**Submission from Kenyan civil society actors on the Draft CESCR General Comment on Land and Economic, Social and Cultural Rights**

**Introduction**

Kenya is currently uniquely placed in relation to the place of international law in the domestic legal system subsequent to the adoption in 2010 of a new Constitution. The Constitution, in articles 2(5) and 2(6) affirm the direct applicability of general rules of international law as well as ratified treaties in the domestic legal system. This positive attitude towards international law has been extended through judicial interpretation, with the Supreme Court of Kenya in the *Mitu-Bell Welfare Society v Kenya Airports Authority and 2 Others [2021]* (Mitu Bell case) case determining that where there is lacuna in domestic law, the court may have recourse to international law – customary and treaty – as proper sources of law in Kenya (para. 132). The Court further gave impetus to reliance on international soft law instruments like General Comments, indicating that they are not offending of the Constitution and could be relied on to fill an existing lacuna in national law and as interpretive tools to help the court elaborate the content and obligations resulting from existing international legal norms (paras. 143-143).

In the context of this judgment, General Comments thus become important sources of interpretive guidance to our courts in the interpretation of the economic and social rights and other relevant provisions of the Constitution. It was thus critical that we as the Kenyan civil society actors engage in the process of the development of this draft General Comment on Land and ESCR to help fill some of the legal gaps that abound in our legal system in relation to land and its intersection with critical economic and social rights such as housing, livelihoods, water, health and social security.

This submission was thus developed subsequent to a webinar held on the 16th of July 2021 convened by the Economic and Social Rights Centre – Hakijamii and Amnesty International. The following organisations also participated in the webinar, particularly by providing panel discussants: Office of the High Commissioner for Human Rights in Kenya; Kenya National Commission on Human Rights; Centre for Advanced Studies in Environmental Law and Policy (CASELAP) of the University of Nairobi; Kenya Human Rights Commission; Pamoja Trust; Haki Yetu Trust; and Kenya Land Alliance. The webinar was attended by over 100 people, some of whom were representatives of different interest groups and also made submissions on the draft General Comment during plenary discussions. This submission is thus a reflection of the concerns and contributions of the land non-state actors in Kenya, who made the specific submissions on the General Comment as contained herein.

**1. linking land and governance more broadly**

While the effort of the Draft GC to link land and economic and social rights is laudable, it was felt that the Draft should capture all aspects of land governance in the broader context by addressing the political, economic, social and ecological components of land. There is especially need for the general comment to effectively contextualize the land question from a historical perspective as the causes of present land challenges can be traced to the past, and the past should be effectively redressed if current land challenges are to be surmounted. This should especially address the contribution of the political elite to the land challenges affecting their countries and propose a framework that could effectively be used to address/redress the land interests and dealings of the political elite at the global level.

It was also felt that the Draft GC focuses on access and use of land but does not adequately elaborate on all the 11 components of land tenure rights – including the balancing of rights in the context of land ownership and use in the context of other societal considerations such as development and environmental considerations.

It was also felt that the Draft GC is narrow in its focus on “agrarian reforms” and should expand to adequately cover land reforms in general, especially as it impacts on the urban poor, as it was felt that the Draft GC does not adequately address the land and related rights of the urban poor in informal settlements. This is clear as para. 15 in detailing some of the vulnerable populations in relation to land fails to mention the landless urban poor in informal settlements, who equally have a legitimate right to the use of land for their settlement and livelihoods as part of their right to the city.

Further, while it is commendable that the Draft GC tackles the question of corruption, which has been a major factor affecting the land sector, the focus is narrowed to land administration, which leaves out other critical areas of land governance. It was felt that there is need for further elaboration of the impact of corruption on all areas of land governance if the General Comment is to provide effective tools for international advocacy on this issue of corruption in the land sector.

It was further felt that the General Comment should advocate the effective participation of all stakeholders in land governance and ensure the protection of land activists and other non-state actors from threats emanating from their involvement in land, rights and conservation advocacy, especially in light of the continued cold-blooded extra-legal execution of land and environmental activists in many countries.

**2. Resettlement as a requirement in the context of eviction of a settled community**

Though the Draft GC effectively covers the issue of evictions, it does not adequately make provision for the mandatory resettlement of settled communities who have lived in the subject land for a long duration of time. Several cases at the national level have made resettlement in this context a requirement, with the jurisprudence of the South African Constitutional Court affirming this requirement in the *Olivia Road Case [2008]* that where evictions lead to homelessness, the State must provide adequate alternative housing with secure tenure from subsequent evictions. The requirement for resettlement has also been confirmed by the Kenyan Supreme court in the Mitu-Bell case where the Court stated as follows:

The right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. This right derives from the principle of equitable access to land under Article 60 (1) (a) of the Constitution. Faced with an eviction on grounds of public interest, such potential evictees have a right to petition the Court for protection…. But, under Article 23 (3) of the Constitution, the Court may craft orders aimed at protecting that right, such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction (U.N Guidelines), the provision of alternative land for settlement.

On this basis, it was proposed that the Draft GC should indicate **in a new para. 26 (between the current paras. 25 and 26)** that the eviction of a settled community can only be undertaken if it is just and equitable to evict them taking into account the following considerations:

* The circumstances under which the community occupied the land and erected their buildings or structures;
* The period the community has resided on the land in question and their level of integration into the surrounding community and their reliance on available livelihood opportunities and public services; and
* The availability of a suitable alternative land for resettlement of the community to avoid rendering them homeless as a result of the eviction.

Further, the Draft GC should include a requirement that before the eviction of a settled community, and in the context of resettlement, that the resettlement is voluntary and is predicated on the free, prior and informed negotiations that establishes a fair and level playing field for the community. These inclusive, robust, transparent and participatory negotiations should lead to the development Resettlement Action Plan (RAP) to guide the resettlement process. Some of the considerations that must be contained in a RAP include:

* Adequate information to the affected community on their rights and options in the context of resettlement, inclusive of the technical and economic feasibility of the different available options and empowering the community to actively participate in the process of selection of resettlement options.
* *Ex ante* human rights impact assessment as well as regular *ex post* human rights assessments subsequent to the resettlement for compilation of disaggregated data on the impact of resettlement on the affected community taking into account the assets, resources, opportunities, access to socio-economic facilities/infrastructure/services and the social support structures lost as a result of resettlement. These assessments should pay special attention to vulnerable and marginalised groups (children, women, persons with disability, the elderly, indigenous people, and the terminally ill) and mitigation measures put in place to address the adverse impacts of the resettlement on these groups.
* An affirmation of the productive potential, locational advantages and the tenure security of the resettlement location comparative/equivalent to the site of displacement to ensure the continuity of the resettled community’s livelihoods and socio-economic activities. This should ensure that communities reliant on the urban economy are resettled as close as possible to the urban centres, those reliant on agriculture are provided alternative productive and cultivable land of commensurate size and value, those with coastal/riparian livelihoods have equivalent access to the sea, lakes, rivers for the continuation of their socio-economic activities.
* The RAP must expressly and in detail deal with the issue of tenure security and assure of secure tenure in the place of resettlement that provides protection against future evictions. It should provide for the issuance of some form of tenure documentation either for the individual resettled households or a common tenure document for the resettled community if the national legal framework makes provisions for such a possibility of communal tenure.
* The RAP must provide assurance adequate housing in the resettlement site, with the critical components of housing such as tenure security, affordability of housing, availability of socio-economic infrastructure/facilities and services, habitability and protection from hazards, pollutants and vectors for physical safety and health of inhabitants, accessibility – including for disadvantaged groups, and cultural appropriateness, among others being assured.
* Livelihood and income restoration programs for the resettled community must also be adopted as essential components of the RAP as socio-economic integration into a new resettlement area takes time. In this context, developmental assistance/support should be provided to the resettled community where required such as employment skills training for resettled urban population (wage-based livelihoods), land preparation and agricultural/livestock input for resettled rural populations (land-based livelihoods), and credit facilities to enable investments for enterprise-based livelihoods.
* The RAP must contain transaction and transitional costs for the resettled community and ensure prompt and adequate compensation for lost assets at full replacement value and the attendant resettlement expenses paid at full costs.
* The RAP must contain an implementation plan with a description of organizational responsibilities, an adequate budget for its implementation and strict implementation schedule/timelines.
* The RAP must also have an effective, accessible and affordable redress mechanism for timely resolution of emergent disputes/complaints/claims for the satisfactory implementation of the resettlement.

**3. Note on terminology: “forced evictions” in paragraph 25 in the Draft General Comment**

It was noted that para. 25 of the draft conflates terminology, using evictions and forced evictions interchangeably. On this point, it was reiterated that it is critical that the Draft GC is in line with General Comment 7 and the Basic Principles and Guidelines on Development-based Evictions and Displacement that clearly differentiates between forced evictions, which are always unlawful and a human rights violation, and *evictions* which may be carried only under exceptional circumstances. The proposed wording subsequent to this submission is as follows:

*Forced evictions are prima facie incompatible with the Covenant ~~and can be justified only in the most exceptional circumstances.~~ The relevant authorities must ensure that ~~forced~~ evictions are carried out in accordance with legislation that is compatible with the Covenant and in accordance with the general principles of reasonableness and proportionality between the legitimate objective of the eviction and its consequences for the evicted persons.”*

**4. Land and alternative justice systems**

Access to justice and pacific settlement of disputes is critical in land governance if land is to be used effectively. Though para. 57 makes provisions for traditional and other dispute resolution mechanisms, it does not give sufficient focus on alternative dispute resolution mechanisms that could be utilised to amicably resolve land disputes, especially in the context of indigenous and traditional communities. This should include formal systems of dispute resolution that are alternative to the court systems and the ordinary litigation processes such as mediation, arbitration, and conciliation among others with a focus on cohesion and restorative justice as objectives of land dispute resolution.

In the context of dispute resolution, it was also felt that the Draft GC has not sufficiently dealt with the issue of reparation for past and present land injustices, which has been the source of tensions and conflicts in many countries. It was suggested that the Draft GC should articulate clear parameters of reparations at the international level so as to guide States in the development of national land reparation frameworks.

**5. extra-territorial obligations of States**

It was felt that these were important contributions of the Draft GC especially in the context of large-scale land acquisitions in the Global South as well as the activities of multinational corporations and the international financial institutions in the area of resource exploitation, development financing and environmental conservation activities that have great reliance on access to land. It was felt that there was need for an effective implementation framework for these extra-territorial obligations so as to ensure that land and related socio-economic rights violations could be redressed, and proper reparations paid for the harm occasioned to vulnerable and marginalised communities in the Global South whose land and related rights are infringed through the activities of foreign states or multinational companies.

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