



**Economic and Social
Council**

Distr.
GENERAL

E/C.12/KEN/CO/1
1 December 2008

Original: ENGLISH

COMMITTEE ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS
Forty-first session
Geneva, 3 - 21 November 2008

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER
ARTICLES 16 AND 17 OF THE COVENANT**

KENYA

Concluding Observations of the Committee on Economic, Social and Cultural Rights

1. The Committee on Economic, Social and Cultural Rights considered the initial report of Kenya on the implementation of the International Covenant on Economic, Social and Cultural Rights (E/C.12/KEN/1) at its 34th, 35th and 36th meetings, held on 6 and 7 November 2008 (E/C.12/2008/SR.34-36), and adopted, at its 51st meeting held on 19 November 2008, the following concluding observations.

A. Introduction

2. The Committee welcomes the submission, albeit late, of the initial report of Kenya and the opportunity thus offered to engage in a constructive dialogue with the State party. The Committee also welcomes the State party's written replies to its list of issues, as well as the generally frank and detailed answers provided by the delegation of the State party to the Committee's oral questions.

3. It regrets the absence of disaggregated statistical data in the report, which would have enabled the Committee to better assess the implementation of the Covenant by the State party.

B. Positive aspects

4. The Committee welcomes the establishment in 2002 of the Kenya National Commission on Human Rights in accordance with the Paris Principles relating to the Status of National Institutions (General Assembly resolution 48/13 of 20 December 1993, annex).

5. The Committee notes with appreciation that the State party adopted legislation to eliminate discrimination against disadvantaged and marginalized individuals and groups such as the Refugees Act (2006), which prohibits discrimination against refugees and asylum-seekers, and the Persons with Disabilities Act (2003), which establishes a National Development Fund for Persons with Disabilities.

6. The Committee welcomes the recent adoption by the State party of legislation designed to strengthen labour standards and trade union freedom, in particular:

- (a) The Employment Act (2007) which strengthens minimum terms and conditions of employment, prohibits forced labour and child labour, sexual harassment and discrimination and provides for 21 days annual leave and three months maternity leave;
- (b) The Labour Institutions Act (2007) which establishes and strengthens institutions dealing with administration and management of labour relations such as the National Labour Board and Court;
- (c) The Labour Relations Act (2007) providing for freedom of association, recognition of trade unions, collective agreements and dispute resolution;
- (d) The Work Injury Benefits Act (2007) extending insurance coverage to all categories of workers and ensuring adequate compensation for injury and work-related diseases irrespective of the employer's solvency; and
- (e) The Occupational Health and Safety Act (2007) prohibiting the employment of children in workplaces where their health is at risk and encouraging entrepreneurs to set achievable safety targets for their enterprises.

7. The Committee notes with appreciation that the State party introduced free compulsory primary education in 2003 and free secondary education in 2008.

C. Factors and difficulties impeding the implementation of the covenant

8. The Committee notes the absence of any significant factors or difficulties preventing the effective implementation of the Covenant in the State party.

D. Principal subjects of concern and suggestions and recommendations

9. The Committee notes with concern that the Covenant rights have not been incorporated into domestic law and therefore are not directly applicable in the courts of the State party.

The Committee recommends 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.

10. The Committee regrets that, despite the State party's "zero tolerance" policy, corruption and patronage still adversely affect the realization of economic, social and cultural rights, and that there have been few prosecutions for corruption in the State party.

The Committee recommends that the State party intensify its efforts to prosecute cases of corruption and review its sentencing policy for corruption-related offences. It also recommends 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.

11. The Committee is concerned about the risk of possible adverse impacts that the Economic Partnership Agreement (EPA), which is currently being negotiated with the European Union, the Investment Agreement under the Common Market for Eastern and Southern Africa (COMESA) as well as of bilateral trade and investment agreements, may have on the State party's obligations under the Covenant and, in particular, on the livelihoods of small-scale farmers who depend on maize, wheat, rice and dairy, the employment of workers in the Kenyan food processing, textiles, paper and printing industries and on labour rights and the right to food. (art., para. 1)

The Committee recommends that the State party undertake the measures necessary to assess the potential adverse impact of any commitments under the Economic Partnership Agreement with the European Union and the Investment Agreement for the COMESA Common Investment Area, which are currently being negotiated, as well as under bilateral trade and investment agreements, on the economic, social and cultural rights of Kenyans, and to ensure that Covenant rights are not adversely affected.

12. 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 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 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.

13. The Committee is concerned about reports that refugees are de facto excluded from employment in the formal sector and often receive wages below the minimum wage in the informal sector. It is also concerned that refugees and asylum-seekers are frequently confined for years to camps which are located in isolated, semi-arid regions, and charged higher fees than nationals in public hospitals. (art. 2, para. 2)

The Committee recommends that the State party issue 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.

14. The Committee notes with concern that article 82 (4) of the Constitution exempts matters of personal law such as marriage, divorce and devolution of property on death, as well as customary law applicable to certain tribes, from the constitutional prohibition of discrimination, with the effect that women are generally discriminated against in these areas of law. (art. 3)

The Committee recommends 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 recommends 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.

15. The Committee is concerned about the still low representation of women in Parliament, in senior government positions and in posts of Court of Appeal or High Court judges. (art. 3)

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

16. The Committee is concerned that only 1.8 million workers are employed in the formal sector, despite the fact that 2.4 million new jobs were created between 2004 and 2007 in the State party. It is also concerned that 6.4 million workers in the informal economy are not sufficiently covered by labour regulations and social security schemes, including pension rights and maternity protection, and that many persons in the State party are still unemployed, in particular women, persons with disabilities, refugees and internally displaced persons (IDPs). (art. 6)

The Committee recommends that the State party intensify 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.

17. The Committee is concerned about the exemption of Export Processing Zones from the application of the Employment Act and the Occupational Health and Safety Act, which has given rise to poor working conditions such as low salaries, excessive and unpredictable working hours, lack of training and promotion opportunities, unstable contracts, sexual harassment, violations of the rights to join trade unions and to collective bargaining, as well as racial discrimination by some foreign managers against Kenyan workers. (art. 7)

The Committee recommends that the State party review its incentive regime for Export Processing Zones, remove 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.

18. The Committee is concerned that the statutory minimum wage is not sufficient to provide an adequate standard of living for workers and their families. It is also concerned that women typically work in low-paid and low-skilled jobs, especially in rural and deprived urban areas. (art. 7)

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, paragraph(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.

19. The Committee is concerned about reported delays in the registration of trade unions, de-registration on vague grounds, interference by officials of the Office of the Registrar of Trade Unions and the Ministry of Labour in the management and operation of trade unions, and excessive restrictions on the right to strike, in particular in the Export Processing Zones. (art. 8)

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 (1948) concerning Freedom of Association and Protection of the Right to Organize..

20. The Committee notes with concern that the National Hospital Insurance Fund (NHIF), which provides for the reimbursement of hospitalization costs other than medical expenses, only covers a small percentage of workers in the informal sector and that the National Social Health Insurance Bill (2004), which sought to introduce a compulsory health insurance scheme for all citizens, did not obtain presidential assent. (art. 9)

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.

21. The Committee notes with concern that many pension schemes are under-funded and that the National Social Security Fund (NSSF), a compulsory contributory social security fund set up to pay pension benefits to employees after retirement, does not include any non-contributory schemes of social assistance. (art. 9)

The Committee recommends that the State party ensure the financial viability of existing pension schemes and extend the scope of the National Social Security Fund to include the main branches of social security, as well as non-contributory schemes of social assistance for those who are unable to pay pension or other social security contributions. It also recommends that the State party consider ratifying ILO Convention No. 102 (1952) concerning Minimum Standards of Social Security).

22. The Committee notes with concern the incidence of domestic violence in the State party, the low number of complaints filed by victims of domestic violence, including spousal rape, the absence of criminal law provisions specifically criminalizing such violence, as well as the absence of statistical data on the number of reported cases of domestic violence. It is also concerned about harmful customary practices such as "wife inheritance" and ritual "cleansing" of widows by male relatives of the deceased husband. (art. 10)

The Committee recommends 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.

23. The Committee notes with concern that female genital mutilation continues to be practiced in the State party, in particular in rural areas such as the North Eastern Province, and that it is prohibited only if it involves children. (art. 10)

The Committee recommends that the State party adopt 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.

24. The Committee notes with concern the absence of statistical data on the reported number of persons, in particular women and children, trafficked to, from and within the State party for purposes of sexual exploitation and forced labour, as well as reports that provisions criminalizing trafficking of persons for the purpose of sexual exploitation and trafficking of children are rarely enforced and that, if they are enforced, sentences imposed on traffickers are frequently lenient. (art. 10)

The Committee recommends that the State party (a) enact 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.

25. While noting the progress achieved by the State party in combating child labour, the Committee remains concerned about the still very high number of children engaged in child

labour. It is also concerned about the high number of children who are forced to engage in prostitution. (art. 10)

The Committee urges the State party to (a) strengthen the enforcement of the Children Act and the Sexual Offences Act prohibiting child labour and sexual exploitation of children, e.g. through mandatory training for police officer, prosecutors and judges, teachers and health and social workers, more effective labour inspections and raids by social services, as well as heavier sentences for persons who make use of illegal child labour; (b) adopt and effectively implement the draft National Policy on Child Labour (2002); (c) conduct awareness-raising campaigns for children and parents on livelihood needs, including education; (d) provide assistance for children engaged in child labour and for their families; and (e) systematically collect data on the extent of child labour, including hidden forms, and of child prostitution in the State party.

26. The Committee is concerned that children and orphans affected by HIV/AIDS are not adequately supported by the State party and that the care for these children and the task of monitoring their school attendance is frequently delegated to their extended families and to community and faith-based organizations, without adequate support and supervision from the State party. (art. 10)

The Committee recommends that the State party step up its efforts to monitor regular school attendance by children and orphans with HIV/AIDS or from HIV/AIDS affected households, combat discrimination by school officials and ensure that these children receive continuous material and psychological support for their education. It also recommends that the State party give priority to placing orphans in foster or other non-institutional alternative care and that it provide financial support to the extended families, as well as to community and faith-based organizations, taking care of children and orphans affected by HIV/AIDS.

27. The Committee notes with concern that more than half of the population of the State party lives in extreme poverty, i.e. on less than US\$ 1 a day, in particular persons living in rural and deprived urban areas, landless persons, women, children, female-headed households, families affected by HIV/AIDS, persons with disabilities, refugees and internally displaced persons. (art. 11)

The Committee recommends that the State party allocate 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).

28. The Committee is concerned about the high incidence of acute malnutrition in the North Eastern Province and of chronic malnutrition in all provinces of the State party, particularly affecting children. (art. 11)

The Committee recommends that the State party effectively implement and allocate sufficient resources to relevant programmes and funds, such as the Child Survival and Development Strategy and the Constituencies Development Fund, to ensure physical and economic access for everyone, including children in rural and deprived urban areas, to the minimum essential food, which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger, in line with the Committee's general comment No. 12 (1999) on the right to adequate food) as well as its Statement on the world food crisis (E/C.12/2008/1).

29. While noting that many of the hundreds of thousands of persons who were internally displaced by the post election violence in early 2008 have been resettled or returned to their homes, the Committee is concerned that the financial assistance provided to internally displaced persons under the National Resettlement Fund is inadequate. (art. 11)

The Committee recommends that the State party provide adequate financial assistance for the resettlement of internally displaced persons and for their reintegration into society, and ensure that those IDPs who have not been resettled or returned to their homes following the post-election violence in 2008 have adequate access to housing and employment.

30. The Committee notes with concern that persons living in informal settlements, as well as in arid and semi-arid rural areas, are frequently deprived of affordable access to adequate water and sanitation, and that new housing units constructed under slum upgrading projects such as the Kenyan Slum Upgrading Programme (KENSUP) for Kibera/Nairobi are unaffordable for disadvantaged and marginalized families and individuals. (art. 11)

The Committee recommends 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 (2002) on the right to water, 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 for disadvantaged and marginalized individuals and families and that affected communities are effectively consulted and involved in the planning and implementation of such projects.

31. The Committee is concerned about the demolition of dwellings and forced evictions of pastoralist communities in the Rift Valley, forest dwellers such as the Mau Forest Ogiek, and persons living in informal settlements and on road reserves, reportedly without prior notice and provision of adequate alternative housing or compensation. (art. 11)

The Committee recommends 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 (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.

32. The Committee is concerned about the high maternal, infant and under-five mortality rates, the lack of adequately equipped maternal health care facilities and skilled birth attendance, especially in the North Eastern and Coastal Provinces, and de facto discrimination against poor women, older women and women with HIV/AIDS in access to maternal health care. (art. 12)

The Committee recommends that the State party take immediate measures to ensure that (a) all pregnant women, including poor women, older women and women with HIV/AIDS, have affordable access to skilled care free from abuse during pregnancy, delivery, postpartum, postnatal periods, and to care of the newborn, including in remote rural areas; (b) the waiver of maternity fees in public hospitals and health facilities is effectively enforced without compromising the quality of services; (c) immunization campaigns for children are implemented in all provinces; (d) pregnant women with HIV/AIDS are not refused treatment, segregated in separate hospital wards, forced to undergo HIV/AIDS testing, and discriminated or abused by health workers, and that they are informed about and have free access to antiretroviral medication during pregnancy, labour and after birth, including for their children; and (e) a date is set for the entry into force of the HIV/AIDS Prevention and Control Act (2006) as soon as possible.

33. The Committee is concerned about the limited access to sexual and reproductive health services and contraceptives, especially in rural and deprived urban areas, as well as about the high number of unsafe clandestine abortions in the State party. (art. 12)

The Committee recommends 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, 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.

34. The Committee notes with concern that children from poor families, pregnant girls, children living in remote rural areas and in informal settlements, nomadic children, children with disabilities, refugee children and internally displaced children have limited access to education. (art. 13)

The Committee recommends that the State party (a) increase 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) facilitate 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.

35. The Committee notes that the Nubians and the Ogiek are not recognized as distinct ethnic communities and that they are referred to as "others" by the State party. (art. 15)

The Committee recommends that the State party recognize 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.

36. The Committee recommends that the State party provide in its second periodic report updated statistical data on the enjoyment of each Covenant right, disaggregated by age, gender, ethnic origin, urban/rural population and other relevant status, on an annual comparative basis over the past five years.

37. The Committee recommends that the State party strengthen the capacity and funding of the Kenya National Commission on Human Rights, with a view to ensuring its financial independence and its presence in all provinces of the State party.

38. The Committee recommends that the State party indicate in its next periodic report the concrete results of the implementation of the Employment Act (2007), the Labour Institutions Act (2007), the Labour Relations Act (2007), the Work Injury Benefits Act (2007) and the Occupational Health and Safety Act (2007).

39. The Committee recommends that the State party withdraw its reservation to article 10, paragraph 2, of the Covenant, and that it consider ratifying ILO Conventions No. 103 (1952) concerning Maternity Protection) and No. 183 (2000) concerning the Revision of the Maternity Protection Convention (.)

40. The Committee recommends that the State party consider ratifying ILO Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.

41. The Committee recommends that the State party consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

42. The Committee invites the State party to submit a common core document in accordance with the 2006 harmonized guidelines on reporting to the international human rights treaty monitoring bodies (HRI/GEN/2/Rev.5).

43. The Committee requests the State party to disseminate the present concluding observations widely among all levels of society, particularly among State officials, the judiciary and civil society organizations, to translate them into Swahili and to inform the Committee on the steps taken to implement them in its next periodic report. It also encourages the State party to continue engaging non-governmental organizations and other members of civil society in the process of discussion at the national level prior to the submission of its next periodic report.

44. The Committee requests the State party to submit its second to fifth periodic reports in a single document by 30 June 2013.
