

The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), Center for Education Policy and Climate Justice ("CEPCJ"), Economic and Social Rights Centre – Hakijamii and the East African Centre for Human Rights (EACHRights), make this submission to the Committee on Economic, Social and Cultural Rights in advance of the examination of Kenya's sixth periodic report under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights.

13 January 2025

Introduction

1. During its 77th session, the Committee on Economic, Social and Cultural Rights ("the Committee") will examine Kenya's implementation of the International Covenant on Economic, Social and Cultural Rights ("the Covenant"), in light of the State Party's initial report under Articles 12, 13 and 14 of the Covenant. The Global Initiative for Economic, Social, and Cultural Rights ("GI-ESCR"), Center for Education Policy and Climate Justice ("CEPCJ"), Economic and Social Rights Centre – "Hakijamii" and the East African Centre for Human Rights ("EACHRights") welcome the opportunity to submit the following comments to this Committee.
2. This submission focuses on the implementation of the right to education (Articles 13 and 14 of the Covenant) and the right to health (Articles 11 of the Covenant), in light of Article 2.1 of the Covenant.
3. This submission draws the Committee's attention to the critical need for Kenya to allocate the maximum of its available resources to finance public services, particularly education and health, which are essential for the realisation of economic, social, and cultural rights.
4. Kenya continues to face significant challenges in fulfilling its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) despite its 2010 Constitution enshrining these rights. The adverse impacts of austerity measures, regressive tax policies, and the commercialisation and privatisation of essential services have deepened inequalities and marginalisation, especially in education and healthcare.

Current Fiscal Challenges, Protests and Repression in Kenya

5. This Committee has taken cognisance of Kenya's fiscal challenges **in its 2016 Concluding Observations**, where it emphasised the need for Kenya to combat illicit financial flows, increase public funding for social rights, improve budget execution, and strengthen anti-corruption investigations and the Ethics and Anti- Corruption Commission's independence (EACC).¹
6. The tabling of the Finance Bill 2024 in Kenya's parliament triggered widespread protests, marking one of the most significant waves of public dissent in the country's history². This Bill proposed to introduce a 16% sales tax on bread and 25% duty on cooking oil; Both are basic items in many households. It also introduced an eco-levy tax which would increase the cost of sanitary towels, diapers and digital items such as mobile phones, cameras and recording equipment used by many in the digital economy as a source of livelihood. Additionally, the bill proposed a 16% tax on goods and services used exclusively for constructing and equipping of specialised hospitals, raising concerns that specialised healthcare costs would increase.³
7. This was done in the context of an already deepening economic crisis, in which external debt and the role of international financial institutions has to be acknowledged. Under the 2021 loan agreement, the IMF granted Kenya a \$3.9 billion loan as part of a 38-month program, with periodic reviews to ensure Kenya was adhering to IMF requirements: increasing taxes, reducing subsidies, and cutting expenditure.⁴
8. President Ruto's 2022 campaign for office was modelled around the bottom-up economic model geared towards bringing down the cost of living, eradicating hunger, creating jobs, expanding the tax base, improving the country's foreign exchange balance as well as inclusive growth.⁵ Nevertheless, the reforms he proposed for achieving this expanded tax base are mostly regressive and discriminatory. First, because their focus is taxing consumption, which is a measure that typically disproportionately affects the poorest sectors of society, while not presenting relevant measures to tax the richest sectors and companies; secondly, because they have discriminatory impacts over certain groups, such as women.

¹ CESCR, Concluding Observations on the Combined Second to Fifth Periodic Reports of Kenya, E/C.12/KEN/CO/2-5. (April 6, 2016). para 18

² Eric Magale and Mario Schimdt, "Kenya protests show citizens don't trust government with their tax money: can Ruto make a meaningful new deal?" *The conversation*, July 16, 2024. <https://theconversation.com/kenya-protests-show-citizens-dont-trust-government-with-their-tax-money-can-ruto-make-a-meaningful-new-deal-234008>

³ Basillioh Rukang, "What are Kenya's controversial tax proposals?" BBC, June 15, 2024. <https://www.bbc.com/news/articles/cv22g359mq9o>

⁴ Fadhel Kaboub, "Why are the US and IMF imposing draconian austerity measures on Kenya?" *The Guardian*, July 10, 2024 <https://www.theguardian.com/commentisfree/article/2024/jul/10/kenya-finance-bill-protests>

⁵ Ian Omondi, "The six pillars of DP Ruto's bottom-up economic model and why he believes it is the solution," *Citizen Digital*, June 30, 2022. <https://www.citizen.digital/news/the-six-pillars-of-dp-rutos-bottom-up-economic-model-and-why-he-believes-it-is-the-solution-n301225>

9. In August 2024, shortly after the president withdrew the 2024 Finance Bill in response to widespread protests, Kenya's Court of Appeal declared the 2023 Finance Act unconstitutional.⁶ Although not as widespread as the 2024 protests against the Finance Bill, the 2023 Finance Act also faced strong opposition due to the increase of various categories of taxes and introduced new taxes such as the Affordable Housing Levy.⁷ The Court's judgement cited several reasons: (i) the National Assembly's failure to justify its decisions to either adopt or reject public proposals during the 2023 Finance Bill's public participation process; (ii) its omission of revenue estimates in both the Appropriation Bill, 2023, and the Appropriation Act, 2023; and (iii) its disregard for procedures mandated by the Public Finance Management Act, 2012, as well as the Constitution.⁸
10. With the 2024 Finance bill withdrawn, the government of Kenya had to re-evaluate itself and draft new financing legislation. Thus, new tax bills were introduced with a majority of Kenya's proposed tax measures under the Finance Bill 2024 being adapted to the Tax Laws (Amendment) Act, 2024. The Act was assented to on 11 December 2024 and took effect from 27 December 2024 with subdued fanfare or reaction from the public.⁹
11. The widespread, spontaneous public protests around the 2024 Finance Bill highlighted the inadequate public participation in discussions related to budget allocation and tax. The uprising underscored widespread dissatisfaction with regressive policies that affect the cost of living, disproportionately impacting the most marginalised while failing to address structural inequalities and undermining public services financing.¹⁰ The International Monetary Fund (IMF) and the World Bank were directly blamed by some protestors for being the drivers behind the increase in taxes. The current Kenyan government seems to prioritize policy advice from global north institutions rather than the voices of Kenyans, civil society organizations and Pan African economic experts.¹¹
12. It is important to note that the 2024 protests faced severe repression by the government. Reports denounced a killer police squad with an unofficial command structure and at least 63 people killed in the context of the Gen-Z protests around the

⁶ Alex Mathini, et.al, "Kenya: Court of Appeal declares the entire Finance Act, 2023, unconstitutional," August 2, 2024. <https://bowmanslaw.com/insights/kenya-court-of-appealdeclares-the-entire-finance-act-2023-unconstitutional/>

⁷ KPMG, "Tax Alert, Affordable Housing Levy", August 2023.

<https://assets.kpmg.com/content/dam/kpmg/ke/pdf/tax/2023/Affordable%20Housing%20Levy.pdf>

⁸ Court of Appeal, National Assembly & another V Okiya Omtata Okioti and 55 Others (Civil Appeal E003 of 2023 & E016, E021, E049, E064 & E080 of 2024 (Consolidated)) [2024] KECA 876 (KLR) (31 July 2024) (Judgement).

<https://kenyalaw.org/caselaw/cases/view/296271/>

⁹ KPMG, "Tax Laws (Amendment Act, 2024)" December 21, 2024. <https://kpmg.com/ke/en/home/insights/2024/12/tax-laws-amendment-act-2024.html>

¹⁰ 'African Civil Society supports Kenyan citizens demands for economic reforms', June 26, 2024

¹¹ Fadhel Kaboub, "Why are the US and IMF imposing draconian austerity measures on Kenya?" The Guardian, July 10, 2024 <https://www.theguardian.com/commentisfree/article/2024/jul/10/kenya-finance-bill-protests>

Finance Bill.¹² Reports also spoke about 60 abductions and disappearances of protesters. As pointed out by the International Network for Civil Liberties Organizations (INCLO) and Physicians for Human Rights (PHR), 1,574 people were unlawfully arrested as Kenyan law enforcement indiscriminately targeted peaceful protesters with tear gas and water cannons, violating the temporary court order prohibiting their use in these protests.¹³

Right to Education

13. The right to education is guaranteed under Articles 43 (1) (f) and 53 of the Kenyan Constitution with Article 53 (1) (b) guaranteeing the right to every child to free and compulsory basic education.

14. The Committee has taken cognisance of the issues relating to the financing of education and the impact of privatisation of education in the following manner:

- a) **CESCR's 2008 concluding observations:** emphasise the need for Kenya to improve access to education for "[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. This includes the state increasing 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."¹⁴
- b) **CESCR's 2016 concluding observations:** place a strong emphasis on Kenya's obligations in terms of the right to education, including by warning that: "inadequacies in the public schooling system have led to the proliferation of so-called 'low-cost private schools', which has led to segregation or discriminatory access to education, particularly for disadvantaged and marginalised children, including children living in informal settlements and arid and semi-arid areas."¹⁵ In addition, this Committee specifically recommended Kenya to take "all the measures necessary to strengthen its public education sector" and to "improve access to and the quality of primary education for all without hidden costs."¹⁶

¹² Kenya Human Rights Commission (KHRC) and Independent Medico Legal Unit (IMLU); "2024: A year of blatant state repression through regime policing," January 2, 2025. <https://khrc.or.ke/press-release/2024-a-year-of-blatant-state-repression-through-regime-policing/>

¹³ International Network for Civil Liberties Organizations (INCLO) and Physicians for Human Rights (PHR), "Kenya: Deadly Repression at Anti-Finance Bill Protests," September 2024. <https://lethalindisguise.org/es/estudios-de-caso/kenya-anti-finance-bill/#473ae8eb-762b-43c3-8be7-d96f11e58ab8>

¹⁴ CESCR, Concluding Observations to Kenya, E/C.12/CO/1, (December 1,2008), para 34

¹⁵ CESCR, Concluding Observations to Kenya, E/C.12/KEN/CO/2-5, (April 6, 2016), para 57

¹⁶ Ibid. para 58

15. Kenya's present report to the committee claims that there has been a steady increase in the budget allocation to the education sector from 2017 to 2022 with a dip in the budget allocation for the FY 2021/22.¹⁷ In its replies to the list of issues, the state claims that it increased the education budget by 7.1% in the FY 2022/23.¹⁸
16. Although the education budget has grown from Ksh. 460.4 billion in the FY 2018/19 to Ksh 628.5 billion in the FY 2022/23, most of the allocation is consumed by recurrent expenditure like teachers' salaries, leaving out inadequate funds for critical needs such as infrastructure, capitation, and student welfare programmes.¹⁹
17. The education sector is also undergoing reforms and implementation of the Competency Based Curriculum. Thus, the sector requires additional resources for teachers (salaries and more teachers), teacher training (on the new curriculum), classrooms and curriculum materials, thus the amount allocated is not sufficient.²⁰ Moreover, due to the protests, and to reduce government expenditure, the president signed into law the Supplementary Appropriation Bill 2024 in August of 2024. The Act sought to create a balance by reducing recurrent expenditure while safeguarding critical essential expenditure in the Agriculture, Health and Education Sector. However, for the education sector, the FY 2023/24 budget was reduced by 5%, as additional cuts were made in a supplementary budget.²¹
18. Furthermore, despite the Teachers Service Commission receiving a substantial portion of the Kenya's education budget - in the FY 2023/24, the Commission was allocated Ksh 343.4 billion, accounting for 49.8% of the sector's allocation - teachers in public schools continue to face poor working conditions, and low wages have contributed to low teacher motivation and negatively impacted the quality of education.²²
19. Kenya's replies to the list of issues claim that it has increased capitation grants to all public schools,²³ with a focus on supporting students with disabilities.²⁴ Yet, there has been a challenge with inadequate capitation grants vis-à-vis the rising inflation costs

¹⁷ CESCR, Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, (November 14, 2022) para 212.

¹⁸ CESCR, Replies of Kenya to the list of issues in relation to its sixth periodic report, E/C.12/KEN/RQ/6 (June 11, 2024) para 93

¹⁹ Kenya Civils Society Joint Submission for the Right to Education for Kenya's 4th Universal Periodic Review, (49th Session of Human Rights Council for UPR) 2024. <https://gi-escr.org/en/our-work/on-the-ground/shaping-the-future-of-education-drafting-of-education-concerns-and-recommendations-for-the-universal-periodic-review>

²⁰ Collins Oyuu, "Why Education ministry's budget should be increased," *The Standard*, July, 2024. <https://www.standardmedia.co.ke/main-staging/counties/article/2001495929/why-education-ministrys-budget-should-be-increased>

²¹ Edwin Mutai, "Education, energy and roads suffer deep budget cuts," *Business Daily*, July, 2024. <https://www.businessdailyafrica.com/bd/economy/education-energy-and-roads-suffer-hefty-budget-cuts-4691226>

²² National Government Budget Implementation Review Report, First Six Months FY 2023/2024. February 2024.

²³ Capitation grant is the sum of money given to a school for each student who is enrolled and registered under the current National Education Management Information System in Kenya.

²⁴ Replies of Kenya to the list of issues in relation to its sixth periodic report, E/C.12/KEN/RQ/6 (June 11, 2024) para 93

that has negatively affected the implementation of quality education in Kenya.²⁵ Despite the government's commitment to Free Primary Education (FPE) and Free Day Secondary Education, the grants remain based on earlier agreed allocations in 2019 which are no longer sufficient to meet current education costs. The current capitation grant per learner as follows: Ksh.1,420 for primary, Ksh.15,000 for Junior Secondary, Ksh. 22,240 for Senior Secondary, Ksh. 3,500 for special needs in primary and Ksh. 35,000 for special needs in boarding secondary respectively.²⁶

20. On the issue of private schools especially with regard to Alternative Provision of Basic Education and Training (APBET) schools, the pandemic also exposed the fragility of the private education system, with many low-cost private schools and APBET schools unable to reopen, leaving children without access to education.²⁷
21. Kenya's report to the Committee and the replies to the list of issues states that the Ministry of Education has provided Registration Guidelines for APBET schools in 2015. However, the 2021 Registration Guidelines for Basic Education Institutions set out the requirements that institutions offering basic education and training must meet in order to be registered under Section 76 (1) of the 2015 Basic Education Act. There is still a need for clearer guidelines on the regulation of APBET schools, recognising that the provisions included in the 2015 the Registration Guidelines for APBET and the 2021 Guidelines differ when it comes to the registration of APBET schools.
22. There is a challenge regarding availability of public education especially in the informal settlements where the few available public schools are overcrowded.²⁸ This places an additional strain on teachers as the ratio of teacher-to-learner is imbalanced, thus compromising the quality of education.

Right to health

23. Article 43 (1) (a) of the Kenyan Constitution 2010 provides that every person has the right to the highest attainable standard of health, including the right to health care services and reproductive health care, and sub-Article 2 provides that a person shall not be denied emergency medical treatment.
24. This Committee in its **2016 Concluding Observations**, emphasised the need for Kenya to increase its health sector funding, expand the health insurance coverage,

²⁵ Lewis Nyaundi, "Capitation delays: Schools could close down as cash crunch bites," *The Standard*, June 2024.

<https://www.standardmedia.co.ke/education/article/2001496436/capitation-delays-schools-could-close-down-as-cash-crunch-bites>

²⁶ Kenya Civils Society Joint Submission for the Right to Education for Kenya's 4th Universal Periodic Review, (49th Session of Human Rights Council for UPR) 2024. <https://gi-escr.org/en/our-work/on-the-ground/shaping-the-future-of-education-drafting-of-education-concerns-and-recommendations-for-the-universal-periodic-review>

²⁷ Build Us More Schools! - The Quest for Quality Free Education in Mabatini and Ngei Wards of Mathare, Nairobi, 2024

²⁸ Ibid.

and expedite the adoption of the Health Bill and amendments to the Anti-Counterfeit Act.²⁹

25. Kenya's report and replies to the list of issues to this Committee does not provide clarity on state funding for public health care services. Regarding private providers of health care services, Kenya's reply to the list of issues vaguely indicates that there are several frameworks set up to monitor non-state providers and private actors in Kenya's health sector. However, the State does not provide a comprehensive list for reference of the relevant regulations.³⁰
26. Public healthcare remains underfunded, with minimal infrastructure and staff to meet demand. The national health budget allocation consistently falls below international recommendations with only 3.69% of the national budget and 0.97% of GDP allocated in 2022/23.³¹ This is far below the Abuja Declaration's minimum threshold of 15% of annual budget and the WHO's recommendation of 5% of GDP. Furthermore, inadequate allocation limits the reach of critical healthcare programs, including Universal Health Coverage (UHC) initiatives and services for marginalised populations.³²
27. The challenge with the accessibility and availability of public hospitals has led to the continued growth of privatised healthcare services,³³ including unregistered clinics that often provide substandard care, disproportionately affecting marginalised communities.³⁴ The reliance on private actors, combined with weak regulation, perpetuates inequities in healthcare access and quality.
28. Despite nominal increases in government health expenditure, healthcare financing remains inadequate to ensure universal access. This continues to widen the gap in terms of availability and accessibility of healthcare, and privatisation continues to dominate the healthcare sector. The for-profit share of healthcare providers has grown rapidly over the past decade, increasing from 33% to 43% of the total between 2013 and 2021.³⁵ This has led to unequal access to quality services and heightened

²⁹ CESCR, Concluding Observations on the Second to Fifth Periodic Reports of Kenya, E/C.12/KEN/CO/2-5. (April 6, 2016) para 52

³⁰ Replies of Kenya to the list of issues in relation to its sixth periodic report, E/C.12/KEN/RQ/6 (June 11, 2024) para 79

³¹ Joint Stakeholder Submission by Right to Health Thematic Group, (49 Session of the Universal Periodic Review), October 2024. <https://gi-escr.org/en/our-work/on-the-ground/we-contributed-to-the-drafting-of-the-universal-periodic-review-of-kenya-s-right-to-health-report>

³² Ibid

³³ Ibid

³⁴ Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), Patients or customers? The impact of commercialised healthcare on the right to health in Kenya during the COVID-19 pandemic (2021). DOI: 10.53110/RPCN4627

³⁵ Data from 2013 are from the following official report: Ministry of Health, Kenya Service Availability Readiness Assessment Mapping (SARAM) Report, http://guidelines.health.go.ke:8000/media/Kenya_Saram_Report.pdf page 12; also see: Economic and Social Rights Centre – Hakijamii and the Centre for Human Rights and Global Justice, 'Wrong Prescriptions: the Impact of Privatising Health care in Kenya' (17 November 2021) https://chrgi.org/wp-content/uploads/2021/11/Report_Wrong-Prescription_Eng_.pdf. p. 12.

risks for marginalised populations.³⁶ While Kenya has enacted frameworks like the Kenya Health Policy (2014-2030) and the Social Health Insurance Act (2023) to replace the National Health Insurance Act (2022), implementation gaps persist due to inadequate funding, weak governance and policies. For example, the Social Healthcare Insurance Fund -created by the Social Health Insurance Act- lacks equity-focused mechanisms to protect low-income populations from financial burdens.

Recommendations

29. Kenya needs to address the structural drivers of inequality, that include regressive tax measures which disproportionately affect disadvantaged groups. Furthermore, there is a need for the government to enhance transparency and accountability in public service delivery to prevent resource mismanagement and ensure equity in budget allocation.
30. We therefore invite the Committee to extend the following recommendations to Kenya:
- a. Kenya needs to increase its domestic revenue through progressive tax reforms and combating illicit financial flows as the country loses 184 million USD annually due to corporate tax abuse.³⁷ Such measure would help the country adequately and sustainably finance public services which make the rights to education and health a tangible reality. Indeed in line with Article 2(1) of ICESCR, State Parties, like Kenya, must use the maximum of their available resources to progressively realise economic, social and cultural rights (ESCRs).
 - b. People have a right to participate in decisions affecting their economic, social and cultural rights. This is in line with Article 37 of the Constitution of Kenya that protects the right to assembly, demonstration, picketing and petition. The Executive Power and the Parliament must guarantee the safety of protestors and implement mechanisms for participation regarding tax and budgetary allocation decisions. This duty is enshrined in Article 118 (1) where it is the constitutional duty of Parliament to conduct its business in an open manner and also to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

³⁶ Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), Patients or customers? The impact of commercialised healthcare on the right to health in Kenya during the COVID-19 pandemic (2021). DOI: 10.53110/RPCN4627.

³⁷ 'African Civil Society supports Kenyan citizens' demands for economic reforms', June 26, 2024., https://www.taxjusticeafrica.net/sites/default/files/publications/Statement_%20Civil%20Society%20on%20RejectFinanceBill2024_0.pdf

- c. Ensure sufficient budgetary allocations to the public education sector to guarantee free, inclusive, and quality education for all. This can be done by raising the learner capitation grants to align with recommendations from the Presidential Working Party Report on Education reforms in 2023.³⁸
- d. Implement and enforce the APBET guidelines to regulate private education providers and ensure compliance with human rights standards.³⁹ This can be done by contextualising the current registration guidelines of basic education institutions with the Abidjan Principles.⁴⁰
- e. Address barriers impeding access to public schools in informal settlements by constructing additional public schools, hiring qualified teachers and providing the necessary learning materials to support learners and teachers in these schools.⁴¹
- f. The Teachers Service Commission should prioritise improving teachers' working conditions and remuneration. This includes implementing competitive salary structures and providing adequate teaching resources to enhance teacher motivation and performance.
- g. Increase domestic healthcare spending to meet the Abuja Declaration minimum threshold (at least 15% of budget) and the WHO recommendation (at least 5% of GDP), ensuring universal access to affordable and quality healthcare services. To further this, the state should:
 - i. Ensure that the roll out of Social Health Insurance Fund (SHIF) is done in accordance with the guiding principles in formulation of Kenya Health Financing Strategy 2020-2030 such as equity, transparency and accountability.⁴²
 - ii. Review the Kenya Health Sector Strategic Plan 2018-2023 and fully implement the contents relevant to domestic health financing, in accordance with its international commitments on budgetary allocation

³⁸ Report of the Presidential Working Party on Education Reform, June 2023 <https://education.go.ke/node/429>

³⁹ Global Initiative for Economic Social and Cultural Rights (GI-ESCR), The Conceptualisation and Regulation of APBET Schools in Kenya: Applying the Abidjan Principles on the Right to Education (2024). <https://gi-escr.org/en/resources/publications/the-conceptualisation-and-regulation-of-apbet-schools-in-kenya-applying-the-abidjan-principles-on-the-right-to-education>

⁴⁰The Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education, <https://www.abidjanprinciples.org/>

⁴¹ Global Initiative for Economic Social and Cultural Rights (GI-ESCR), Build Us More Schools! - The Quest for Quality Free Education in Mabatini and Ngei Wards of Mathare, Nairobi, 2024

⁴² Ministry of Health, Health Financing Strategy, 2020-2030. <https://guidelines.health.go.ke/#/category/20/351/meta>

to health, as a percentage of the total government budget (15%) as evidenced through budget estimates and the Count Health Budget Analysis.⁴³

- h. Strengthen the regulation and monitoring of private healthcare facilities to protect marginalised populations from substandard care.
- i. Expand public health insurance coverage, prioritising low-income households to reduce out-of-pocket expenditures.

Conclusion

We thank this Committee for the opportunity to make this submission, which is made in a spirit of co-operation and with the intention of improving the Government of Kenya's efforts to ensure targeted reforms to prioritise the financing of public services, such as education and health care, while upholding human rights. GI-ESCR, CEPCJ, Hakijamii and EACHRights hope that this submission may assist the Government of Kenya in reporting to this Committee in the future.

Submitted by:

Contact:

Roselyne Adhiambo Onyango, Associate Programme Officer – Africa, at the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR). Email: roselyne@gi-escr.org

⁴³ Joint Stakeholder Submission by Right to Health Thematic Group, (49 Session of the Universal Periodic Review), October 2021