalization Fund. The fund is meant to provide basic services including water, roads, health facilities and electricity in marginalized areas. Over the years, the Government has introduced various avenues to address economic growth and poverty in the country.

129. The various initiatives: Constituency Development Fund (CDF), Constituency Bursary Fund, free primary education fund, Local Authority Transfer Fund (LATF), Poverty Eradication Loan Fund, the National Development Fund for PWDs, Women’s Enterprise Fund and the Youth Enterprise Development Fund.

130. Budget allocation for the poverty alleviation programs was increased during the 2011/12 financial period. To promote rural development for employment and poverty reduction, the Government increased provisions for the Economic Stimulus Program (ESP) projects to ensure that they were fully completed and initiate new projects. ESP projects were in health, education, fish enterprise development, agriculture, irrigation, youth employment and support for ASALs using devolved funds.38

131. Despite the various funds and projects initiated by the Government, the marginalized communities still do not receive the basic services and if they do it is of low quality. Plans have been developed but rarely implemented due to corruption practices at all levels of service delivery.

132. The recent (2011) World Bank Forensic Audit Report on the Arid Lands and Resources Management Project in Northern Kenya linked the 2010/11 hunger in the region to fraud.39 Tight anti-corruption measures and effective monitoring and evaluation plans must be implemented to ensure development funds are used effectively and results achieved. There is delay in relaying feedback to individuals applying for the various funds. Processing the request forms takes a long time and feedback to the individuals on whether they have qualified for the funds is slow and sometimes no feedback is given.40

133. Effective assessment of these programmes requires the documentation and publishing of the Government’s poverty alleviation strategies. However, the Government has failed to adequately monitor and document the effectiveness of these strategies.

37 UPR 2012-2013, op.cit., p. 40
38 UPR 2010-2011, op.cit., p. 29
39 Ibid
40 Ibid, p. 30
Right to Food & Food Security

134. The policy institutional framework guiding the Ministry of Agriculture is the Sector Development Strategy (ASDS 2009-2020) reflecting the aspirations of the Kenya Vision 2030 framework which aims at improving prosperity of Kenyans through economic development programmes, and also ensuring enhanced agricultural strategies focusing of food security.49

135. In 2011, the Government put in place various programmes that focus on reduction of food security, such as the Njaa Marufuku Kenya Programme and the National Accelerated Agricultural Input Access Programme (NAAIAP). The effect of the programs has not been significant over the years.

136. The UN General Comment 12 makes special mention of vulnerable groups and obligated the State to develop special programs to cater for the various groups concerned. Factors leading to food insecurity, particularly in Northern Kenya, include recurrent drought, conflicts, insecurity and crop failure. Insecurity along the Kenya-Somalia border disrupts market supply to people leading to low levels of supply of food and other necessities.

137. Further, inflation has raised the cost of commodities which may not be attainable by majority of the people in the region. In 2012, the Kenya Food Security Steering Group (KFFSSG) confirmed that about 2.2 million people are classified in either crisis or stress phases of food insecurity down from the 3.75 million people in 2011. The strategic national grain reserves were almost depleted.

138. Of most concern is that the interventions are largely through food aid from relief agencies which intervene through general distribution, food assets, cash for assets and unconditional cash transfers modalities.40 The National Food and Security Nutrition Policy states that over the past 30 years, per capita availability of food has declined by more than 10%.41 The country has been dependent on relief and aid and long term solutions are required to tackle the issue of food security.

139. There needs to be a coordinated and holistic approach to ensuring food security in Kenya which includes among others undertaking legislative, policy and administrative measures. There is also need to monitor cross border issues that affect food security in the country. The development and adoption of the National Disaster Management policy should be fast tracked and regular studies conducted to determine the food supplies level.42

Right to Water and Sanitation

140. The National Water Quality Management Strategy (2012-2016) has been developed to streamline and harmonize water quality management. The Ministry of Water is also undertaking measures geared towards ensuring provisions for development of water storage units address the perennial water shortage including enhancing irrigation countrywide.43

141. An emerging issue for the environment, water and irrigation sector is enshrining the rights to clean and safe water in adequate quantities and also to reasonable standards of sanitation.44 The Pro-poor Implementation Plan for Water Supply and Sanitation 2007 provides that the Government through the Ministry of Water and Irrigation commits to meet the MDGs which target to half by 2015 the proportion of people without sustainable access to safe drinking water and giving access to the poor the highest priority on all levels.

142. Sustainable access to safe water in Kenya is estimated at 60% in the urban areas, dipping sharply to 40% in the rural areas.45 The right to water is not enjoyed by all Kenyan. Formal settlements have access to water although sometimes they face water rationing and disruption. However, residents in informal settlements have limited and/or no access to adequate and safe drinking water. In addition, inadequate management of the country’s watersheds has led to excessive soil erosion, increased cost of water treatment and rapid siltation of reservoirs.46

143. The State is expected to ensure equal distribution of water to the entire population. In the case of Ibrahim Sangor Osman versus The Attorney General47 the Court held that the right to water is justiciable and whether or not the right is stated in the Constitution, important statements in international law recognise and ensure that standards of this right are being met.

144. Poor sanitation remains a challenge to the majority of the Kenyan population. The challenge is greater for the urban poor as compared to the rural poor in sanitation. Further, Kenya also has a uniform water tariff irrespective of differences in socio-economic status of users or the quality of the water or the nature of the water use. As a result, the poor person’s access to water and sanitation is severely compromised.48

Proposed Recommendations

a. The State should increase the current food reserves and also provide farm inputs including fertilizer to farmers in order to increase production. There should be improvement of infrastructure to ensure that farmers are able to market their products and also ensure easy access for relief food supplies when delivering supplies.

b. The State should ensure the participation of farmers/food producers in setting prices and decision making on international trade policies. The State should prioritize Agriculture, Livestock, Fisheries, Water, infrastructure, research and other portfolios that impact of food security.

c. The state must put in place land use planning strategies that anticipate growth and plan for water re-generation, conservation and harvesting.

41 Ibid, p.27
42 UPR 2011, op.cit., p. 41
43 Ibid
44 Ibid
46 Ibid
48 Ibid
d. The State should develop and enforce minimum standards of sanitation.

e. The State should ensure water tariffs take into consideration the quality and use of the water.

f. The state must in allocation of funds distinguish the amount allocated for water and sanitation from the estimate for environment, water, irrigation and housing in order to enhance it as a

g. The state should adopt the draft National Water Policy and enact the Water Bill, 2014.

h. The State party should step up its efforts to reduce poverty and integrate a human rights based approach in all poverty reduction programmes and strategies, guaranteeing entitlements to individuals and ensuring accountability.

Right to Housing

145. The Housing Bill 2012 aims at providing effective coordination, facilitation and monitoring of the housing and human settlement sector to provide for capacity building within the housing sector, to establish the Kenya Housing Authority and the National Housing Development Fund for the provision of the right to accessible and adequate housing under Article 43 (1)(b) of the Constitution.

146. The Ministry of Lands, Housing and Urban Development have initiated various programs such as the Appropriate Building Technology Program, Slum Upgrading and Prevention Policy, Eviction and Resettlement Bill, Civil Servants Housing Scheme, Housing Infrastructure and Government Estate Management.

147. The State should harmonize policy and legislation intended to deal with matters of adequate housing in order to prevent any further incoherence in the housing sector. Vision 2030: the blueprint calls for the radical reshaping of all; urban planning processes in order to create conditions for an adequate and decently housed nation in sustainable environment. It recommends the passage of a housing legislation to consolidate all housing-related legislation into one law.

148. An emphasis on the provision of housing for civil servants only by the State and leaving a larger investment in housing to the private sector is likely to be an impediment to the fulfilment of the right to housing and reasonable standards of sanitation.

149. In 2011, the Government launched the Kenya Informal Settlement Improvement Programme (KISP) to improve the housing for the informal sector. But there have been little to no results to speak of. The controversial Kenya Slum Upgrading Project (KENSUP) a project funded jointly by the Government of Kenya and the UNHABITAT/World Bank Cities alliance was premised on the fact that almost half of the Nairobi City’s Population in over 100 slums and squatter settlements live in deplorable conditions with little or inadequate access to safe water and sanitation. Lack of public participation in decision making and political expediency has greatly hampered the success of the project.

150. To improve housing of residents in informal settlements, the Government of Kenya in partnership with the UN HABITAT initiated a pilot project in Kibera Soweto East to rehabilitate the area, through provision of new permanent residential housing, equipped with basic services. About 822 houses have been fully completed; ready to be handed over to 822 households.

Proposed Recommendations

a. a. The State should revise the National Housing Policy and the Draft Housing Bill to, make reasonable provisions, within its available resources, to ensure adequate access to housing especially for the most vulnerable and marginalized groups.

Land Ownership and Forced Evictions

151. Kenya has not ratified the ILO Convention No. 169 but has instead ratified other ILO conventions that are relevant to indigenous and tribal people; Conventions Numbers 29, 111 and 182. This is seen as a hood wink as it is not adequate, until and unless the ratification of the ILO Convention No. 169 takes place.

152. The State should ratify the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which contains protections for indigenous people’s right to land and natural resources. The State should ensure enactment of legislation on community land to provide the legal framework for the use, transfer and management of community land in line with the Constitution 2010. The State should not undertake evictions in the absence of proper guidelines measures to prevent any other or further violations of the rights.

153. The State through the National Land Commission stopped transactions of land belonging to indigenous and minority communities, however the same has been ineffective as there are subsequent reported complaints of eviction of communities by the Government without proper procedures set out in the new land legislations of May 2012. The failure to adequately address land historical injustices in the Coastal region has led to challenges in State legitimacy as epitomized by the rise of the MRC.

154. In February 2010, ACHPR found that the Government of Kenya had violated the rights of the Endorois, an indigenous community, by removing them from their ancestral lands. The government was asked to report on the implementation of the recommendations within three months from the date of notification. First, its response was that this decision will be implemented within the larger framework of the National Land Policy.

155. Before the Human Rights Committee in July 2012, the State indicated that the AGs office and the Ministry of Justice, National Cohesion and Constitutional Affairs were working on an implementation framework. The stakeholders are yet to be

51 Ibid, p. 69
54 Ibid, p. 46
55 Ibid, p.69
56 Ibid, p. 34
57 UPR 2011-2012, op.cit., p. 32
consulted on such a framework. The ACPHR in April 2013 held an implementation hearing with the State and the community, resulting in further direction on the implementation of the case. The TJRC recommended the implementation of decision in the Endorois case.

156. The members of the Ogiek community evicted from the catchment and biodiversity hotspots within the Mau Forest Complex continue to await resettlement in line with the recommendations of a government-sanctioned taskforce.

157. In Satrose Ayuma and Others versus The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others (2013) the court found that the Respondents had violated the petitioners right to adequate housing and sanitation, right to human dignity and the right to the protection of children, especially the right to shelter and education. The Court stated that the Government should develop proper policies and a legal framework for evictions in line with the acceptable international standards.

158. Further, the Government was mandated to ensure the process of reform and redress of the matter should involve all the parties involved in the matter. In the case of Osman versus Minister of State for Provincial Administration & Internal Security and Others (2001) the High Court of Kenya held that the forced eviction of 1,122 people was a violation of various rights under the Constitution, 2010. The Court stated that the appropriate remedy in cases of forced evictions is restitution of the petitioners to the original land and the construction of alternative accommodation. The Court permanently restrained the authorities from further evictions of the petitioners.

159. Forced evictions continue to occur with an example of the May 2013 eviction at City Carton in Nairobi West. The more than 400 families were rendered homeless and in urgent need of food, water and shelter. Police, who were providing food for the eviction, used live ammunition and teargas.

**Proposed Recommendations**

a. The state should ratify ILO convention 169 to promote and protect the rights of the indigenous people

b. The state should put in place a legislative framework that will give effect to the UN guiding principles on Business and human rights

c. The state should fast track the enactment of Community Land Bill

d. The state should implement the decision of the African Court on Human and Peoples Rights

e. Rights with respect to the Endorois

f. The state should ensure that the Indigenous and marginalized communities in Kenya are protected by putting in place enabling legislation in line with the constitutional provision

g. The State should ensure, as part of its National Environmental Policy, that comprehensive independent impact assessments are carried out prior to the setting up of mining projects, and ensure that such activities are not a threat to health and do not adversely impact water, air or soil quality, in particular in rural and remote areas

**Article 12. RIGHT TO HEALTH**

160. The Committee on Economic and Social Rights in its General Comment No. 14 provides two essential elements for the right to health: availability and accessibility. Accessibility of the right has four dimensions: non-discrimination of any person on any grounds; physical accessibility by all; economic accessibility (affordable) and information accessibility on health issues.

161. The Africa Union, 2001, Abuja Declaration on HIV/AIDS, Tuberculosis and other related Infectious Diseases recommended that a State must progressively strive to include its national health budget to 15% of the total national budget.

162. Despite the budgetary allocation and various laws and policies that touch on the right to health in Kenya, access to health still remains a big challenge. Affordability and physical accessibility remains a major hindrance to access to quality healthcare. A quarter of the Kenyan households are located more than 8 kilometres from any form of health facility.

163. Universal health care refers to a healthcare system which provides health care and financial protection to all its citizens. The right to health envisioned by the Constitution does not connote the concept of universal health care as it only provides for a rights to the highest attainable which is to be realised progressively.

164. The NHIF scheme in Kenya can however be stated to be move towards universal healthcare but the major concern is the fact that the fund does not cover everyone, making realisation of health to the very poor and vulnerable people in society a big problem.

165. Other avenues for health financing have included use of devolved funds and prepayments schemes. Prudent utilization of devolved funds such as the CDF and county budgets can provide a mechanism for increasing access to health services for all including the poor.

166. Unfortunately, uncoordinated development has resulted in some of the health facilities built with those funds becoming ‘white elephants’ because of lack of proper planning. Corruption too has shown its ugly face in these developments, resulting in some of the buildings being condemned as unfit for the intended purpose.
167. A presidential Decree was issued in 2013 that made maternal health care free for women. However the same should be translated to policy and resources allocated for the same. So far, many maternal health care facilities are experiencing an overwhelming influx of patients resulting into a myriad of challenges in actualizing this directive, for instance there is a shortage of hospital facilities, infrastructure, personnel capacity and mobile services to those hard to reach places.65

168. The State must develop and put in place a comprehensive maternal healthcare programme that address amongst others: the necessary infrastructure, capacity personnel on pre and post maternal health care and programs to reach hard to reach populations.66

169. The WHO has set a minimum threshold of 23 doctors, nurses and midwives per population of 10,000 as necessary for the delivery of essential child and maternal health services. Kenya’s most recent ratio stands at 13 per 10, 000.67 This shortage is markedly worse in the rural areas where, as noted in a recent study by Transparency International, under-staffing levels of between 50 and 80 percent were documented as provincial and rural health facilities.68

170. Actualization the realisation of the right to the highest attainable standard of physical and mental health and availing women with the necessary reproductive health information and family planning methods is yet to be achieved.73 WHO statistics 2013 indicate that in 2010 maternal mortality rate per 100, 000 births for Kenya was 530.74

**Proposed Recommendations**

a. The state should increase Budgetary allocations to the health sector

b. The state should implement the various recommendations and concluding observations of various treaty bodies relating to the rights to health.

c. The state should guarantee the enjoyment of free maternal services by mothers in Public hospitals by enacting enabling legislation

**Article 13. RIGHT TO EDUCATION**

171. The budget allocation to the education sector has been undermined by gross misappropriation of funds, thus negating the real benefit intended for children. All allegations of misappropriation of funds emerged in 2009, leading to withdrawal of funding by certain development partners. These allegations were confirmed further by the Ministry of Finance in its audit report detailing how public funds were misappropriated under the Ministry of Health and the Kenya Education Sector Support Programme under the Ministry of Education.75

172. In the 2013/2014 National Budget, the education budget consisted of Kshs. 10.3 billion towards free Primary education. Kshs. 2.6 billion for the school feeding programme, Kshs. 20.9 for free Day Secondary education, Kshs.11.7 billion for Secondary schools bursary and Kshs. 800 million to upgrade National Schools.

173. The Government allocated in the medium term Kshs. 53.2 billion for deployment of digital content, building capacity and rolling out computer laboratories. The Government’s laptop project raises the issue of misplaced prioritization of the education sector needs particularly the issue of quality education.76

**Quality of Education**

174. The implementation of the free education programme is facing challenges threatening the quality of education offered. This may be a result of limited infrastructure and human personnel. Kenya needs 52,335 more teachers for primary schools.77 By September 2012, there were 19360 primary schools and 6178 post primary institutions that require a total of 333, 480 teachers. However, the institutions only have 263, 060 teachers, creating a shortage of 70, 420 teachers.78

175. Further, the teachers have gone sought better working conditions and remunerations for over 15 years and have gone on several strikes in pursuit of their rights and agreements made with the Government. In The Teachers Service Commission versus Kenya Union of Post Primary Education Teachers (KUPPET)(2013), the Court held that the employer of the teachers and by extension the Government must secure and protect the rights of the teachers in order to safeguard the rights of the children.

176. Access to education is also not equally realised since free education programme does not address the education needs of children from poor or marginalized backgrounds.79 Schools in rural areas and semi-arid regions suffer greater shortages than schools in urban centres.

177. The Basic Education Act 2013 seeks to address some of the challenges faced by children with special needs. However, integration of children with special needs into the regular school system is still a challenge at both primary and secondary level. Transition levels for children with special needs to the secondary schools is also a challenge as they are required to have the same pass marks as other children.

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65 UPR 2012-2013, op.cit., p.62
66 Ibid, p.63
69 M. Sarah, (2014), op.cit., p. 63
70 Final Audit Report Addressing the Governance Challenges in the Kenya Education Sector Support Programme (KESSP) under the Ministry of Education and the Pending Biils Audit of the Ministry of Medical Services, Ministry of Finance, 2011
71 UPR 2012-2013, op.cit., p. 66
72 Human Resources Sector Development Report. 2011/12- 2013/14
73 Education Sector Medium Term Expenditure Framework 2012/13-2014/15 (January 2012); quoted in UPR 2012, p. 47
74 UPR 2010-2011, op.cit., p. 12
178. There is a shortage of trained teachers for children with special needs and the existing ones are not properly remunerated. Greater emphasis must be placed on these areas (Northern Frontier District), and the need has been recognised by Vision 2030, with two of its flagship projects being the building of at least one primary boarding school in each constituency within pastoral districts, and to build 560 new secondary schools to accommodate the increasing number of students graduating from private schools.

**Proposed Recommendations**

a. The state should address gender and regional disparities in access to Education
b. The state should implement the policy on alternative provision of basic education and training for children in urban slums and other informal settlements.
c. The state should reduce the student teacher ratio in public schools and ensure that the quality of education.
d. The state should increase budgetary allocation for free primary education and free day secondary education, special needs education.
e. The State should take steps to improve the quality of instruction in and physical infrastructure of schools in rural areas and take urgent steps to increase attendance rates, address the high dropout and repetition rates, in particular for girls in rural areas, and address the illiteracy rate among children of indigenous communities

75 UPR 2012-2013, op.cit., p. 65-66
76 Kenya Vision 2030 Popular Version, p.109
CONCLUDING REMARKS

Concluding observations on the combined second to fifth periodic reports of Kenya
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Concluding Observations on the Combined Second to Fifth Periodic Reports of Kenya

The Committee on Economic, Social and Cultural Rights considered the combined second to fifth periodic reports of Kenya on the implementation of the International Covenant on Economic, Social and Cultural Rights (E/C.12/KEN/2-5) at its 8th and 9th meetings (E/C.12/2016/SR.8-9), held on 25 and 26 February 2016, and adopted the following concluding observations at its 20th meeting, held on 4 March 2016.

A. Introduction

The Committee welcomes the combined second to fifth periodic reports submitted by the State party, despite the long delay in submission, and the supplementary information provided in the replies to the list of issues (E/C.12/KEN/Q/2-5/Add.1). The Committee also appreciates the constructive dialogue held with the State party’s interministerial delegation.

B. Positive aspects

The Committee welcomes the incorporation of Covenant rights in the 2010 Constitution and the rulings of the High Court that recognize these rights.

The Committee also welcomes the adoption by the State party of the following:

a. Basic Education Act, 2013;

b. Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012;

c. Kenyan Citizenship and Immigration Act, 2011;

d. (d) Prohibition of Female Genital Mutilation Act, 2011;

e. (e) Counter-Trafficking in Persons Act, 2010.

C. Principal subjects of concern and recommendations

Domestic application of the Covenant

The Committee is concerned that there has been a long delay in adopting legislation and policies that are crucial to the realization of the economic, social and cultural rights enshrined in the Constitution. It is also concerned at the failure of the State party to comply with many court rulings.

The Committee urges the State party to expedite the adoption of pending legislation and policies, including the Community Land Bill, the Social Protection Bill, the Water Bill, the Housing Bill, the Health Bill and the National Social Health Insurance Fund Bill, to give full effect to the economic, social and cultural rights enshrined in its Constitution. It also recommends that the State party implement the decisions of its courts without delay.

The Committee is concerned at the provisions of section 21 (4) of the Government Proceedings Act, which essentially provide impunity to the State party when a monetary award is made against it in favour of an aggrieved party, by way of damages or costs, as is the case in Ibrahim Sangor Osman v. Minister for Provincial Administration and Internal Security.

The Committee urges the State party to repeal section 21 (4) of the Government Proceedings Act, since it places the State party above the law in that it does not oblige the State party to comply with court orders and it infringes the rights to equality and the right of access to courts in that it denies the right of an effective remedy in case of a violation by the State party of the economic, social and cultural rights of an aggrieved party.

Legal aid

While noting the introduction of the National Legal Aid and Awareness Programme, the Committee is concerned at the insufficient resources allocated to the Programme. The Committee is also concerned that access to free legal aid is still very limited, making it difficult for disadvantaged and marginalized individuals to claim their economic social and cultural rights.

The Committee recommends that the State party expedite the adoption of the Legal Aid Bill, expand the National Legal Aid and Awareness Programme and allocate sufficient resources to the Programme so that disadvantaged and marginalized individuals, particularly indigenous peoples, women, people living in rural areas and urban informal settlements, are able to claim their economic, social and cultural rights.

Internally displaced persons

While noting the measures taken by the State party to re integrate or resettle persons displaced as a result of the 2007/2008 post-election inter-ethnic violence, the Committee is concerned that the Truth, Justice and Reconciliation Commission’s recommendations have not been fully implemented and that those internally displaced persons continue to face difficulties in enjoying their economic, social and cultural rights. The Committee is also concerned at the overall lack of implementation of the economic, social and cultural rights of internally displaced persons in the State party, resulting from intercommunal conflicts, disasters and development and environment preservation projects, in particular:

a. The absence of a comprehensive registration system, which leaves most internally displaced persons unregistered, unprotected and unsupported;

1 Adopted by the Committee at its fifty-seventh session (22 February-4 March 2016).
b. The delay in adopting a national policy on internally displaced persons;
c. Social segregation, the lack of public transportation and limited access of internally displaced persons to basic services, including water and sanitation, health, education and social assistance.

12. The Committee recommends that the State party implement, without further delay, the Truth, Justice and Reconciliation Commission’s recommendations relating to the 2007/2008 post-election violence, including adequate compensation for the internally displaced persons concerned. It also recommends that the State party:
   a. Establish a comprehensive registration system and keep up-to-date records of all internally displaced persons;
   b. Adopt a national policy on internally displaced persons in consultation with them to facilitate the implementation of the Act;
   c. Ensure that internally displaced persons in resettlement sites have access to public transport and basic services, including water and sanitation, health, education and social assistance.

Economic partnership agreement

13. While noting that on 16 October 2014 the East African Community States, including Kenya, concluded the negotiations for a region-to-region economic partnership agreement with the European Union, the Committee regrets that the negotiations were not preceded by an assessment of its impact on the enjoyment of economic, social and cultural rights (art. 1 (2)).

14. The Committee encourages the State party to seize the opportunity of the consultations that shall take place prior to the ratification of the economic partnership agreement in October 2016 to identify the potential negative impacts on the enjoyment of economic, social and cultural rights and to adopt the measures necessary to mitigate such impacts, particularly on the livelihood of small-scale farmers and fisherfolk, as well as on access to medicines. The Committee draws the attention of the State party, in this regard, to the 2011 guiding principles on human rights impact assessments of trade and investment agreements (A/HRC/19/59/Add.5).

The Endorois

15. The Committee is concerned that the implementation of the decision of the African Commission on Human and Peoples’ Rights relating to the Endorois has been long delayed, despite acceptance of the decision of the Commission. While noting the establishment of the Task Force on the implementation of the decision of the African Commission on 26 September 2014 contained in communication No. 276/2003, the Committee regrets that the Endorois are not represented on the Task Force and that they have not been sufficiently consulted on the work of the Task Force (art. 1 (2)).

16. The Committee recommends that the State party implement, without further delay, the decision of the African Commission on Human and Peoples’ Rights (276/2003) and ensure that the Endorois are adequately represented and consulted at all stages of the implementation process. It also recommends that the State party set up a mechanism that will facilitate and monitor the implementation, with active participation of the Endorois. It further recommends that the State party ratify the Indigenous and Tribal Peoples Convention, 1989 (No. 169), of the International Labour Organization.

Maximum available resources

17. The Committee is concerned that corruption in the public sector is pervasive and that there is a large amount of illicit financial flows and tax avoidance, which impede the realization of economic, social and cultural rights. It is also concerned that cases of corruption, particularly those involving high-level officials, are not thoroughly investigated, which results in a very small number of convictions in comparison to the large number of cases brought before the Ethics and Anti-Corruption Commission. It is further concerned that the Commission is not able to carry out its mandate independently and effectively owing to lack of resources and interference by high-level officials (art. 2 (1)).

18. The Committee recommends that the State party take all the measures necessary to combat illicit financial flows and tax avoidance with a view to raising national revenues and increasing reliance on domestic resources. It also recommends that the State party increase the level of public funding, at both the national and county level, to ensure the progressive realization of economic, social and cultural rights, particularly the rights to housing, water and sanitation, social security, health and education, and that the State party make all efforts to improve its budget execution process with a view to spending all the allocated funding in a timely, effective and transparent manner. It further recommends that the State party strengthen its investigation of cases of corruption and the prosecution of those involved in corruption by enhancing the investigative capacity of the anti-corruption body and public prosecutors and ensuring the independent functioning of the Ethics and Anti-Corruption Commission.

Non-discrimination

19. The Committee is concerned at the absence of comprehensive anti-discrimination legislation (art. 2).

20. The Committee recommends that the State party adopt a comprehensive antidiscrimination law that prohibits discrimination, direct or indirect, on all grounds expressed in article 2 of the Covenant and taking also into account the Committee’s general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights and to take all the measures necessary to eliminate discrimination de jure and de facto.

Lesbian, gay, bisexual, transgender and intersex persons

21. The Committee is concerned that sexual relations between consenting adults of the same sex are criminalized in the Penal Code and that lesbian, gay, bisexual, transgender and intersex persons are stigmatized and socially excluded, as well as discriminated in gaining access to social services, particularly health-care services (art. 2 (2)).
22. The Committee calls upon the State party to decriminalize sexual relations between consenting adults of the same sex. It also recommends that the State party take the steps necessary to put an end to the social stigmatization of homosexuality and ensure that no one is discriminated in accessing health care and other social services owing to their sexual orientation or gender identity.

Equal rights of women and men
23. While noting with appreciation that gender equality is guaranteed through the Constitution and national laws, the Committee remains concerned at gender discriminatory provisions in the existing laws, particularly customary laws that allow polygamous marriages and deny women’s equal rights to inheritance and ownership of land (art. 3).
24. The Committee recommends that the State party take all the steps necessary to review the existing laws with a view to repealing gender discriminatory provisions, including those in customary law, especially in relation to polygamous marriages and to the rights of women to inheritance and ownership of land. It also recommends that the State party review the Matrimonial Property Act of 2013 and take all the measures necessary to strengthen its enforcement once reviewed, including raising awareness among women, local and traditional communities and their leaders, the judiciary and land administration officials and providing legal support to women to claim their rights.

Representation of women at the decision-making level
25. While welcoming the two-thirds gender rule guaranteed in the Constitution and the progress made in the judiciary in this respect, the Committee is concerned that it has not been fully implemented owing to the lack of a legislative and policy framework and that the representation of women remains low at most decision-making levels, including in Parliament (art. 3).
26. The Committee recommends that the State party take all the measures necessary to fully implement the two-thirds gender rule in the public sector, in both elective and appointive bodies, and expeditiously adopt and implement the Duale Bill.

Unemployment and underemployment
27. The Committee is concerned that the unemployment rate remains high, particularly among youth, women and persons with disabilities, and that the majority of work opportunities are in the unregulated informal economy. The Committee regrets that the measures taken to promote the employment of marginalized groups, including the 5 per cent employment quota for persons with disabilities in the public and private sector and the Access to Government Procurement Opportunities for youth, women and persons with disabilities, have not been effective (art. 6).
28. The Committee recommends that the State party intensify its efforts to upgrade the vocational skills of the workforce to meet the needs of the labour market and to create decent job opportunities, including through implementation of the National Employment Policy and Strategy of Kenya. It also recommends that the State party develop and implement special measures to promote the employment of youth, women and persons with disabilities, including through the creation of an effective system for enforcing the existing quota systems and the Access to Government Procurement Opportunities.

Minimum wages
29. The Committee is concerned that minimum wages are not applied to all sectors of the economy and that the levels of minimum wages are not sufficient to ensure a decent living for workers and their families (art. 7).
30. The Committee recommends that the State party take concrete steps to apply minimum wages to all employees, unionized or non-unionized, and to establish a mechanism to index the minimum wage to the cost of living, and also to increase minimum wages to ensure an adequate standard of living for workers and their families (art. 7).
31. The Committee is concerned that minimum wages are not applied to all sectors of the economy and that the levels of minimum wages are not sufficient to ensure a decent living for workers and their families (art. 7).
32. The Committee recommends that the State party provide the Directorate of Occupational Safety and Health Services with sufficient human and financial resources to carry out its mandate (art. 7).

Occupational safety and health
31. While noting the increase in the number of labour inspections carried out in the past years, the Committee regrets the lack of information on results and follow-up to the inspections. The Committee is also concerned that the Directorate of Occupational Safety and Health Services lacks sufficient human and financial resources to carry out its mandate (art. 7).
32. The Committee recommends that the State party provide the Directorate of Occupational Safety and Health Services with sufficient human and financial resources to carry out its mandate effectively. It also recommends that the State party include detailed information on labour inspections, particularly results and follow-up, and the effectiveness of the National Occupational Safety and Health Policy in its next periodic report.

Migrant domestic workers overseas
33. The Committee is concerned at the exploitative working conditions of Kenyan domestic workers in the Gulf and Middle East region and the lack of mechanisms to protect them in the countries where they work (art. 7).
34. The Committee recommends that the State party take the steps necessary to put in place effective mechanisms to protect Kenyan domestic workers overseas from abuse and exploitation, including through bilateral agreements with countries of destination, to strengthen the regulation of recruitment agencies and to enhance consular and legal services for these workers.

Right to social security
35. The Committee is concerned at the limited coverage of cash transfer programmes, leaving more than half of people eligible for the programmes unsupported, at duplication errors in beneficiary registration and overlapping benefits. It is also concerned that the amount of the benefits is not regularly adjusted or sufficient to ensure a decent living and that payments
are often delayed. The Committee is further concerned that the coverage of the National Social Security Fund and the National Health Insurance Fund is very low and excludes most workers in the informal economy (art. 9).

36. The Committee recommends that the State party intensify its efforts to ensure that the cash transfer programmes cover all eligible beneficiaries, increase the amount of benefits and regularly readjust the amount to ensure a decent living and timely payment for the beneficiaries. It also recommends that the State party take the measures necessary to extend the coverage of the National Social Security Fund and the National Health Insurance Fund to all employees in the formal and informal economy and the self-employed. The Committee draws the attention of the State party to its general comment No. 19 (2008) on the right to social security and its statement on social protection floors (2015).

**Domestic violence**

37. While welcoming the adoption of the Protection against Domestic Violence Act, the Committee is concerned that the Act is not effectively enforced and that domestic violence is still pervasive, particularly against women, children and persons with disabilities and that the majority of cases of domestic violence go unreported (art. 10).

38. The Committee recommends that the State party take all the measures necessary to strengthen enforcement of the Act, including by conducting training for law enforcement officials and judges on the application of the Act and awareness-raising campaigns for the public.

**Female genital mutilation**

39. The Committee remains concerned that, despite the fact that female genital mutilation tends to be gradually decreasing, it is still rampant, particularly in the North Eastern region, where the prevalence rate is 97.5 per cent, and that the perpetrators are rarely convicted and punished under the Prohibition of Female Genital Mutilation Act (art. 10).

40. The Committee recommends that the State party intensify its efforts to prevent and eradicate female genital mutilation and other harmful traditional practices, by strengthening the enforcement of relevant legislation and enhancing awareness-raising campaigns on the negative impact of female genital mutilation, particularly at the community level, with a view to abandoning the practice.

**Poverty**

41. The Committee is concerned at the high percentage of people living under the poverty line and the failure of the State party to significantly reduce the poverty rate (art. 11).

42. The Committee recommends that the State party intensify its efforts to eradicate poverty, including through the comprehensive analysis of the needs of the most disadvantaged and marginalized individuals and groups and adoption of concrete and targeted measures to address them.

**Adequate food and malnutrition**

43. The Committee is concerned at the prevalence of chronic malnutrition and the high level of stunting, particularly among children and those living in arid and semi-arid areas (art. 11).

44. The Committee recommends that the State party take the steps necessary to address chronic food insecurity, chronic malnutrition and the critical nutritional needs of children, particularly in arid and semi-arid areas, including the adoption of a national action plan on food security and nutrition in line with the Committee’s general comment No. 12 (1999) on the right to adequate food and the 2004 Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security.

**Right to housing**

45. The Committee is concerned at the lack of effective measures to provide social housing for low-income families, at the large proportion of the population living in informal settlements in poor living conditions with limited access to basic services, including water and sanitation, health care and education (art. 11).

46. The Committee recommends that the State party take all the measures necessary to provide affordable social housing units for low-income families and to improve living conditions in informal settlements, including through the adoption of the Housing Act, the Community Land Bill and the National Slum Upgrading and Prevention Policy, and allocate sufficient budgetary resources to ensure the implementation of such measures.

**Forced evictions**

47. The Committee reiterates its concerns that pastoralist communities and persons living in informal settlements are under constant threat of eviction due to the lack of legal security of tenure and that forced evictions continue without prior notice and provision of adequate alternative housing or compensation. It is also concerned that the State party has not yet enacted a legislative framework to recognize and protect communities’ right to land and to explicitly prohibit forced evictions and define the circumstances and safeguards subject to which evictions may be carried out, despite the decisions of its own domestic courts (art. 11).

48. The Committee recommends that the State party take concrete steps to guarantee security of tenure for all, including residents of informal settlements. It also recommends that the State party prioritize the enactment of the Community Land Bill and the Evictions and Resettlement Bill. The Committee further recommends that the State party implement judicial orders that provide remedies to victims of forced evictions as a matter of priority and adopt a moratorium on mass evictions at the national level until adequate legal and procedural safeguards are in place. The Committee draws the attention of the State party to its

Water and sanitation

49. The Committee is concerned at the insufficient access to safe drinking water and adequate sanitation with huge disparities between urban and rural areas, and formal and informal settlements. It is also concerned at the lack of effective regulation of water prices, particularly unregistered small-scale water vendors, and at the high prices that people living in informal settlements and rural areas have to pay for water (art. 11).

50. The Committee recommends that the State party increase the budgetary allocation to improve access to water and sanitation, particularly in urban informal settlements and rural areas. It also recommends that the State party intensify its efforts to effectively regulate water prices and ensure compliance, particularly by small-scale water vendors, with the tariff guidelines, which were set by the Water Services Regulatory Board.

Access to health-care services

51. The Committee is concerned at the inadequate budget allocation to the health sector, very limited coverage of the National Health Insurance Fund and the significant share of out-of-pocket payments in health expenditure, which limit access to health for disadvantaged and marginalized persons. The Committee also regrets the regional disparities in access to health-care services and the delay in enacting the Health Bill, implementing the decision of the High Court in P.A.O. and 2 others v. Attorney General (2012) and amending the Anti-Counterfeit Act, 2008 (art. 12).

52. The Committee recommends that the State party take concrete measures to enhance access to health services, particularly for disadvantaged and marginalized individuals and groups, including through increasing budgetary allocation to the health sector and expanding the coverage of the National Health Insurance Fund. It also recommends that the State party expeditiously adopt the Health Bill and amend the Anti-Counterfeit Act, 2008.

Sexual and reproductive health

53. The Committee is concerned at the criminalization of abortion under any circumstance provided in the Penal Code, the large number of unsafe abortions and the consequent high rate of maternal mortality. It is also concerned at cases of post-delivery detention of women unable to pay their medical bills in health-care facilities. It is further concerned at the limited access to sexual and reproductive health information and services as well as contraceptives, especially for women living in rural areas (art. 12).

54. The Committee recommends that the State party amend its legislation on the prohibition of abortion in order to render it compatible with other fundamental rights, such as women’s rights to health, life and dignity, and reinstate the Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya. It also recommends that the State party take concrete measures to ensure free maternal health-care services and to prevent the incidence of post-delivery detention in health-care facilities. It further recommends that the State party strengthen its efforts to improve access to sexual and reproductive health information and services, including contraceptives. In this regard, the Committee draws the attention of the State party to its general comment No. 22 (2016) on the right to sexual and reproductive health.

HIV/AIDS

55. The Committee is concerned at the high rates of HIV/AIDS and of new infections as well as at the high mother-to-child transmission rate, which has raised the mortality rate among children under 5 years of age. It is also concerned that mother-to-child transmission has become criminalized. It is further concerned at the large gap between children and adults in receiving antiretroviral treatment and the low retention rate of women who are being treated within a year of initiation. While welcoming the High Court decision on the HIV and AIDS Prevention and Control Act, it is concerned that the State party has not yet implemented the decision (art. 12).

56. The Committee recommends that the State party intensify its efforts to combat the spread and effects of HIV/AIDS, including mother-to-child transmission, by effectively implementing relevant national policies, strategies, guidelines and programmes on HIV/AIDS and extending the coverage of free antiretroviral treatment, particularly to children and women. It also recommends that the State party make an adequate amendment to the HIV and AIDS Prevention and Control Act in accordance with the High Court decision (Petition No. 97, 2010).

Right to education

57. The Committee is concerned that the State party has not dedicated sufficient resources to financing school facilities and qualified teachers, and to ensuring effective enjoyment of the right to free primary education for all. It is also concerned that inadequacies in the public schooling system have led to the proliferation of so-called “lowcost private schools”, which has led to segregation or discriminatory access to education, particularly for disadvantaged and marginalized children, including children living in informal settlements and arid and semi-arid areas (arts. 13 and 14).

58. Recalling that the State has the primary responsibility in ensuring the right to education, the Committee recommends that the State party take all the measures necessary to strengthen its public education sector. The State party should increase the budget allocated to primary education and take all the measures necessary to improve access to and the quality of primary education for all without hidden costs, particularly for children living in informal settlements and arid and semi-arid areas.

59. It also recommends that the State party bring the Registration Guidelines for Alternative Provision of Basic Education and Training in line with articles 13 and 14 of the Covenant and other relevant international standards; that it ensure that all schools, public, private, formal or non-formal, are registered; and that it monitor their compliance with the Guidelines.
60. While noting the measures taken to assist children who have left school to continue to study, the Committee reiterates its concern at the large number of children dropping out of school, particularly girls due to early marriage and pregnancy (arts. 13 and 14).

61. The Committee recommends that the State party take the measures necessary to address the underlying reasons why children drop out of school, to intensify its efforts to prevent students from doing so and to bring those children back to school to complete their education.

Access to the Internet

62. While noting that more than 50 per cent of the population has access to the Internet, the Committee expresses its concern that, among disadvantaged and marginalized individuals and groups and in rural areas, such access is limited (art. 15).

63. The Committee recommends that the State party continue working to expand Internet access, in particular for disadvantaged and marginalized individuals and groups.

D. Other recommendations

64. The Committee encourages the State party to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

65. The Committee also encourages the State party to withdraw its reservation to article 10 (2) of the Covenant.

66. The Committee recommends that the State party take steps to progressively develop and apply appropriate indicators on the implementation of economic, social and cultural rights in order to facilitate the assessment of progress achieved by the State party in the compliance of its obligations under the Covenant for various segments of the population. In this context, the Committee refers the State party to, inter alia, the conceptual and methodological framework on human rights indicators developed by the Office of the United Nations High Commissioner on Human Rights (HRI/MC/2008/3).

67. The Committee requests the State party to disseminate the present concluding observations widely among all levels of society, particularly among members of Parliament, public officials and judicial authorities, and to inform the Committee, in its next periodic report, about the steps taken to implement the recommendations contained herein. It also encourages the State party to engage non-governmental organizations and the wider civil society in the implementation of the present recommendations, as well as in the preparation of its next periodic report.

68. The Committee requests the State party to submit its sixth periodic report, to be prepared in accordance with the reporting guidelines adopted by the Committee in 2008 (see E/C.12/2008/2), by 31 March 2021. The Committee also invites the State party to update its common core document in accordance with the harmonized guidelines on reporting under the international human rights treaties (see HRI/GEN/2/Rev.6, chap. I).
The slums are not a place of despair. Its inhabitants are all working towards a better life.

Vikas Swarup
We, the People, recognize that we have responsibilities as well as rights, that our destinies are bound together, that a freedom which only asks what's in it for me, a freedom without a commitment to others, a freedom without love or charity or duty or patriotism, is unworthy of our founding ideals, and those who died in their defense.

Barack Obama