

Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights

A Supplementary Submission to the Kenyan Government's Initial Report under the ICESCR, scheduled for review by the Committee on Economic, Social, and Cultural Rights during its 41st session (Nov. 3-21, 2008).

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EXECUTIVE SUMMARY

To better comply with the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Kenyan government must take advantage of increased domestic support for political reform to improve its protection of women's rights, in particular their rights to an adequate standard of living, including housing and food, and health. Kenya's efforts to address the impact the post-election violence provide an ideal opportunity to conform its laws and harmful customary practices to international human rights standards.

While women form a majority of the population in Kenya (52%) and play an active role in the development of the society, Kenya remains a very patriarchal society, and the status of women remains relatively low with inequalities and inequities prevailing in many aspects of life. Women continue to be marginalized and discriminated against in almost all aspects of their lives, a situation which is reinforced by the existing laws and policies, as well as the socio-cultural factors.

The Federation of Women Lawyers Kenya (FIDA Kenya), an independent, non-governmental organization of women lawyers in Kenya, along with the International Women's Human Rights Clinic (IWHRC) at Georgetown University in the United States, jointly highlight key concerns for women's human rights in Kenya to enable a more accurate assessment of the review of Kenya's compliance with the ICESCR (41st Session, Nov. 3-21, 2008).

Since the Kenyan government became a party to the ICESCR in 1976, it has taken no steps to domesticate the Covenant. The government – as is glaring missing from its report to this Committee – has taken few steps to eradicate sex-discrimination in the enjoyment of economic, social, and cultural rights. Our submission highlights the violations of women's and girls' property and inheritance rights, and the consequent effect on their increased vulnerability to violence, HIV infection, and prosecution for the transmission of HIV, especially in the context of mother to fetus transmission.

Kenya's current system of property and land access and ownership discriminates against women, creating social inequality and serious economic disadvantages. The Kenyan constitution, by permitting sex discrimination in customary law and personal-status law, permits violations of women's rights under the ICESCR, such as the right to an adequate standard of living, including housing, and to property, health, work, and the protection of the family. Customary laws largely exclude women from inheriting, owning, and possessing land, including their matrimonial homes, which they have worked on and, in many cases, helped purchase. Additionally, because Kenya lacks statutory guidance on the division of matrimonial property at divorce, women often must leave marriages, including abusive or polygamous unions, with nothing but the clothes on their backs. Widows are evicted from their homes or forced to be sexually "cleansed" or "inherited" as property by the kin of their deceased husband, or risk losing their housing.

While the Laws of Succession Act grants widows a life interest in their matrimonial home, the government has failed to adequately enforce this protection, especially in rural areas. Many widows evicted from their homes along with their children have nowhere to go and end up migrating to urban "slums" where they eke out sub-standard living, and often must resort to sex for necessities for themselves and their children. Without laws to protect the equal rights of women to housing and property, including during marriage and at its dissolution, both at divorce and death of a spouse, women will continue to unreasonably shoulder the burden of poverty in Kenya.

While women and girls are disproportionately affected by HIV, in particular widowed and divorced women (with 17-21% HIV infection rate) and those in polygamous unions (11% compared to the overall rate of 7%), the Kenya government has failed to directly address their needs and the root causes for their plight. Instead, in an effort to curb the disease, the government has instituted laws criminalizing HIV and AIDS transmission. Though they are well-intentioned measures to curb the spread of HIV, these laws violate women's rights to non-discrimination, health, work, and dignity under the ICESCR., because women are more likely both to contract HIV/AIDS and to know their HIV status. The Kenyan government should follow the standards contained in the ICESCR and support women who seek treatment, rather than laws which direct government resources towards pointless retribution.

The Committee on Economic, Social, and Cultural Rights (CESCR) in its Concluding Observations to the Kenyan government could lend substantial support to local efforts by human rights groups to achieve better gender equality in the enjoyment of economic, social, and cultural rights. The timing of Kenya's review by the CESCR is critical as the government builds on political will for reform following post-election violence in early 2008.

I. INTRODUCTION

Women form a majority of Kenya's population (52%) and play an active role in the development of the Kenyan society. Kenya is, however, a patriarchal society and the status of women remains relatively low with inequalities and inequities prevailing in many aspects of society. Women continue to be marginalized and discriminated upon in almost all aspects of their lives, a situation that is reinforced by the existing laws and policies as well as the social-cultural factors. This submission addresses Kenya's progress in ensuring that women are able to enjoy their rights under the International Covenant on Economic, Social, and Cultural Rights (ICESCR) on the same footing as men.

This submission supplements the Twelfth Periodic Report submitted by the government of Kenya on September 10, 2007 (U.N. Doc. No. E/C.12/KEN/1) on its compliance with the ICESCR ahead of the government's scheduled review during the Committee's 41st session (Nov. 3-21, 2008). The Federation of Women Lawyers - Kenya (FIDA-Kenya), an independent, non-governmental organization of women lawyers in Kenya, and the International Women's Human Rights Clinic (IWHRC) at Georgetown Law in Washington, D.C., United States of America, jointly compiled the letter with the aim of furthering the Committee's work on the intersection of race and gender discrimination. (See Appendix for additional information on FIDA Kenya and IWHRC) The information contained in this submission is based largely on legal research, test-case development, and fact-finding investigation conducted by the FIDA-Kenya in partnership with the IWHRC. On page 6 of this submission, we include proposed recommendations for the Committee to consider in formulating its concluding observations to the government of Kenya on its compliance with the Convention.

Since the Kenya acceded to the ICESCR on May 1, 1972, and the entry into force of the Covenant on January 3, 1976, the Kenyan government has taken no steps to domesticate the Covenant into its national law. The government's failure to educate the public about the ICESCR has resulted in little awareness about the Covenant by lawyers and judges who might invoke it in judicial or other proceedings. The Kenyan government has taken few steps to eradicate sex-

discrimination in the enjoyment of economic, social, and cultural rights – a glaring oversight in its report to this Committee.

This submission addresses critical issues that severely and adversely affect Kenyan women's ability fully to exercise their economic, social, and cultural rights. Kenya's initial report to the Committee (E/C.12/KEN/1)¹ fails to examine and explain this deprivation. This submission therefore addresses some of the gaps in the government's report and highlight discrimination against women in Kenya in violation of the ICESCR.²

This submission addresses two related concerns:

- the violations of women's and girls' property and inheritance rights, including their right to an adequate standard of living and housing; and
- the effect of economic disempowerment on women's and girls; greater vulnerability to violence, HIV infection, and prosecution for the transmission of HIV, especially in the context of mother-to-fetus transmission, in violation of their right to health.

II. PROPOSED QUESTIONS FOR KENYAN DELEGATION

Upon consideration of the information provided in this submission, FIDA Kenya and the IWHRC urge the Committee to pose the following questions to the Government of Kenya:

A. Discrimination Against Women's Property and Inheritance Rights, Including During Marriage and at Divorce

1. What measures has the government taken to prevent officials and traditional leaders in rural areas from ignoring the Law of Succession Act and applying local customary laws that deprive women and girls of their right to inheritance?
2. What steps has the government taken to inform women of their property and inheritance rights and ensure that they can access financial and legal aid to enable them to bring property claims to court if those rights are violated?
3. What steps has the government taken to ensure that the judiciary is interpreting laws in accordance with the international-human-rights norms of equality and dignity of the person, particularly in the context of the Law of Succession, the Registered Land Act (which effectively confers absolute ownership by husbands over matrimonial property), and the Married Women's Property Act of 1882 (the antiquated British colonial law that Kenya still uses to determine division of property at divorce)?
4. When will the Kenyan government enact the pending Marriage Bill and Matrimonial Property Bill of 2007?
5. In its last state report to the Committee overseeing the Convention on the Elimination of All Forms of Discrimination Against Women and before the Court of Appeal's 2007 *Echaria v. Echaria* decision denying equal matrimonial property rights to women working in the

home, the Kenyan government stated in its last that “[a]ll property acquired during the marriage period is considered matrimonial property and therefore each spouse has an equal share in the same.”³ In light of *Echaria*, that is no longer true. What is the government doing to ensure the equal division of property after marriage, including the full recognition of domestic labor as a valuable contribution?

6. What is the status of efforts to amend the sex-discriminatory provision in the Law of Succession Act, and eliminate the spousal exemption for rape in the Sexual Offenses Act (sec. 43(5))?
7. How does Kenya’s HIV/AIDS program address the needs of women who have suffered property-rights violations and who have contracted or are now at risk of contracting HIV/AIDS?

B. Discriminatory Impact on Women of HIV-Criminalization Laws

1. What laws and policies are in effect in Kenya to protect people with HIV/AIDS, and in particular women, from discrimination by the general public, as required by Article 2(2) of the ICESCR? What laws and policies are in effect to protect those with HIV/AIDS from discrimination by the government?
2. What measures has the government taken to minimize the potential adverse impact on women living with HIV and AIDS of Kenya’s statute criminalizing HIV transmission (section 26 of the Sexual Offences Act of 2006)?
3. What, if any, parliamentary discussions have addressed passing laws on the prevention of HIV transmission, including use of more precise language in the Acts as required by General Comment No. 14 to the ICESCR, which states: “[Any] State Party which ... restricts the movement of, or incarcerates, persons with transmissible diseases such as HIV/AIDS, ... on grounds such as national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in article 4”?
4. What guidelines has the Kenyan government given to prosecutors to enforce the Sexual Offenses Act of 2006 and to prepare for the operational date of the HIV and AIDS Prevention and Control Act of 2006? What constitutes putting someone “at risk,” as required in section 24(2) of the HIV and AIDS Prevention and Control Act; and what types of activities make transmission “likely,” as used in section 26(1)(b) of the Sexual Offenses Act?
5. Given Kenya’s limited resources, how accessible are scientific tests needed to enforce the transmission laws, such as phylogenetic testing which are used to rule out one person as the source of another person’s infection?
6. How does the government ensure that measures to protect public health do not violate individual rights?
7. How is the Kenyan government working to provide adequate prenatal care to women with HIV/AIDS, as required by the ICESCR’s Article 12 right to health?

8. What is the current status of the State's health-service-waiver program regarding the elimination of user fees at HIV/AIDS and maternity healthcare facilities?
9. How has Kenya worked towards improving health-care providers' general knowledge of mother-to-fetus HIV transmission and the available treatments to reduce the risk of transmission?
10. What steps have been taken by the government to increase funding and accessibility to anti-retroviral treatment for women infected with HIV/AIDS?

III. PROPOSED RECOMMENDATIONS

Upon consideration of the information provided in this submission, FIDA Kenya and the IWHRC urge the Committee to consider the following recommendations to the Government of Kenya:

A. Discrimination Against Women's Property and Inheritance Rights, Including During Marriage and at Divorce

1. Eliminate the carve-out in Section 82(4)(b) and (c) of the Kenyan Constitution, which allows for discrimination with respect to "marriage, divorce, burial, devolution of property on death or other matters of personal law" and customary law, respectively.
2. Pending constitutional reform, instruct the judiciary to interpret the exceptions in Section 82(4) of the Constitution to allow only that customary law which is not repugnant to any international human rights treaties to which Kenya is a party, including the ICESCR

Land and Property

3. Enshrine in law and titles women's occupancy and secondary (or derivative) land rights.
4. Ensure the availability of alternative forms of collateral to land, and, as a corrective action, lengthen payment periods for loans extended to women.
5. Provide for female representation in institutions that adjudicate land disputes.
6. Amend procedures for land disputes to guarantee the right to an advocate and the right to appeal decisions based on customary law.

Matrimonial Property

7. Enact a framework for requiring spousal consent in transactions, such as the sale, rental, use as collateral, and mortgage, involving matrimonial property; and enact clear rules for equal division of matrimonial property at separation or divorce.
8. Place legal protections on women's property during marriage, so that it is not sold or traded without their consent.

9. Incentivize joint ownership and registration of matrimonial property by giving tax breaks for the registration of joint ownership, and by eliminating fees and taxes upon land registration, such as the stamp duty and conveyancing fees. In conjunction, amend Section 101(3)(a) of the Registered Land Act to restrict the Minister of Lands from exercising discretion to limit joint registration to one proprietor, except where there are legitimate, compelling circumstances, and land registration boards should instead require joint registration of marital property.
10. Pass legislation to override the harmful aspects of the *Echaria* decision, which rejected unpaid contribution to a marital household – such as childbirth, childcare, cleaning, and agricultural labor – in dividing matrimonial property at divorce.
11. Require that all marriages be registered and enact incentives, such as tax credits and subsidies, to encourage registration. The registration of all customary and polygamous unions is necessary to protect the wife's or wives' rights in marriage and in matrimonial property.
12. Pass without delay the Marriage Bill and the Matrimonial Property Bill which will give spouses equal interests in matrimonial property during marriage and at divorce.

Inheritance

13. Reform Kenya's succession laws to reflect the equal inheritance rights to widows and widowers granted by international human rights treaties to which Kenya is a party, including the ICESCR.
14. Explicitly eliminate the exception in the Law of Succession Act sections 32 and 33 allowing discriminatory customary law to apply to Gazetted agricultural land and livestock.
15. Design and implement an information-sharing program, such as the one recommended to Kenya by the CEDAW Committee in 2007, which would inform rural women of their rights regarding inheritance.
16. Require administrative officers, chiefs, and assistant chiefs – who are already obligated to report a death, secure property of the deceased, and locate people who appear to have an interest in the property – to inform potentially affected parties of their legal rights under the Law of Succession Act.
17. Establish penalties for widow evictions, and criminalize wife “inheritance” and ritual “cleansing.”

Polygamy

18. Discourage polygamy as a permissible form of legal marriage.
19. In the interim as polygamy continues, enact laws to mitigate the harms of polygamy by enforcing an equitable property arrangement for all wives involved. The arrangement should include: written consent of each prior wife and the future wife, and a property distribution agreement which outlines the matrimonial property interest that each existing and prospective wife can expect to enjoy during the course of the marriage and upon its dissolution.

B. HIV-Criminalization Laws' Discriminatory Impact on Women

1. Take measures to amend the Kenyan Constitution or draft legislation that prohibits discrimination based upon actual or perceived HIV/AIDS status.
2. Remove, to the extent possible, clauses that criminalize the transmission of HIV in the Sexual Offenses Act and the HIV and AIDS Prevention and Control Act that are facially or effectively discriminatory against people with HIV/AIDS and in particular against women, such as the Sexual Offenses Act, section 26(1) and the HIV Prevention and Control Act, section 24(1).
3. Amend section 30 of the Sexual Offenses Act, which penalizes failure to disclose a conviction under the act so that the clause does not apply to people convicted under section 26, which broadly criminalizes transmission. Alternatively, amend the law to require persons to inform employers of their conviction only if 1) the court determines the crime involved *mens rea* rather than mere negligence, or 2) the job involves activities that may expose others to HIV transmission.
4. Expand health care options so that women with HIV and AIDS have access to antiretroviral medications and appropriate maternal care to increase the likelihood that women will not pass HIV or AIDS on to their children.
5. Counteract harmful customary practices that lead to the spread of HIV and AIDS through legislation that criminalizes practices such as widow inheritance, ritual cleansing, Female Genital Mutilation/ Genital Cutting.
6. Criminalize domestic violence, including rape by a spouse, to support women's rights to negotiate safer sex methods without fear of violence.
7. Increase the number of HIV/AIDS treatment centers and health-care providers in rural areas.
8. Create guidelines and enforce universal implementation of the HIV Acts' pre- and post-test counseling requirements, including counseling around the requirement for notifying a partner of one's HIV status.
9. Implement thorough HIV/AIDS training for its licensed medical providers covering the disease and its particular effects on women's health.

IV. THE ICESCR CAN HELP SHAPE THE KENYAN POLITICAL-REFORM AGENDA

This Committee could play a catalyst role in ensuring that Kenya incorporate gender equality in the enjoyment of economic, social, and cultural rights as the government builds on existing momentum to move forward and strengthen the nation. The Kenyan government must take advantage of increased domestic support for political reform to improve its protection of women's economic, social, and cultural rights, in particular their rights to an adequate standard of living, including housing and food, and health. Kenya has made commendable efforts to provide legal protections for women's human rights through constitutional reform. For example, the draft constitution that was defeated in a November 2005 referendum included provisions giving women equal rights to inherit and access and control property.⁴ Without ensuring such rights in a revised constitution, women stand to lose the gains made through the constitutional review process. Despite past failures of such efforts, Kenya again has the chance to achieve reforms that will

strengthen women's rights in compliance with the International Convention on Economic, Social and Cultural Rights, and in turn strengthen Kenyan society.

The government report to this Committee (dated September 7, 2006) pre-dates the new opportunity for change sparked by the December 27, 2007 elections. These elections, which occurred at the presidential, parliamentary, and local-government levels, were marred by reports of serious irregularities.⁵ Despite such reports, on December 30, 2007, the Electoral Commission of Kenya (ECK) declared incumbent Mwai Kibaki as the winner, igniting two months of post-election violence.⁶ During those two months, more than 1,000 people were killed and approximately 500,000 people were internally displaced.⁷ Women in particular suffered in the aftermath of the election. The bulk of internally displaced Kenyans are women and children, with women continuing to experience disproportionately high levels of poverty and landlessness.⁸ Women who have lost husbands and sons to the violence are at risk of losing land that was never registered in their names due to discriminatory property statutes and customary law. Reports from the Nairobi Women's Hospital and the Coast General Hospital indicated a two-to-three-fold increase in the number of women and children seeking treatment for sexual assault.⁹

Kenya's efforts to heal and address the impact the post-election violence provide an ideal opportunity to reform its laws and address harmful customs that violate women's rights. Recent significant achievements reinforce the timing for this unique opportunity for Kenya to institute progressive change. To quell the violence, former U.N. Secretary-General Kofi Annan led mediation talks resulting in the Orange Democratic Movement party and the Party of National Unity reaching a reconciliation agreement on February 28, 2008. As part of a power-sharing agreement, today, Mwai Kibaki serves as the president and Raila Odinga as prime minister.¹⁰ This coalition government, which required an amendment to the constitution, marked the beginning of reform. Following the appointment of a new cabinet, the Ministry of Gender, Sports, Culture and Social Services was changed to become the Ministry of Gender and Children Affairs.¹¹ And the theme of Finance Minister Amos Kimunya's budgetary presentation earlier this year was, "Working Together to Build a Cohesive, Equitable and Prosperous Kenya." Minister Kimunya stated that the Ministry intends to "usher our new thinking and vision for building this Nation."¹²

V. KENYA'S LEGAL SYSTEM VIOLATES WOMEN'S RIGHTS UNDER THE ICESCR

To better comply with guarantees under the ICESCR, Kenya must address sex-discriminatory provisions in its constitution, statutes, and customary laws. In detailing its compliance with Article 3 on sex equality in the enjoyment of ICESCR rights, the Kenyan government report to this Committee recognizes that while the Constitution prohibits discrimination on the basis of sex "[i]t recognizes customary law for the determination of matters of adoption, marriage, divorce, and burial, devolution of property on death or other matters of personal law. This recognition of customary laws brings with it customary practices that are in some cases, discriminatory in their very nature" (para. 40).

Subsections 82(4)(b) and (c) of the Constitution permit discrimination with respect to personal law and customary law.¹³ Several provisions in statutes also defer to customary law. For example, any agricultural land, crops, or livestock located within areas specified by the Gazette are governed by customary law and excluded from being distributed according to the Law of Succession Act, which unlike the customary laws of many Kenyan communities, provides for equal inheritance

rights for men and women.¹⁴ For example, this claw-back provision allows for discrimination against women in the devolution of property at death, eviction of widows from their matrimonial homes, for child marriage, which is illegal under Kenyan Children's Act.¹⁵

The government further recognizes that “customary law continue[s] to be a challenge to realisation of rights for the marginalised groups especially women and children” (para. 40), but fails to account for statutes and practices that condone and perpetuate discrimination against women's rights under the ICESCR. Yet, whereas the government specifies that “[t]he discriminatory nature of African Customary Laws is reflected in women's inheritance and property rights,” it dismisses the adverse impact on women's rights by adding that “suffice to note that the courts have been very proactive in declaring the rights or women as far as property is concerned whether in matrimonial, succession or other suits” (para. 40). Thus, the report excuses a fundamental flaw in the Kenyan Constitution by claiming erroneously that courts have been “proactive” in issuing progressive decisions. In reality, courts and other tribunals (especially bodies handling land allocation and disputes) bound by sex-discriminatory laws continue to curtail women's access to land, property, and housing. For example, a 2007 decision by Kenya's highest court, *Echaria v Echaria*, eviscerated any perceived progress on women's rights to matrimonial property (see Section VII(B)(2) of this submission). Moreover, despite the laudable and tireless efforts by the Kenya Law Reform Commission in producing bills that ensure women's equal rights to property, including matrimonial property, parliament has consistently failed to table, much less pass, such key legislation.

Kenya's legal system contains a mix of statutory and customary law¹⁶ that has resulted in conflicts between overall guarantees of human rights and their extension to women and girls. Within Kenya's legal hierarchy, the Constitution supersedes any other law.¹⁷ The role of customary law within the Kenyan legal system is spelled out in section 3(2) of the Judicature Act, stating that “African customary law” shall govern in “civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law....”¹⁸ In practice, however, the “repugnancy” exception to the application of customary law has rarely been invoked successfully in cases dealing with women's equal rights. Statutory and constitutional deference to customary law harms the rights of women under the ICESCR, and thus must be immediately amended.

VI. THE CESCR HAS THE MANDATE TO ADDRESS ISSUES EXAMINED IN THIS SUBMISSION

In its expanded note on NGO participation, the Committee has reiterated the importance it attaches to information from NGOs which will “enhance the effectiveness of the international monitoring, through [the Committee's] examination of State party reports, of the implementation of the International Covenant on Economic, Social and Cultural Rights by States parties.”¹⁹ This submission aims to address critical issues which severely and adversely impact Kenyan women's ability to fully exercise their rights to economic, social, and cultural rights. Kenya's initial report to the Committee (E/C.12/KEN/1) fails to capture fully the gender impact of such deprivation. This submission aims to address some of the gaps in the government report and to highlight discrimination against women in Kenya in violation of the ICESCR.

The right to non-discrimination in the enjoyment of economic, social, and cultural rights forms the bedrock of this Committee's Mandate. Articles 2(2) and 3 explicitly prohibit sex-based discrimination in the enjoyment of the rights contained in the ICESCR. In its General Comment 16 on the equal rights of men and women to enjoy the ICESCR rights, the Committee defined

discrimination to mean “any distinction exclusion or restriction made on the basis of sex which has the *effect* or *purpose* of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights” (para. 11). In addition, the Committee has recognized that “[w]omen are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination” (para. 5). In reviewing state’s implementation of article 3 on non sex –discrimination, the Committee has requested state to “take into account that [gender neutral] laws, policies and practice can fail to address or even perpetuate inequality between men and women because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women.” (para. 8)

The prohibition against non-discrimination is not subject to the allowance in Article 2(1) for the progressive realization of the rights in the Covenant, and as such requires immediate and crucial attention in reviewing Kenya’s compliance with its obligations under the ICESCR.²⁰

The Committee’s mandate covers the consideration of the particular harm to women who are denied their equal rights to land, property, and inheritance, including the evictions of widows, and the denial of equal share to matrimonial property to married and divorced women. Article 11(1) of the ICESCR mandates state parties to “recognize the right of everyone to an adequate standard of living ..., including adequate housing.” The Committee explicitly highlighted in para. 10 of its General Comment 7 on the right to housing, that “[w]omen...are especially vulnerable [to evictions] 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, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.”²¹ Additionally, this Committee’s mandate extends to assessing the harm to the family caused by the eviction of women, under article 10.1 which requires “the widest possible protection and assistance [to] be accorded to the family... particularly for its establishment and while it is responsible for the care and education of dependent children.”²²

As outlined in this submission, yet absent from the government report, the deprivation of women’s equal enjoyment of economic, social, and cultural rights because law and custom deprive them of economic resources, subject women to greater risk of domestic violence and HIV/AIDS. Kenyan women, who are at greater risk of HIV infection or who are already living with the virus are denied the “highest attainable standard of ... health” guaranteed under Article 12 of the ICESCR. The Committee’s General Comment 14 recognizes that “Health is a fundamental human right indispensable for the exercise of other human rights” and is crucial to “to living a life in dignity.”²³ The Committee specified that the right to health includes “the right to control one’s health and body, and the right to be free from interference, such as the right to be free from... non-consensual medical treatment”(para 8.) and that “[a] wider definition of health also takes into account such socially-related concerns as violence.... [and] HIV/AIDS... which need to be taken into account when interpreting article 12” (para. 10).²⁴ Finally, the Committee recognized in paras. 28 and 29 that any justifiable limitation on the exercise of the right to health must be “proportional” and “of limited duration and subject to review.”²⁵ The submission will address the new Kenyan law which by broadly criminalizing the transmission of HIV /AIDS violates women’s and girls’ rights under the ICESCR.

VII. KENYA'S LAND-AND-PERSONAL-PROPERTY LAWS VIOLATE WOMEN'S ECONOMIC RIGHTS

Women experience discrimination in property throughout their lives including before, during, and after marriage, but especially at the death of a spouse. This discrimination exists in part due to current customary laws, but the government's legislative measures have also failed to uphold women's rights to property and in some cases have made the discrimination worse. Kenyan women are denied their Article 1.2 right to own land and Article 11 right to housing. Kenya has the ability and power to end the effects of this discrimination immediately and should take adequate steps to do so.

A. Kenya's Property Laws Discriminate Against Women

Kenya's land statutes discriminate against women by (1) vesting in men absolute sole ownership rights to registered land; (2) invoking customary law which generally confers exclusive control of land to men to govern land rights, and which is insulated from appeal and judicial scrutiny. Kenya has over 75 land laws, which create a confusing and anachronistic legal framework that fails to recognize women's land rights.²⁶ In the draft National Land Policy, the government acknowledged the injustices this framework has caused, in particular to women.²⁷ The bodies that govern land lack adequate procedural safeguards to protect the rights of women because: women are nearly absent from land bodies; the land disputes procedures remain biased against women; and husbands may sell matrimonial land without their wife's consent.²⁸

1. Vesting in Men Absolute Sole Ownership of Registered Land Deprives Women of their Rights to Housing and Property

Highlighting Kenya's disregard to Art. 10 of ICESCR on the right to housing, the U.N. Special Rapporteur on Housing concluded that discrimination against women in land ownership, access, and control in Kenya has "a direct and negative impact on their right to adequate housing."²⁹ Even if Kenya abandoned customary law, the current legislative structure by which land is registered lacks protection for women. Under the Registered Land Act, the first person to register title to a portion of land retains "absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto,"³⁰ free from any other interest or claim.³¹ As men inherit first, they register the land before women have a chance to register with the men. This negates any ability by a woman who has worked the land beside her husband, brother, or father to make any claim to the land on which she lives and labors. In fact, women provide the vast majority of agricultural labor including 89 percent of the subsistence farming labor force³² and over 70 percent of labor in cash-crop production³³ yet, they only hold 1% of the registered land titles and only 5-6% of the land titles jointly.³⁴ According to Nancy Abisai of the Shelter Forum, an NGO working on land and housing issues in Kenya, "[m]ost women work on land and they are responsible for productivity of land but unfortunately the majority of them do not have a say on the proceeds of the land, they cannot own it, and at the end of the day it's the male counterparts who hold the title deed . . ."³⁵

If Kenya required joint registration, it could improve women's rights to land and housing. Most men, however, do not register land jointly and give a variety of reasons for not registering land jointly. One married man from the rural Mount Kenya area stated: "I wouldn't say there is a reason. But it's kind of tradition."³⁶ In some cases women lack the ability to initially register the land because the large majority of women in Kenya leave their father's land to reside with their husband on property that he may have previously purchased or inherited. Once property has been registered, the owner has no incentive to reregister it jointly.³⁷

Women have no say in what happens to the property on which they live. In fact, “there is no legal requirement that a wife be consulted when property owned by the males during marriage or a *de facto* relationship is sold or otherwise disposed. This limits the woman’s ability to control disposition of the property or the income derived from it.”³⁸ Johnson Okoth Okello, a senior state counsel at the Kenyan Law Reform Commission, explained the adverse impact of this situation on women:

“It’s a big problem because women give money to husbands and then he registers land in his name and sells it without telling the woman and she has no say . . . We tried to do this in cases of transfer so that before family land is transferred you would have to get consent of the wife or children but [the] system has been abused. People have . . . bribed their way or in the alternative, they say, “Look here I’m the registered owner. I’m free to do what I like.”³⁹

The decisions of land control boards fail to account fully for the interests of women because “[m]en have reportedly bribed land control boards, fraudulently brought imposter ‘wives’ to the boards to consent to land transfers, and threatened their wives with violence or eviction.”

Finally, women are deprived of the ability to receive loans and credit as many banks require land titles as collateral. A rural male farmer stated that “[b]ecause the land is registered in a man’s name, a woman can’t get the loan.”⁴⁰ Thus even if a woman attempts to become financially independent, her husband has the final say over her finances.

2. Customary Law and Land Dispute Resolution Bodies and Processes Discriminate Against Women

While the customary law system is complex and diverse in Kenya there is almost total uniformity in that it discriminates against the ability of women to own land. Under some customary laws invoked, women cannot own or control land.⁴¹ Not only do women lack access to property, in some cases women are considered as property. According to Lily Murei, Monitoring and Evaluation Officer for the Kenya Land Alliance (KLA), “we have different cultural systems [that] believe women cannot even be acknowledged to own land. . . . [Y]ou talk of land and cows and all that property that men have, they also put women as part of their property.”⁴² Women only have customary rights to access and cultivate land, and even those rights are dependent on men.⁴³ In the majority of communities, women have to ask a male for permission to cultivate the land,⁴⁴ although some males traditionally reserve fields for the wife or wives.⁴⁵ According to a Kenya National Commission on Human Rights report, for example, under Luo customary law a man usually parceled out his tract of land to his wife or wives, and each wife cultivated her tract and could amass a larger tract based on her labor.⁴⁶

Customary land law constitutes a serious barrier to realizing women’s economic, social, and cultural rights. Yet, numerous land laws, including Chapter IX: Trust Land of the Constitution,⁴⁷ the Trust Land Act,⁴⁸ the Land Adjudication Act, the Land Consolidation Act, and the Land Disputes Tribunals Act, rely on customary law, under which men control the land,⁴⁹ to determine and govern land rights. According to Assistant Chief Jackson Kirigia from the Meru area, local government officials also apply customary law when they are unfamiliar with the written laws: “[b]ecause [we] do not have the statutes or written laws, we usually invoke custom because that is what we know.”⁵⁰

Under the customary law invoked in land statutes, women cannot own or control land.⁵¹ Because customary law prescribes that men control land and property but women cannot, not only

have the bodies that determine these land rights have not recognized women's claims, as explained by the Kenya Land Alliance, the Acts were "bound to exclude most women from acquiring titles to land since they only had rights of use while men retain those of allocation"⁵² under customary law. Frederick Ochieng of the United Nations Development Fund for Women (UNIFEM) in Kenya, explains that "Traditionally, a woman doesn't own land. The land is owned by the man, and in other cultures land is owned by the community [In some] cases . . . a woman has to ask for permission to go and till the land . . . so that even when the government says everybody is free to own land . . . the woman in the family is prevented by the traditional dynamics within those cultures from owning land and even from using it and having any say about the use of clan land."⁵³

The bodies that govern land lack adequate procedural safeguards to protect the rights of women because (1) women are nearly absent from land bodies, (2) the land disputes procedures are biased against women, and (3) husbands may sell matrimonial land without their wives' consent. The Kenyan government has acknowledged that women are underrepresented in land determination and dispute bodies in both the National Gender and Development Policy⁵⁴ and the National Land Policy.⁵⁵ On county councils, which oversee land transactions dealing with Trust Land, on which most women reside, women made up only 8.2 percent of county councils in 1997, a minute increase from 1.7 percent in 1986.⁵⁶ As of 2008, the Meru County Council included only 5 women out of 43 council members,⁵⁷ and the Laikipia County Council included only 5 women out of a total of 36 council members.⁵⁸

Under the Land Disputes Tribunals Act, disputes regarding agricultural land are adjudicated before a panel of elders, who are nearly exclusively male,⁵⁹ who apply customary law.⁶⁰ Customary-law decisions of the Land Disputes Tribunals and Appeals Committees are insulated from judicial review, and women cannot ask the courts to safeguard their rights. The procedures also prohibit advocate representation before a Tribunal or Appeals Committee,⁶¹ exacerbating the discriminatory effect on women.

Also, although Land Control Boards must approve transactions affecting agricultural land, they do not require spousal consent for such transactions.⁶² In *Kamau v. Kamau*, for example, the Court of Appeal upheld a husband's sale of matrimonial land without his wife's consent.⁶³ A non-binding presidential decree from the 1980s directs land control boards to take all adult family members' interests into account, but Boards may disregard the decree, and some husbands present "fake" wives to give their consent to the Boards.⁶⁴

B. Matrimonial Property Laws, Recent Case Law, and Custom Discriminate Against Women During Marriage and at Divorce

Gaps in Kenyan law on matrimonial property and land during marriage and at divorce violate women's rights to equality marriage, an adequate standard of living, including housing, and to property. Regardless of whether the marriage is formalized under statute or custom, women often have no more than mere use rights to the matrimonial land, revocable at the will of the husband. Married women rarely enjoy equal rights to control, alienate, or transfer matrimonial property.⁶⁵ At separation or divorce, women are often unable to take away an adequate share of their matrimonial property, and are often forced to leave the matrimonial home with little more than personal effects.

No single statute in Kenya comprehensively addresses the rights and property interests of spouses during marriage or at its dissolution. Following its review in 2007 of Kenya's compliance with CEDAW, the CEDAW Committee highlighted the problem of overlapping and parallel laws and urged Kenya to: "harmonize civil, religious and customary law with article 16 of the Convention

and to complete law reform in the area of marriage and family relations”⁶⁶ As of October 2008, despite on-going attempts by the Kenya Law Reform Commission, the parliament has yet to amend, harmonize, or pass such laws.

1. Women Must Often Leave Their Marriages With Nothing But The Clothes On Their Backs

Many women are chased away from the home upon divorce and cannot take anything with them or do not want to take anything for fear of reprisal. When asked if women tended to go back to get property, Charity Mithiga, a retired schoolteacher in Meru, said, “If you go back, it is a beating. It is better to go without beating. The woman is sent home without anything. Sometimes the husband burns the woman’s things because he is mad and does not want to see them anymore”⁶⁷ Of the divorced women interviewed, most had left the matrimonial home with little to nothing, rendering them essentially homeless or dependent on the charity of a relative.⁶⁸ Joyce Wangui - a mother of two who was chased from her home by her husband when she was unable to conceive more children - had to leave everything.⁶⁹ Fearing that her in-laws or husband might harm her if she stayed in the home or tried to reclaim her possessions, she said, “I did not want to go with anything because I wanted to avoid conflict.”

Jane Wanjiru Magenda’s matrimonial home was sold, and after fifteen years of marriage and caring for five children, she got nothing. Currently staying with her elderly parents and struggling to care for her children while working as a househelp, she recalls that “even the house he had in the village, he sold it and disappeared. I got nothing from the sale; that was our matrimonial home.”⁷⁰

After being chased away by her husband, Margaret Domiciano from Meru became a squatter, living on a plot of land from which she can be evicted at any moment. She was the first wife of a polygamous man who squandered their property which included a shop they built together and a 3 acre land plot, to acquire additional wives and to drink. She was chased away after 21 years of marriage, and having cared for 4 of her children and 5 from her husband’s other wives:

He used to come home very late, very drunk. He would throw me out, I’d spend the night outside. I was thrown out with all my children. He brought children from another marriage, five to be taken care of by me He had a lot of wives. . . . I was the first wife. He never told me, no consent, [just] brought the wives from outside. [He used the property we acquired together to get other wives], he destroyed our things.

Asked what she was able to take with her after the divorce, she replied “I was given my personal effects.”⁷¹

While many customs state that children belong to the father’s family, women are almost always the ones to assume responsibility for them after a divorce. In addition to being rendered homeless, women often have to provide for the livelihood of their children absent any contribution from the father. After being kicked out of the matrimonial home, Joyce Wangui, who now lives with her sister, was left to struggle to provide for her children. Back in her parents’ home, Jane Wanjiru Magenda was not only deprived of any of the matrimonial property which she helped acquire and improve, but also receives no help from the father of the children as she labours to see to their education.⁷² When asked what she would have wanted after her divorce, Margaret Domiciano expressed a commonly-heard sentiment by divorced women, many of whom are

resigned to the fact that they have lost any access to matrimonial property, by answering “[t]he money for educating the children. For him to pay the fees for my daughter, nothing else.”⁷³

The Married Women’s Property Act of 1882 (MWPA), a woefully inadequate remnant of British colonial rule, remains the only statute to govern married women’s right to property acquired during a marriage, whether during the marriage or at its dissolution. The MWPA applies to all Kenyan marriages regardless of the type of marriage or regime governing the marriage, including marriages contracted under Customary or Muslim law.⁷⁴ Under the MWPA, married women have express claim to separate property (presumably registered in her name) acquired before or during the marriage.⁷⁵ Married women’s claim to matrimonial property, however, is all but completely left out of the statute. This Act is severely limited as it neither defines matrimonial property nor provides guidance about the equitable division of such property.⁷⁶

The women of Kenya continue to be governed by an antiquated act, ill-equipped to deal with the realities of their lives or to protect their human rights. The legal vacuum on equitable division of property at divorce resulted in judicial decisions that undervalue and dismiss the immense contribution of women to their families and the household.

2. Recent Court of Appeals Decision Robs Women of Equal Share of Matrimonial Property at Divorce

At separation or divorce, Kenyan women rarely take away their equal share of matrimonial property. Often, they are violently chased away and are only able to take with them the clothes on their backs. The tradition of registering property, including matrimonial property, solely in the name of the husband becomes a serious obstacle when women seek to stake a claim in matrimonial property. Kenyan law lacks any guidance on the division of matrimonial property. Instead, various cases have focused on a painstaking analysis of the contribution of a wife in order to determine her right to any proportion of the matrimonial property.⁷⁷

In 2007, Kenya’s highest court, the Court of Appeal, handed down a decision which marked a significant setback for the social, economic, and cultural rights of Kenyan women. This decision, *Echaria v. Echaria*, held that for a spouse to receive a share of the matrimonial property, she would have to prove that she had made direct, financial contribution towards the purchase of the property.⁷⁸ The Court of Appeal refused to acknowledge non-financial contributions, therefore removing the interests of non-salaried or stay-at-home spouses to the matrimonial property, absent a showing of actual, financial contribution, if the property is held solely in the name of the other spouse. This narrow interpretation of what constitutes “contribution” severely limited Kenyan women’s access to matrimonial property. It excludes from consideration indirect contributions usually performed by wives, such as domestic chores, bearing and raising children, and tilling and harvesting the family farm. Even within that decision itself, the justices noted the unfairness of the holding in the Kenyan context and urged Parliament to take measures to rectify the law so that the division of matrimonial property is no longer at the whims of judicial panels. In referring to the MWPA, the sole act governing matrimonial property, the court lamented that “there is no sign, so far, that Parliament has any intention of enacting the necessary legislation on matrimonial property. It is indeed a sad commentary on our Law Reform agenda to keep the country shackled to a 125 year-old foreign legislation which the mother country found wanting more than 30 years ago!”⁷⁹

Women who wish to divorce in Kenya are intimidated to leave their bad marriages because they may lose their property. Sometimes women lose not only all of their property, but their child support as well, and do not expect their own property, hoping only for “[t]he money for educating

the children. For him to pay the fees for my daughter, nothing else.”⁸⁰ When the state allows a woman to lose her matrimonial property, it violates her right to housing and an adequate standard of living.⁸¹

The *Echaria* decision also undercut the line of progressive Kenyan cases, in which courts considered both the direct and indirect contributions by a spouse to a household,⁸² as well as the Kenyan constitutional amendment in 1997 to add sex as a ground for non-discrimination and Kenya’s ratification of several international human rights treaties, including the ICESCR, ICCPR and CEDAW. To conform to both the current realities of women’s lives in Kenya, as well as international legal standards, Kenya must enact laws that recognize the indirect and non-financial contribution of spouses to a marriage.

VIII. WOMEN IN POLYGAMOUS UNIONS FACE ADDITIONAL BARRIERS TO REALIZING THEIR RIGHTS TO EQUALITY, AN ADEQUATE STANDARD OF LIVING, HOUSING, AND HEALTH

While Kenya recognizes both polygamous and monogamous marriages, only women in monogamous marriages have even minimal protection of their property rights in marriage and at divorce. Polygamous unions for Muslims are governed under the Mohammedan Marriage, Divorce and Succession Act⁸³ and those performed under custom are handled under the individual community’s customary laws.

Despite the added vulnerability of women in polygamous marriages to discrimination, inequality, and lower standard of living, they enjoy little to no legal protection or recourse. No law mandates the consent of existing wives to a husband taking another wife.⁸⁴ Yet women in polygamous marriages, who tend to be rural and poor, have little choice but to acquiesce. If they leave, they leave with nothing. According to a widow who lived in a polygamous marriage: “The wives in polygamous relationships face so many problems but because they’ve got no choice, they choose to remain in the relationships.”⁸⁵

Women married under laws allowing polygamy are unable to opine whether and when a husband takes a second wife and whether he can tap into existing matrimonial property acquired with the existing wife to acquire and support additional wives and their children. According to University of Nairobi law professor, Dr. Patricia Kameri Mbote, “As long as women are dependent on men women are going to be left holding the short end of the stick, because it is either the first wife thinking she is the only wife and putting her all or the second wife coming in and putting something and then being thrown out when she would actually need care, protection and security.”⁸⁶ Through intimidation, coercion, and physical violence, women have been silenced and their rights violated as matrimonial property is used to advance the interests of a polygamous husband.⁸⁷ Margaret Muriuki, a woman in a polygamous marriage described how her husband acquired his second wife: “He took the food that we were farming, he sold it and spent the money on the second dowry... I felt bad because now he was using the family property to acquire a wife. But I didn’t have any say – there’s nothing I could have done.”⁸⁸

Since the husband retains control over matrimonial property and even in some cases the wives’ own separate property, the wife is powerless to ensure that her contributions will not be used to benefit the other wives and their family.⁸⁹ Revenues from agricultural work performed by the wife may also be lost to a husband seeking another wife, as he uses the profits to make dowry payments. Further, women are limited from bettering themselves because they are forced to

support an extended family that they did not consent to: “I have not been able to invest, especially after my husband got the other two wives. It used to be we would do farming and discuss what to save, and I would be able to invest money for myself. Now that it is polygamous, I haven’t been able to get any produce for the farming activity. Now what I have in the house is taken for the children of the other wives so even if I could invest I don’t have the ability to do so.”⁹⁰

Women in polygamous unions are also often hard pressed to prove a valid marriage was concluded under customary law, without which women cannot claim any rights in the marriage or upon divorce. According to the most recent Demographics and Health Survey (DHS) of Kenya, “Women with no or low education and those who are poor are more likely to live in polygynous marriages.”⁹¹ Country-wide, on average “[s]ixteen percent of currently married women live in polygynous unions (having one or more cowives).”⁹² In some regions of Kenya, such as the North Eastern Province, the proportion of women in polygynous marriages is as high as 34 percent.⁹³ According to University of Nairobi law professor, Dr. Patricia Kameri Mbote, “As long as women are dependent on men women are going to be left holding the short end of the stick, because it is either the first wife thinking she is the only wife and putting her all or the second wife coming in and putting something and then being thrown out when she would actually need care, protection and security.”⁹⁴

At least two other treaty-monitoring bodies have condemned Kenya for failing to address polygamy and its harmful consequences on women. After reviewing Kenya’s compliance with the ICCPR in 2005, the Human Rights Committee concluded that “... the continued application of some customary laws, including the permissibility of polygamous marriages, undermines the scope of the non-discrimination provisions in the Constitution and other legislative texts.”⁹⁵ In response to the connection of polygamy and culture, the CEDAW committee in 2007 has specifically urged Kenya “to put in place without delay a comprehensive strategy, including legislation, to modify or eliminate cultural practices and stereotypes that discriminate against women....[and] to address harmful cultural and traditional customs and practices, such as ... polygamy, more vigorously.”⁹⁶

The practice of polygamy should likewise be addressed by this Committee. Polygamy violates women’s social, economic, and cultural rights. Polygamous marriages violate Art. 2.2 of the ICESCR, which protects against sex discrimination. Women in polygamous marriages are also denied the basic right to enter marriage with the “full and free consent” of the parties involved. This right is enshrined in the ICESCR, article 10 (1): “The States Parties to the present Covenant recognize that . . . Marriage must be entered into with the free consent of the intending spouses.”⁹⁷ Polygamy also places women at higher risk of contracting HIV/AIDS, in violation of their right to health protected by Art. 12. In Kenya, HIV prevalence is higher for both women and men in polygamous marriages.⁹⁸ Finally, the right to an adequate standard of living, including housing, is severely undermined by having to share hard-earned property with multiple wives and children.

IX. INHERITANCE DENIAL, WIDOW EVICTIONS, AND RELATED HARMFUL PRACTICES VIOLATE WOMEN’S ICESCR RIGHTS

Because discriminatory customary law often prevails in matters of inheritance, widows in Kenya suffer human rights violations on the basis of their sex and marital status. Some widows are evicted by in-laws who use customary law to claim that a widow has no right to her deceased husband’s property. Others are coerced into marrying a male in-law, “inherited” by him as part of their husbands’ estate, and evicted from her home and banished from the community if they refuse. Still others are forced to have sex with a “*jater*,” originally the levir in some communities⁹⁹ and today

known as a professional cleanser who rids the widow of her deceased husband's evil spirits, because the village elders insist that custom demands it. These practices violate the ICESCR protections for non-discrimination, an adequate standard of living, including housing, and the best attainable standard of health. They lead to still more horrific consequences for the widow and her children, including increased risk of HIV-infection, poverty, and life in the slums.

A. Widow Evictions are Harmful and Discriminatory

"Under the customary law of most ethnic groups in Kenya," admits the government in its report to CEDAW, "a woman cannot inherit land, and must live on the land as a guest of male relatives by blood or marriage."¹⁰⁰ As such, a widow may be told upon her husband's death by his family that she is no longer welcome on her property. Indeed, "[m]ost times it's the men who get the property," states villager Alice Mumbi.¹⁰¹ Alice tells the story of a widow who was disinherited by her in-laws, saying: "She was left with children. All the land and property was taken away so she had to go back home."¹⁰² Gilbert O. Ombachi, an advocate, adds: "There are times when even somebody passes away and he has only one wife, and the in-laws will always come in and say 'No, we don't recognize you. Now you can go back where you came from.'... normally the widows will find it very hard."¹⁰³ Despite deserving a life interest, some widows only inherit a piece of land large enough to serve as her husband's burial plot. According to Irene Oloo of the League of Kenya Woman Voters, "If my husband died today... I would be given a piece of land to bury my husband and that would be the *only* land I could use... The only thing that I am entitled to is the grave."¹⁰⁴

This Committee has noted that forced evictions, defined as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land they occupy, without the provision of, and access to appropriate forms of legal or other protection,"¹⁰⁵ are "*prima facie* incompatible with the requirements of the Covenant."¹⁰⁶ Kenya's obligation is clear: "The State itself must...ensure that the law is enforced against...third parties who carry out forced evictions" and that "where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved."¹⁰⁷ Moreover, ensuring the right to adequate housing, when considered in tandem with the guarantee against non-discrimination, "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."¹⁰⁸ In addition, ICESCR Article 11 recognizes the importance of protecting the family when implementing the right to an adequate standard of living and requires States parties to "ensure that women have equal rights to marital property and inheritance upon their husband's death."¹⁰⁹ Kenya admits that women and children remain vulnerable and disadvantaged with respect to housing.¹¹⁰

B. Deprivation of Widows' Property Rights Leads to Increased Poverty

The government of Kenya conceded in its 1997-2001 National Development Plan that the deprivation of women's property rights is one of the major determinates of poverty in Kenya.¹¹¹ Women who are evicted upon their husband's death, or after refusing to participate in widow inheritance or cleansing, often must eke out a living along with their children in urban slums. As stated in Kenya's government report to CEDAW, "there is a higher incidence of poverty amongst female-headed households," which account for 31.7% of all households, such that "79.5% of [female-headed] households live below the poverty line."¹¹² Nancy Abisai, Project Officer at Shelter Forum in Nairobi, states that "many women whose husbands died of HIV were chased away and look for shelter in the slums because they don't have anywhere else to go."¹¹³ When asked why he thought so many women were heads of household in the slums, a Program Coordinator with the

Economic & Social Rights Centre in Nairobi answered: “[i]t is linked to the whole issue of inheritance — because of issues like AIDS and other causes of deaths, once the husband dies, most of these women, whatever they had they’re dispossessed. They cannot go back to their homes and in places where they married, their in-laws say this is a portion of their land...[b]ut if they go home the chance is they’re attacked by in-laws. They think, ‘why expose my life to danger when I can start life afresh in urban center where no one knows me — places where housing is cheap and they can start with very minimal financial support.’”¹¹⁴

Neglect of women’s property rights also undermines their capacity to avoid risky practices such as wife inheritance, ritual cleansing, or transactional sex and thus also directly influences the spread of HIV/AIDS. A Land Policy Coordinator in Nairobi states:

“[W]hen women...go to the slums with the children...[y]ou’ll find that they will engage in prostitution. It is the easiest thing to do to make ends meet. And even those who seem to be engaged in gainful employment like small scale traders they still supplement; that income is not adequate in most cases. [T]he children will not go far in school...The boys become thieves. So it really becomes a vicious cycle within that family.”¹¹⁵

Lack of protection for widows also exposes their children to the dangers of survival sex. Of sexually active Nairobi girls aged 15 to 19 living in slums, 21 percent reported having exchanged sex for money or gifts.¹¹⁶ Impoverished life in the slums for a widow and her children, as well as this increased exposure to HIV-infection, further implicates the ICESCR guarantees of housing and health.

C. The Succession Act Fails to Sufficiently Protect Widows

The Law of Succession Act is a double-edged sword which somewhat serves women by providing inheritance rights, but denying them inheritance rights equal to those of men. Provisions of the Act that benefit women include Section 38, which states that absent a will, male and female children shall inherit from their parents equally,¹¹⁷ and Sections 35 and 36, which guarantee the surviving spouse a life interest in the whole residue of the net intestate estate, thus protecting against the practice of widow eviction.¹¹⁸ However, that life interest guaranteed in Sections 35 and 36 is terminable upon remarriage if the surviving spouse is a widow.¹¹⁹ Widowers, on the other hand, do not lose their life interest regardless of whether or not they remarry. In the case of an intestate who dies and leaves behind no spouse or child, that person’s property passes first to the father, and then in the case that there is no father, it devolves to the mother.¹²⁰

Common misapplication of the Law of Succession further disadvantages women. The law is meant to supersede customary law except in cases of livestock, agricultural land, or crops located in exempted areas of land that have been specified in the Gazette, but in practice, it is applied much less often, especially in rural areas. This is because rural communities “remain unaware of statutory laws relating to property” and are instead “inclined to use customary laws in matters of inheritance.”¹²¹ The misapplication of customary law is not limited to the uninformed. A justice on Kenya’s highest court, the Court of Appeal, stated, “The Law of Succession Act can’t apply [to rural land in general] because women are supposed to be married and go away.”¹²²

Widows also encounter difficulties inheriting property because of the Registered Land Act. The Act makes it highly unlikely that any of the marital property will be registered under a woman’s name when her husband dies, giving greater weight to her in-laws’ argument that she ought to

receive very little, if any, of the marital property upon her husband's death. The negative impact of this common scenario would be lessened if the Law of Succession, which grants the surviving spouse a life interest in the estate, were enforced.

D. Widow "Inheritance" and Cleansing Endanger Women's Health

Upon her husband's death, a widow might be "inherited" by a male relative of her deceased spouse, thus becoming his wife and property along with the land and tangible property from her husband's estate. This custom arose as a way to protect widows and ensure their maintenance and survival upon the death of their husband and provider. In the era of HIV/AIDS, however, the custom allows further spread of the virus. In addition to "inheritance," a widow is often first ritually "cleansed" by unprotected sex with a "*jater*," a man paid to rid widows of evil spirits through the act of intercourse. A woman who refuses inheritance faces eviction or worse. Mildred Ngesa, a Nairobi journalist, explains: "There [are] one or two or three cases of some few brave women who refuse to be inherited, and because they refuse to be inherited, they are ostracized. The clan throws them out with the children, and they have nothing."¹²³ A widow must often choose between "inheritance" by a male relative of her deceased husband or eviction. Upon the death of her husband, a widow sometimes has the choice of being inherited by a brother or male relative of her deceased husband, continuing to reside in the matrimonial home without entering into such a union (this is usually the case if a widow is past child-bearing age), or returning home to her father's home.¹²⁴ Although the original purpose of these customs was to protect and provide for widows and their children, they have since been perverted, devolving into the harmful practices of widow eviction, forced inheritance, and forced ritual cleansing.¹²⁵

Some families pressure women into "inheritance" even if they are HIV-positive. The Rev. Dr. Judy Mbugua notes: "we see a lot of problems with health because of women inheritance, so that even if the husband died of HIV/AIDS, she will have to be inherited by somebody else. This perpetuates AIDS, as she may herself have AIDS because her husband may have died of AIDS, or she may be forced to be inherited by somebody with HIV/AIDS."¹²⁶ An HIV-positive widow might have been "inherited" when she returned to her husband's village had her friends not intervened to help her avoid passing on the disease: "We had to form a protective ring around her when we took her back to bury her husband . . . there was talk that her brother-in-law would inherit her. This happened in a family where there were doctors and lawyers."¹²⁷ Similarly, a young woman named Mildred Auma, whose husband died of HIV/AIDS, was pressured by her in-laws into marrying one of her husband's brothers.¹²⁸ She felt she had no choice but to be inherited and risk passing on the disease: "Because of the customs . . . I had to be inherited," otherwise, "I would have been alone, homeless."¹²⁹ Her new husband then infected two other women before dying of HIV/AIDS.¹³⁰

Kenya's highest HIV/AIDS prevalence occurs in the regions where widow inheritance and ritual cleansing are most common.¹³¹ These practices not only affect the integrity of a woman and her physical health, but also violate the human rights of all Kenyans because of the possibility that the male relative inheriting the woman will contract HIV/AIDS or pass on the virus to their children. Kenya's government admitted this link between wife inheritance and HIV/AIDS in its report to CEDAW: "[w]ife inheritance is still practiced in Kenya by some communities. This has led to the infringement of women's rights to choose who to marry and has also consequently led to the spread of HIV/AIDS."¹³² Article 12 obligates the government to "take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties." Kenya's "failure to discourage the continued observance of harmful traditional medical or cultural practices" constitutes a violation of the Convention.¹³³

X. LACK OF ECONOMIC RIGHTS FUELS VIOLENCE AGAINST WOMEN AND INCREASES THEIR VULNERABILITY TO HIV/AIDS INFECTION

Kenya has not significantly addressed violence against women as a systemic injustice that deprives women of their economic, social, and cultural rights. As a result, too many Kenyan women face a Hobson's choice: They must either remain in physically and sexually abusive relationships that may expose them to life-threatening injuries and diseases, or they must leave the relationship with nothing, and risk being forced to engage in survival sex – and the accompanying risk of HIV/AIDS infection – to feed themselves and their children.

A. The Link Between the Lack of Property Rights and Domestic Violence

Existing laws and practices force women to choose between their rights to life, dignity, and equality or their rights to property and an adequate standard of living, including health and housing. Husbands force wives to relinquish their property,¹³⁴ and wives feel that they must remain in abusive marriages because they will have no property and are thus dependent on their husbands.¹³⁵ When men control matrimonial property, women faced increased risk of domestic violence.¹³⁶ According to the Rev. Dr. Mrs. Judy Mbugua, the head of the Pan-African Christian Women Alliance (PACWA), many cases of domestic violence are tied to property, and women who do not surrender their salaries to their husbands are beaten.¹³⁷ Gilbert O. Ombachi, an advocate who has handled several matrimonial property cases, stated that a woman may even “be shot dead” because of a property dispute.¹³⁸

Often women stay in violent marriages because they do not own property, or they are excluded from ownership by custom, or they depend on their husbands for housing and sustenance. The absence of a law governing division of property at divorce and the recent *Echaria* decision subject women to continued intimate partner violence, because if they divorce their husbands, they are likely to leave with not much more than their personal effects. As most of Kenya's population is rural, the loss of property means not just a decrease in personal wealth, but the loss of livelihood. If a woman leaves they may take nothing and they and their children may have nowhere to go. Gitobu Imanyara, a Member of Parliament, explained that women are “enslave[d]” in marriages “because they have nowhere else to go to.”¹³⁹ Women in the Maasai community, for example, must remain in abusive marriages because they do not own any matrimonial property and cannot return to their parents' property.¹⁴⁰ According to Lanoi Parmuat, a Maasai community activist, “[W]ife battering is the order of the day,” and elderly Maasai women tell brides on the night before they marry that they cannot leave if their spouses are abusive: “The very night before you go, . . . the elder women come in and tell you. They use a proverb: Whatever pain the situation will bring there is no going back . . . There is no going back.”¹⁴¹

As recognized by the government in its 2007 report to CEDAW, violence against women, including domestic violence, is widespread, and has increased over the past decade.¹⁴² In its responses to CEDAW, the government reported that about 60.9 percent of Kenyan women report experiencing physical abuse, and 40.6 percent report sexual abuse.¹⁴³ While sexual assault is a serious crime in Kenya,¹⁴⁴ the recently enacted Sexual Offences Act of 2006 exempts spouses from its coverage. Section 43(5) defines when an act is “intentional and unlawful,” including various coercive measures and circumstances which vitiate a person's consent to sexual acts. It explicitly excludes “persons who are lawfully married to each other.”¹⁴⁵ Due to both law and societal expectations, marital rape goes unreported and largely unpunished.

B. Disempowered Women Have Higher Rates of HIV Infection

Kenya's AIDS indicator Survey conducted in 2007 by the Ministry of Health revealed that "Kenyans in polygynous unions (one man, more than one woman) are more likely to be HIV infected (11 percent) than those in monogamous unions (7 percent). Also, women who have ever been widowed and women who are currently divorced or separated have high HIV prevalence at 17-21 percent."¹⁴⁶ Yet, Kenya's report to this Committee contains no information about the rates of HIV disaggregated by gender or along other critical factors, such as form of marriage and marital status. Beyond a few passing references to "poverty" (see e.g., Para. 80), the government report lacks any analysis as to the root causes and possible solutions to the spread and management of the epidemic.

The deprivation of women's economic and social rights and consequent dependence on men also prevent them from negotiating safe sex, which increases their chances of exposure to HIV/AIDS. In a study on violence against women and girls in Kenya, the UN Theme Group on HIV and AIDS found that women yield to demands "for unprotected sex, despite the danger, as they often have nowhere to go, limited financial options (a Kenyan woman's average earnings is less than half of that of man), limited land rights, and fear of losing their children."¹⁴⁷ According to Annie Mumi Muchiri, of the Kenya AIDS NGO Consortium (KANCO), a network of over 850 organizations working on HIV/AIDS issues in Kenya,¹⁴⁸ women who do not have property rights are likely to remain in marriages that render them vulnerable to HIV/AIDS: "Women would continue staying in marriages when they were being abused because they had no way of leaving. They were vulnerable."¹⁴⁹ Moreover, regional studies show women in abusive relationships as three times more likely to contract HIV/AIDS.¹⁵⁰

Though the Kenyan government has taken commendable steps to eradicate sex trafficking,¹⁵¹ it has not done enough to protect Kenyan women from economic circumstances which force them into survival sex.¹⁵² When women lose their matrimonial property, through divorce or widowhood, they must fend for themselves in their children, often having to start from scratch. Women may also engage in survival sex or be forced to move to the slums because they do not own property and were or dispossessed of or evicted from their homes by their husbands or relatives. Such dire economic circumstances force women into survival sex or sex work, where they are vulnerable to HIV/AIDS infection,¹⁵³ physical and sexual abuse, and criminal prosecution.¹⁵⁴ Economic disempowerment acts both as a cause and an effect of survival sex. Women who engage in survival sex have little income, struggle to keep their children in school, and should they contract HIV/AIDS because of their situation, they will lack financial access to life-saving medications.

XI. LAWS CRIMINALIZING HIV TRANSMISSION HIV DISCRIMINATE AGAINST WOMEN AND ERODE THEIR RIGHTS UNDER THE ICESCR

As the preceding sections demonstrate, by failing to protect women's property rights sufficiently, the Kenyan government perpetuates the economic circumstances that make women more vulnerable to HIV/AIDS. Kenya recently promulgated several new statutes – the Sexual Offenses Act¹⁵⁵ and the HIV and AIDS Prevention and Control Act¹⁵⁶ – to help curb the spread of AIDS. While these laws were well-intentioned, they (1) discriminate against women because they are more likely to be prosecuted, violating Articles 2(2) and 3 of the ICESCR; (2) unintentionally jeopardize women's right to work, enshrined in Article 6, and women's right to health, guaranteed in Article 12; (3) are too broadly drafted, violating women's right to dignity; and (4) fail to accomplish

Kenya's goal of decreasing HIV transmission. In addition to discriminating against women in violation of the ICESCR,¹⁵⁷ the laws also violate women's rights to health (article 12), work (article 6), and dignity (Preamble).

A. Laws Criminalizing HIV Transmission Discriminate Against Women and Penalize Them for Kenya's Failure to Address the Root Causes of the Epidemic

The Sexual Offenses Act and the HIV and AIDS Prevention and Control Act undermine the right to non-discrimination, as expressed in Articles 2(2) and 3 of the ICESCR.¹⁵⁸ The CEDAW Committee expressed particular concern in its 2007 Concluding Observations that Kenya's "current policies and legislation do not adequately take into account gender-specific vulnerabilities and do not protect the rights of women and girls affected by HIV/AIDS."¹⁵⁹ The Committee was "especially concerned that the persistence of unequal power relations between women and men and the inferior status of girls and women hamper their ability to negotiate safe sexual practices and increases their vulnerability to infection."¹⁶⁰ The Sexual Offenses Act and HIV and AIDS Prevention and Control Act ignore the Committee's plea that Kenya include a visible gender perspective in its policies.¹⁶¹ Women are more likely to be prosecuted under these laws because they are (1) more likely to be infected with HIV or AIDS in Kenya,¹⁶² (2) more likely to know their HIV/AIDS status.¹⁶³ The fact that women are more likely to be tested is significant because the Sexual Offenses Act requires that the accused have had "actual knowledge" that he or she had the disease upon transmitting HIV¹⁶⁴ and the HIV and AIDS Prevention and Control Act requires awareness.¹⁶⁵ Women know when they are HIV/AIDS positive more often than men because of routine gynecological exams or prenatal testing and are more likely to have the actual knowledge or awareness required to be prosecuted under these laws.¹⁶⁶

The Kenyan government's failure to address the violations of women's economic, social, and cultural rights increases women's likelihood of conviction under the Sexual Offenses Act and the HIV and AIDS Prevention and Control Act. Because more women than men are tested for HIV/AIDS in Kenya, primarily in the context of prenatal care,¹⁶⁷ they are more likely to be targeted for prosecution. The disproportionate prosecution of women would serve to entrench the notion that women are the primary vectors of the epidemic and in turn "justify," in the minds of some, violence against HIV/AIDS-infected women, their expulsion from their homes, and the denial of their right to inherit property – all of which contribute to the high rates of HIV/AIDS infection among Kenyan women in the first place. It is counter-productive for the Kenyan government on the one hand to declare the HIV/AIDS epidemic a national emergency¹⁶⁸ and enact laws criminalizing HIV transmission, and then on the other hand allow the customary practices described above to continue. If the government is to take an active role in preventing HIV transmission, it must not place the responsibility solely on people living with HIV/AIDS, but must eliminate those traditional practices that contribute to the spread of the disease.

By criminalizing HIV transmission, Kenya further compounds the problems women face with regard to housing and property rights, in particular under Article 11 of the ICESCR. The affirmative defenses allowed under the Sexual Offenses Act and the HIV Prevention and Control Act – informing sexual partners of one's HIV/AIDS status¹⁶⁹ or asking them to use condoms,¹⁷⁰ will often not protect Kenyan women, nearly half of whom suffer from domestic violence.¹⁷¹ Worse still, Kenyan law lacks any provision criminalizing domestic violence.¹⁷² Domestic violence diminishes the likelihood that a woman will tell her partner that she has HIV/AIDS. Furthermore, women with abusive partners are unable to demand safe-sex practices, or the cessation of sexual

activity. Abusive men often force wives to relinquish their property upon marriage, so women become dependent upon their husbands. This limits their ability to negotiate for safer sex. If they disclose their HIV status to their husbands,¹⁷³ they may face abuse.¹⁷⁴ Ultimately, lack of assets may force some women to engage in survival sex, in which they have even less bargaining power,¹⁷⁵ whereas the affirmative defenses permitted under the law are inadequate because of women's lack of social and economic autonomy.

B. Laws That Criminalize HIV Transmission Curtail Women's Rights to Health and Work

The provisions in the Sexual Offenses Act and HIV and AIDS Prevention and Control Act that could lead to the criminalization of a mother who transmits HIV or AIDS to her newborn baby are illogical when these same women are not given adequate health care.¹⁷⁶ The Kenyan government provides free health care for children under five years old, but does not have a similar program to prevent HIV transmission.¹⁷⁷ Most mothers would do everything in their power to prevent transmission to children *in utero*, but few Kenyan women, especially in rural areas, have access to treatments that can prevent such transmission. The lack of services to provide health care to people without adequate resources violates ICESCR's guarantee of the right to health under Article 12. Kenya is not able to provide sufficient ARVs to people infected with HIV/AIDS.¹⁷⁸ So in effect, the HIV-criminalization laws punish women for the government's violation of their right to health care.

The Sexual Offenses Act negatively affects the right to work of women living with HIV/AIDS guaranteed in Article 6 of the ICESCR. Section 30 of the Act requires individuals convicted of an offense under the act to disclose that conviction when applying for employment that places him or her in care of children, or in a position of authority over children or any other vulnerable person.¹⁷⁹ If a person convicted under the Act does not disclose her conviction and by implication, her HIV-positive status, that person is liable to imprisonment for a minimum of three years or to a fine of at least fifty thousand shillings or both.¹⁸⁰ As women are more likely to hold jobs in the informal sector, requiring them to take care of children or other vulnerable people,¹⁸¹ and because they are already more likely to be convicted under section 26 of the Sexual Offenses Act for transmission of HIV or AIDS, this provision will disproportionately affect women's right to work by stymieing her opportunities to attain employment after being convicted under the Sexual Offense Act. This restriction has the potential to reinforce women's dependence on men, diminishing women's capacity to negotiate safer sex practices in their relationships; and makes unskilled women more likely to turn to survival sex in order to provide for themselves and their families.¹⁸²

The Sexual Offenses Act and HIV Prevention and Control Act could ironically undermine women's right to health. Because conviction requires "actual knowledge"¹⁸³ or "aware[ness] of being infected,"¹⁸⁴ the law creates an incentive not to be tested in order to avoid potential criminal liability.¹⁸⁵ And this Committee, in General Comment 14, cited evidence that criminalization laws impede the creation of a "favourable climate for the realization of the right [to health]"¹⁸⁶ because people with HIV/AIDS may fear that public health agencies will turn their information over to criminal prosecutors.¹⁸⁷ Maintaining trust is crucial to encourage people living with HIV/AIDS to inform medical professionals of any recent sexual contacts. It is unclear whether Kenya has issued guidelines limiting the extent to which public health agencies can share information with prosecutors. Given these problems, criminalization laws unwisely divert Kenya's attention and resources from public health and prevention to prosecution and retribution.

C. Kenya Must Uphold ICESCR Rights in Addressing the HIV/AIDS Epidemic

Kenya's laws criminalizing HIV transmission undermine the right to dignity expressed in the ICESCR preamble by increasing the stigma borne by persons, and especially women, living with HIV/AIDS.¹⁸⁸ In other countries with similar laws, women who refused to disclose their HIV/AIDS status to sexual partners for fear of abuse or abandonment have been prosecuted even when no actual transmission occurred. For example, in a recent case in Bulawayo, Zimbabwe, a woman taking ARVs was sentenced to a suspended term of 5 years, even though her lover tested negative and did not want to proceed with the prosecution.¹⁸⁹ Pregnant women without access to ARVs have faced prosecution for giving birth to an HIV positive child.¹⁹⁰

According to the Committee's General Comment 14, the burden is on the State to justify measures to imprison citizens due to their HIV/AIDS status.¹⁹¹ And such "limitations [on rights] must be proportional, i.e. the least restrictive..." Neither the Sexual Offenses Act nor the HIV Prevention and Control Act is proportional nor least restrictive. They potentially criminalize intimate activity that poses no transmission risk, such as kissing, while not requiring proof that the disease was actually transmitted.

Kenya's report to the ICESCR cited a 6.6 percent drop between 2002 and 2004 in the national HIV/AIDS infection rate, from 13.6 percent to 7 percent.¹⁹² The government's report cited high-level political will, voluntary counseling and testing centers, and the involvement of all stakeholders for the decrease. In 2004, neither the Sexual Offenses Act nor the HIV and AIDS Prevention and Control Act were in force, yet incidences of HIV/AIDS decreased by 7 percent. Commissioner Lichuma from the Kenya National Commission on Human Rights reinforces the notion that criminalizing HIV transmission is not the solution Kenya needs to solve its problem with HIV/AIDS.¹⁹³ Instead, Kenya should focus on tried-and-true methods that do not violate basic rights – education and the provision of health options for people who are living with HIV/AIDS.

XII. CONCLUSION

Kenya's new government has great potential to make significant progress towards the equal protection of women's social, political, and economic rights. Working within the ICESCR mandate, the government can ensure protections for women's rights to non-discrimination, dignity, health, and an adequate standard of living, including housing, and property. Kenya conform existing legislation and pass new laws to account for women's rights under the ICESCR to ensure that women do not face destitution in the event of divorce or the death of a spouse. It should ensure equal access and control of property by women, particularly widows, and outlaw harmful, dangerous, and degrading practices such as widows inheritance and ritual cleansing. The Kenyan government should also take a holistic and respectful approach to its response to the HIV/AIDS crisis; most critically, it must reevaluate or repeal laws which criminalize HIV/AIDS and place women at particular risk for prosecution. Such action is not only an obligation under ICESCR and is within the direct power of the Kenyan government, but would considerably advance the goal of economic, social, and cultural rights for all citizens of Kenya.

End Notes

- ¹ Republic of Kenya, *Initial Report of States Parties to the Committee on Economic, Social and Cultural Rights* (2007), para. 37–38, U.N. Doc. E/C.12/KEN/1 (Sept. 7, 2006) [hereinafter Kenya ICESCR Report].
- ² International Covenant on Economic, Cultural, and Social Rights (ICESCR), G.A. Res. 2200A (XXI), arts. 10(1), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), Preamble, *available at* <http://www2.ohchr.org/english/law/cescr.htm>.
- ³ See Republic of Kenya, *Combined Fifth and Sixth Periodic Reports of States Parties to the Committee on the Elimination of Discrimination Against Women* (39th Sess., 2007), para. 173, U.N. Doc. CEDAW/C/KEN/6 (Oct. 16, 2006), *available at* <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (under Kenya) [hereinafter CEDAW Report 2006].
- ⁴ DRAFT CONSTITUTION, Sec. 37 (2004) (Kenya).
- ⁵ See Human rights Watch Report: Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance (2008), *available at* <http://www.hrw.org/reports/2008/kenya0308/kenya0308webcover.pdf>.
- ⁶ See U.S. Department of State, Background Note: Kenya (2008), *available at* <http://www.state.gov/r/pa/ci/bgn/2962.htm>.
- ⁷ *Id.*
- ⁸ Kenyan Women's Consultation Group On The Current Crisis In Kenya, *Women's Memorandum To The Mediation Team* (Jan. 29, 2008), *available at* <http://allafrica.com/stories/200801310664.html>.
- ⁹ *Id.*
- ¹⁰ KEY POINTS: KENYA POWER-SHARING DEAL (2008), *available at* <http://news.bbc.co.uk/2/hi/africa/7269476.stm>.
- ¹¹ Ministry of Genre, Changes in the Ministry, *available at* http://www.gender.go.ke/index.php?option=com_content&task=view&id=201&Itemid=183.
- ¹² Honorable Amos Kimunya, E.G.P., M.P. Minister for Finance, Budget Speech for the Fiscal Year 2008/2009, Address to the National Assembly (June 12th, 2008).
- ¹³ CONSTITUTION, Sec. 82(4)(b)-(c). Republic of Kenya, *Responses to the list of issues and questions to the Committee on the Elimination of All Forms of Discrimination Against Women*, para 22, U.N. Doc. CEDAW/C/KEN/Q/6/Add.1 (April 27, 2007), *available at* <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (under Kenya) [hereinafter Response to CEDAW].
- ¹⁴ Law of Succession Act, (1981) Cap. 160 § 32 (Kenya).
- ¹⁵ CEDAW Report 2006, *supra* note 3, para. 57.
- ¹⁶ See UN THEME GROUP ON HIV AND AIDS, PROPERTY AND INHERITANCE RIGHTS OF WOMEN AND GIRLS IN KENYA IN THE ERA OF HIV AND AIDS 12 (2006) [hereinafter UN THEME GROUP ON HIV AND AIDS, PROPERTY AND INHERITANCE RIGHTS].
- ¹⁷ CONSTITUTION, Art. 83 (rev. 2001) (Kenya): "This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."
- ¹⁸ The Judicature Act, (1967) Cap. 8 § 3(2) (Kenya).
- ¹⁹ CESCR Secretariat, *NGO participation in the activities of the Committee on Economic, Social and Cultural Rights*, paras. 10-12, UN Doc. No. E/C.12/2000/6 (July 7, 2000), *at* [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/79b3595b0ab945afc125693d0047a504/\\$FILE/G0043093.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/79b3595b0ab945afc125693d0047a504/$FILE/G0043093.pdf).
- ²⁰ Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of State parties obligations (art. 2, para. 1 of the Covenant)* (5th Sess., 1990), para. 5, U.N. Doc. E/1991/23. (1990), *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument) [hereinafter *CESCR General Comment 3*]. ("Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, "shall have an effective remedy" (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, ... which would seem to be capable of immediate application by judicial and other organs in many national legal systems.")
- ²¹ Committee on Economic, Social, and Cultural Rights, *General Comment 7, The right to adequate housing: forced evictions*, (16th Sess., 1997), para. 10, U.N. Doc. E/1998/22, annex IV at 113 (1997), *available at* <http://www2.ohchr.org/english/bodies/cescr/comments.htm> [hereinafter *CESCR General Comment 7*]
- ²² ICESCR, *supra* note 2, art. 10.1.
- ²³ Committee on Economic, Social and Cultural Rights, *General Comment 14, The right to the highest attainable standard of health* (22nd Sess., 2000), para. 1, U.N. Doc. E/C.12/2000/4 (2000), *available at*

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument) [hereinafter *CESCR General Comment 14*].

²⁴ *Id.* at paras. 8,10.

²⁵ *Id.* at paras 28, 29.

²⁶ Kenya Land Alliance & FIDA Kenya, Policy Brief: Women, Land and Property Rights and the Land Reforms in Kenya 1 (2006), available at <http://www.kenyalandalliance.or.ke/womenpercent20policypercent20brief.pdf> [hereinafter KLA, Women, Land and Property Rights].

²⁷ See Ministry of Lands, National Land Policy §§ 3.6.2, 3.6.6, 3.6.10.3 (2007) [hereinafter National Land Policy].

²⁸ KLA, Women, Land and Property Rights, *supra* note 26.

²⁹ See U.N. Special Rapporteur on Adequate Housing, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Kenya*, para. 38, delivered to the Committee on Economic, Social and Cultural Rights and the Commission on Human Rights, U.N. Doc. E/CN.4/2005/48/Add.2 (Dec. 17, 2004).

³⁰ The Registered Land Act, (2006) Cap. 300 § 27(a).

³¹ *Id.* § 28.

³² Kenya National Commission on Human Rights, From Despair to Hope: Women's Right to Own and Inherit Property 3 (2005) [hereinafter From Despair to Hope 2005].

³³ See CEDAW Report 2006, *supra* note 3; Kenya Land Alliance, The National Land Policy in Kenya: Critical Gender Issues and Policy Statements 6 (2004), available at

<http://www.kenyalandalliance.or.ke/Issues%20Paper%20gender%20.pdf> [hereinafter KLA, Critical Gender Issues].

³⁴ KLA, Women, Land and Property Rights, *supra* note 26.

³⁵ Interview with Nancy Abisai, Project Officer, Shelter Forum, in Nairobi, Kenya (Apr. 2, 2008).

³⁶ Interview with Joshua Kiriinya, in Meru, Kenya (March 30, 2008).

³⁷ See generally, Telephone Interview with Evelyne Opondo, Senior Counsel, FIDA-Kenya (Jan. 30, 2008)

³⁸ Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation 21: Equality in Marriage and Family Relations* (13th Sess., 1994), paras. 30-31, U.N. Doc. A49/38 at 1 (1994), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> [hereinafter *CEDAW, General Recommendation 21*]. See also, Jacinta Wanjiku Kamau v. Isaac Kamau Mungai, Civil Appeal 59 of 2001 (2006) 59 K.L.R. 9 (C.A.K.) (Kenya).

³⁹ Interview with Johnson Okoth Okello, Senior State Counsel, Kenya Law Reform Commission, in Nairobi, Kenya (Apr. 2, 2008).

⁴⁰ Interview with rural male farmer in Male, Kenya (Mar. 29, 2008).

⁴¹ CEDAW Report 2006, *supra* note 3, at para. 7; Interview with county clerk, Laikipia County Council, in Nanyuki, Kenya (Apr. 3, 2008); Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

⁴² Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008).

⁴³ See Akinyi Nzioki, The Effects of Land Tenure on Women's Access and Control of Land in Kenya, in *Cultural Transformation and Human Rights in Africa* 218, 228 (Abdullahi A. An-Na'im ed., 2002).

⁴⁴ Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

⁴⁵ See Nzioki, *supra* note 43.

⁴⁶ From Despair to Hope 2005, *supra* note 32.

⁴⁷ See, e.g., CONSTITUTION, Sec. 115(2) (rev. 2001) ("Each county council . . . shall give effect to such rights, . . . in respect of the land as may, under . . . African customary law").

⁴⁸ See, e.g., sec. 69 of the Trust Land Act, (2004) Cap. 288 ("In respect of the occupation, use, control, . . . and disposal of any Trust land, every tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing African customary law").

⁴⁹ Telephone Interview with Evelyne Opondo, Senior Counsel, FIDA-Kenya, (Jan. 30, 2008); Telephone Interview with Lily Murei, Monitoring and Evaluation Officer, Kenya Land Alliance (Feb. 26, 2008).

⁵⁰ Interview with Jackson Kirigia, Assistant Chief, in Meru, Kenya (Mar. 31, 2008).

⁵¹ See CEDAW Report 2006, *supra* note 3, at para. 10; Interview with county clerk, Laikipia County Council, in Nanyuki, Kenya (Apr. 3, 2008); Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

⁵² KENYA LAND ALLIANCE, THE CASE FOR WOMEN'S LAND RIGHTS IN THE PROPOSED NEW CONSTITUTION 9 (2006), available at www.kenyalandalliance.or.ke/Women%20land%20rights%20bk.pdf [hereinafter KLA, THE CASE FOR WOMEN'S LAND RIGHTS].

⁵³ Interview with Frederick Ochieng, UNIFEM, in Nairobi, Kenya (Apr. 4, 2008).

⁵⁴ MINISTRY OF GENDER, SPORTS, CULTURE AND SOCIAL SERVICES, NATIONAL GENDER AND DEVELOPMENT POLICY 20 (2000), available at <http://www.culture.go.ke/images/stories/pdf/genderpolicy.pdf> [hereinafter NATIONAL GENDER AND DEVELOPMENT POLICY]. "Despite the fact that women account for slightly more than half of the total population and comprise a large voting population, they are still inadequately represented in . . . grassroots-based institutions such as Land Boards." *Id.* at 18.

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- ⁵⁵ NATIONAL LAND POLICY, *supra* note 27, § 3.6.10.3, para. 223 (2007).
- ⁵⁶ *Id.* at 20.
- ⁵⁷ Interview with Charles Murithi Marangi, Chairman, Meru Central County Council, in Meru, Kenya (Mar. 31, 2008) (Only 1 woman was elected and 4 women were nominated).
- ⁵⁸ Interview with County Clerk, Laikipia County Council, in Nanyuki, Kenya (Apr. 3, 2008).
- ⁵⁹ *See* The Land Disputes Tribunal Act, (2004) Cap. 287 §§ 4(2), 5(1).
- ⁶⁰ *Id.* § 3(7) (“The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law.”)
- ⁶¹ *See* Land Disputes Tribunals (Forms and Procedure) Rules, 1993, (2004) Cap. 287 § 19 (“No party to or other person interested therein shall be entitled to appear by or to be represented by an advocate in any proceedings unless a Tribunal or an Appeals Committee directs otherwise.”).
- ⁶² *See* Land Control Act, (2004) Cap. 302 § 6.
- ⁶³ Jacinta Wanjiku Kamau v. Isaac Kamau Mungai, (2006) 59 K.L.R. 9 (C.A.K.) (Kenya).
- ⁶⁴ *See, e.g.*, KLA, THE CASE FOR WOMEN’S LAND RIGHTS, *supra* note 52, at 9–10; Interview with former chief in Meru, Kenya (Mar. 31, 2008); Interview with Hellen Kwamboka Ombati, advocate of the High Court of Kenya and member of FIDA-Kenya, in Nairobi, Kenya (Apr. 1, 2008).
- ⁶⁵ *See generally*, KLA, CRITICAL GENDER ISSUES, *supra* note 33.
- ⁶⁶ Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding Comments: Kenya*, para. 44, U.N. Doc. CEDAW/C/KEN/CO/6 (2007), *available at* <http://www.un.org/womenwatch/daw/cedaw/39sess.htm> (under “Kenya,” then “Concluding Comments”) [hereinafter CEDAW Committee, *Concluding Comments: Kenya*].
- ⁶⁷ Interview with Charity Mithiga, Retired Schoolteacher, in Meru, Kenya (Mar. 30, 2008).
- ⁶⁸ IWHRC & FIDA-Kenya, Fact-finding on Women’s Property, Land, and Inheritance Rights in Kenya (Mar.–Apr. 2008) (on file with author).
- ⁶⁹ Interview with Joyce Wangui, Divorced Woman, in Nanyuki, Kenya (Mar. 30, 2008).
- ⁷⁰ Interview with Jane Wanjiru Magenda, Divorced Woman, in Nanyuki, Kenya (Mar. 30, 2008).
- ⁷¹ Interview with Margaret Domiciano, Divorced Squatter, in Meru, Kenya (Mar. 31, 2008).
- ⁷² Interview with Jane Wanjiru Magenda, Divorced Woman, in Nanyuki, Kenya (Mar. 30, 2008).
- ⁷³ Interview with Margaret Domiciano, Divorced Squatter, in Meru, Kenya (Mar. 31, 2008).
- ⁷⁴ Telephone Interview with Evelyne Opondo, Senior Counsel, FIDA-Kenya (Jan. 30, 2008). For example, the MWPA has been applied in customary marriages in *Karanja v. Karanja*, (1976) 1 K.L.R. 389 and in Muslim marriages in *Fathiya Essa v. Mohamed Alibhai Essa*, (1995) Civil Appeal 101 of 1995 (H.C. Nairbi) (unreported), and *Amina O. Abdulkadir v. Ravindra N. Shah*, (2006) eK.L.R. 1, 3 (H.C. Mombasa) (Kenya).
- ⁷⁵ The Married Women’s Property Act, (1882) Cap. 75 §1 (Kenya).
- ⁷⁶ *Id.* § 1.
- ⁷⁷ *See* *Echaria v. Echaria*, Civil Appeal 75 of 2001, (2007) eKLR (C.A.) (Kenya); *But see* *Makunda v. Makunda* (2006), Civil Suit 5 of 2002, eK.L.R. (H.C.) (Kenya) (court found wife made direct and indirect contribution to the acquisition and development to properties and had equal share in them).
- ⁷⁸ *Echaria v. Echaria*, Civil Appeal 75 of 2001, (2007) eKLR (C.A.) (Kenya).
- ⁷⁹ *Id.* at 522.
- ⁸⁰ Interview with Margaret Domiciano, Divorcee Squatter, in Meru, Kenya (Mar. 31, 2008).
- ⁸¹ ICESCR, *supra* note 2, Art. 11(1).
- ⁸² *Kivuitu v. Kivuitu*, Civil Appeal 26 of 1985, (1991) eKLR (C.A.) (Kenya).
- ⁸³ The Mohammedan Marriage, Divorce and Succession Act, (1806) Cap. 156 (Kenya)
- ⁸⁴ *See, e.g.*, The Marriage Act, (1902) Cap. 150 (Kenya); The Mohammedan Marriage, Divorce and Succession Act, (1806) Cap. 156 (Kenya); The Married Women’s Property Act, (1882) Cap. 75 (Kenya).
- ⁸⁵ Interview with Beatrice Nyokabi, Nanyuki Kenya, (March 30, 2008).
- ⁸⁶ Interview with Dr. Patricia Kameri Mbote, Law Professor, University of Nairobi Law School in Nairobi, Kenya (Apr. 3, 2008).
- ⁸⁷ Interview with rural Kenyan woman, in Meru, Kenya (Mar. 30, 2008).
- ⁸⁸ Interview with Margaret Muthoni Muriuki, TIST client, in Meru, Kenya (Mar. 31, 2008).
- ⁸⁹ *Id.*
- ⁹⁰ *Id.*
- ⁹¹ CENTRAL BUREAU OF STATISTICS, KENYA DEMOGRAPHIC AND HEALTH SURVEY 2003, at 90 (2004), *available at* <http://www.measuredhs.com/pubs/pdf/FR151/FR151-KE03.pdf> [hereinafter DHS SURVEY].
- ⁹² *Id.*
- ⁹³ Other regions in Kenya exhibit lower rates of polygamous marriages: of 20-23 percent in Nyanza, Rift Valley, Western, and Coast provinces, and the lowest rate of 3 percent in the Central Province. *Id.*

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- ⁹⁴ Interview with Dr. Patricia Kameri Mbote, Law Professor, University of Nairobi Law School in Nairobi, Kenya (Apr. 3, 2008).
- ⁹⁵ See Human Right Committee, *Concluding Observations: Kenya* (83rd Sess., 2005) ¶ 10, U.N. Doc. CCPR/CO/83/KEN (2005).
- ⁹⁶ CEDAW Committee, *Concluding Comments: Kenya*, *supra* note 66, para. 22.
- ⁹⁷ Similar provisions exist in CEDAW, article 16 (1): “States Parties shall . . . ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right to freely choose a spouse and to enter into marriage only with their free and full consent;” and ICCPR, article 23(3): “No marriage shall be entered into without the free and full consent of the intending spouses.”
- ⁹⁸ See DH S SURVEY, *supra* note 91, at 224; National AIDS and STI Control Programme, Ministry of Health, Kenya AIDS Indicator Survey (July 2007), at 18, *available at* http://www.aidskenya.org/public_site/webroot/cache/article/file/KAIS__Preliminary_Report.pdf.
- ⁹⁹ For example in the Luo community. See COTRAN, *RESTATEMENT OF AFRICAN LAW: KENYA*, Vol. 2: Succession, at 167 (1969).
- ¹⁰⁰ CEDAW report 2006, *supra* note 3, para. 81.
- ¹⁰¹ Interview with Alice Mumbi in Mwiyo, Kenya (Mar. 30, 2008).
- ¹⁰² *Id.*
- ¹⁰³ Interview with Gilbert O. Ombachi, Advocate, in Nanyuki, Kenya (Mar. 29, 2008).
- ¹⁰⁴ Interview with Irene Oloo in Nairobi, Kenya (Apr. 2, 2008).
- ¹⁰⁵ CESCR General Comment 7, *supra* note 21, para. 3.
- ¹⁰⁶ *Id.* at para 1.
- ¹⁰⁷ See *id.* at para. 8 (“The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.”); *id.* at para. 10 (“The non-discrimination provisions of articles 2.2 and 3 of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.”).
- ¹⁰⁸ Committee on Economic, Social and Cultural Rights, General Comment 16, *Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (34th Sess., 2005), para 28, U.N. Doc. E/C.12/2005/3, *available at* <http://www2.ohchr.org/english/bodies/cescr/comments.htm> [hereinafter *CESCR, General Comment 16*].
- ¹⁰⁹ *Id.* at para 27.
- ¹¹⁰ Kenya ICESCR Report , *supra* note 1, para 130.
- ¹¹¹ Republic of Kenya, National Development Plan 1997-2001, at 151.
- ¹¹² CEDAW Report 2006, *supra* note 3, para 194.
- ¹¹³ Interview with Nancy Abisai, Project Officer, Shelter Forum, in Nairobi, Kenya (Apr. 2, 2008).
- ¹¹⁴ Interview with Elijah Odhiambo, Economic & Social Rights Centre, in Nairobi, Kenya (Apr. 1, 2008).
- ¹¹⁵ Interview with Ruben Mwenda Murugo, Land Policy Coordinator, in Nairobi, Kenya (Apr. 2, 2008).
- ¹¹⁶ UN THEME GROUP ON HIV AND AIDS, PROPERTY AND INHERITANCE RIGHTS, *supra* note 16, at 9.
- ¹¹⁷ Law of Succession Act, (1981) Cap. 160 § 38 (Kenya).
- ¹¹⁸ *Id.* §§ 35(1)(b), 36(1)(c).
- ¹¹⁹ *Id.*
- ¹²⁰ *Id.* § 39(1).
- ¹²¹ UN THEME GROUP ON HIV AND AIDS, PROPERTY AND INHERITANCE RIGHTS, *supra* note 16, at 19.
- ¹²² Human Rights Watch interview with Justice Richard Otieno Kwach, Justice, Kenya Court of Appeal, in Nairobi, Kenya (November 7, 2002).
- ¹²³ Interview with Mildred Ngesa, Designated Features Writer, Nation Media Group Ltd., in Nairobi, Kenya (Apr. 3, 2008).
- ¹²⁴ COTRAN, *supra* note 99, at 166.
- ¹²⁵ Telephone Interview with Judith Okal, Senior Legal Counsel, FIDA Kenya, in Kisumu, Kenya (Sept. 11, 2008).
- ¹²⁶ Interview with the Rev. Dr. Judy Mbugua, Team Leader for Kenya, Association of Evangelicals in Africa and head of Pan African Christian Women Alliance, in Nairobi, Kenya (Apr. 4, 2008).
- ¹²⁷ Interview with Mildred Ngesa, Designated Features Writer, Nation Media Group Ltd., in Nairobi, Kenya (Apr. 3, 2008).
- ¹²⁸ Stephen Buckley, *Wife Inheritance Spurs AIDS Rise in Kenya*, Washington Post, Nov. 8, 1997, *available at* http://www.washingtonpost.com/wp-srv/inatl/longterm/africanlives/kenya/kenya_aids.htm.
- ¹²⁹ *Id.*
- ¹³⁰ *Id.*
- ¹³¹ UN THEME GROUP ON HIV AND AIDS, PROPERTY AND INHERITANCE RIGHTS, *supra* note 16.
- ¹³² CEDAW Report 2006, *supra* note 3, para 193.
- ¹³³ CESCR, General Comment 14, *supra* note 23, para. 11.

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- ¹³⁴ See Interview with Judy Mbugua, head of the Pan-African Christian Women Alliance and Team Leader for Kenya, Association of Evangelicals in Africa, in Nairobi, Kenya (Apr. 4, 2008).
- ¹³⁵ Interview with Gitobu Imanyara, Member of Parliament, in Nairobi, Kenya (Apr. 3, 2008).
- ¹³⁶ See Interview with Judy Mbugua, head of PACWA and Team Leader for Kenya, Association of Evangelicals in Africa, in Nairobi, Kenya (Apr. 4, 2008).
- ¹³⁷ *Id.*
- ¹³⁸ Interview with Gilbert O. Ombachi, Advocate, in Nanyuki, Kenya (Mar. 29, 2008).
- ¹³⁹ Interview with Gitobu Imanyara, Member of Parliament, in Nairobi, Kenya (Apr. 3, 2008).
- ¹⁴⁰ See Interview with Lanoi Parmuat, FGM Project Leader, Free Pentecostal Fellowship in Kenya, in Nairobi, Kenya (Apr. 3, 2008).
- ¹⁴¹ *Id.*
- ¹⁴² CEDAW Report 2006, *supra* note 3, para. 22.
- ¹⁴³ *Responses to CEDAW*, *supra* note 13, para. 23.
- ¹⁴⁴ CEDAW Report 2006, *supra* note 3, para. 132.
- ¹⁴⁵ The Sexual Offenses Act, (2006) Cap. 3 § 43(5). (Kenya) [hereinafter SOA]
- ¹⁴⁶ Ministry of Health, National AIDS and STI Control Programme, Kenya AIDS Indicator Survey (July 2007), at 17-18, available at http://www.aidskenya.org/public_site/webroot/cache/article/file/KAIS__Preliminary_Report.pdf.
- ¹⁴⁷ UN Theme Group on HIV and AIDS, *Violence Against Women and Girls in the Era of HIV and AIDS: A Situation and Response Analysis in Kenya*, at 12 (2006), available at http://data.unaids.org/pub/Report/2006/20060630_GCWA_RE_Violence_Women_Girls_Kenya_en.pdf
- ¹⁴⁸ KANCO - Kenya AIDS NGOs Consortium, <http://www.kanco.org/about.php> (last visited May 3, 2008).
- ¹⁴⁹ Interview with Annie Mumi Muchiri, Intern, KANCO in Nairobi, Kenya (Apr. 1, 2008).
- ¹⁵⁰ The Secretary General, *In-depth study on all forms of violence against women*, para. 160, delivered to the General Assembly, U.N. Doc. A/61/122/Add.1 (July 6, 2006), available at <http://www.un.org/womenwatch/daw/vaw/violenceagainstwomestudydoc.pdf> The Global Coalition on Women and AIDS, Intimate Partner Violence and HIV/AIDS 1007 (2004) (noting that “[s]tudies from Rwanda, Tanzania, and South Africa show up to three fold increases in risk of HIV among women who have experienced violence compared to those who have not.”).
- ¹⁵¹ CEDAW Report 2006, *supra* note 3, para. 67-71. Section 156 of the Penal Code criminalizes the selling of sex by a third party, and sec. 153 prohibits detaining women in order to force them into prostitution.
- ¹⁵² Interview with Alice Mumbi in Mwiyo, Kenya (Mar. 30, 2008).
- ¹⁵³ UN THEME GROUP ON HIV AND AIDS, PROPERTY AND INHERITANCE RIGHTS, *supra* note 16, at 87.
- ¹⁵⁴ Penal Code, (2003) Cap. 63 § 154-56. (Kenya).
- ¹⁵⁵ SOA, *supra* note 145, §26
- ¹⁵⁶ The HIV and AIDS Prevention and Control Act, Cap. 14 (2006) Kenya Gazette Supplement No. 98 § 24. (Kenya) [hereinafter HPCA]
- ¹⁵⁷ ICESCR, *supra* note 2, arts. 2(2), 3.
- ¹⁵⁸ *Id.* art. 2(2) (requiring Kenya to guarantee that “the rights expressed in the Covenant will be exercised without discrimination of any kind as to race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status”); *id.* art. 3 (requiring Kenya to ensure “equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”).
- ¹⁵⁹ CEDAW Concluding Comments, *supra* note 66, at para. 39,
- ¹⁶⁰ *Id.*
- ¹⁶¹ *Id.* at para. 40.
- ¹⁶² CEDAW Report 2006, *supra* note 3, para. 130; National AIDS and STI Control Programme, Ministry of Health, Kenya, Kenya AIDS Indicator Survey 2007: Preliminary Report 12 (2008) [hereinafter KAIS report] (confirming higher prevalence of HIV/AIDS in women, 8.7% of women to 5.6% of men, ages 15-64) .
- ¹⁶³ *Id.* (showing 43% of women and only 25% of men tested for HIV and received results in 2007; and showing 43% of women and only 25% of men tested for HIV and received results in 2007).
- ¹⁶⁴ SOA, *supra* note 145, § 26(1).
- ¹⁶⁵ HPCA, *supra* note 156, § 24(1).
- ¹⁶⁶ See KAIS Report, *supra* note 162, at 21 (showing 43% of women and only 25% of men tested for HIV and received results in 2007).
- ¹⁶⁷ CEDAW Report 2006, *supra* note 3, para. 130 (ratio of 1.9 women to 1 male as of 2003); KAIS Report, *supra* note 165, at 12 (confirming higher prevalence of HIV/AIDS in women, 8.7% of women to 5.6% of men, ages 15-64).
- ¹⁶⁸ See Republic of Kenya, *Second Periodic Report of States Parties to the Human Rights Committee*, ¶ 64, U.N. Doc. CCPR/C/KEN/2004/2 (Sept. 27, 2004) [hereinafter Kenya ICCPR Report] (providing that Kenyan government declared HIV/AIDS a national disaster in 2001).

¹⁶⁹ HPCA, *supra* note 156, § 24(1)(b) (“Inform, in advance, any sexual contact...”).

¹⁷⁰ *Id.* § 24(1)(a) (“Take all reasonable measures and precautions to prevent the transmission of HIV to others.”).

¹⁷¹ See Betty Khasakhala-Mwenesi et al., Study of Gender Violence in Kenya 244, *available at* <http://www.measuredhs.com/pubs/pdf/FR151/15Chapter15.pdf>.

¹⁷² See CEDAW Report 2006, *supra* note 3, paras. 22-23 (citing increase in gender based violence with the number of reported cases of rape and attempted rape rising from 1,675 in 2000 to 2,908 in 2004 and cases of assault and battery rose from 6,255 in 2000 to 8,959 in 2004).

¹⁷³ While many observers presume men in African societies are more promiscuous and therefore more likely to spread HIV to their wives, a recent study suggests that women are the infected partner in marriages more often than previously believed. Vinod Mishra, *Evaluation of bias in HIV seroprevalence estimates from national household surveys*, 84 (supp. 1) Sexually Transmitted Infections i63- i64 (2008).

¹⁷⁴ Studies in Rwanda, Tanzania, and South Africa have shown a threefold increase in risk of HIV among women who experienced domestic violence compared to those who have not. Global Coalition on Women and AIDS, *Intimate Partner Violence and HIV/AIDS* 1007 (2004).

¹⁷⁵ See CEDAW Report 2006, *supra* note 3, paras. 64, 81 (blaming the continuous existence of prostitution on the disproportionate number of unemployed women living below the poverty line, 63% of urban women versus 49.2% of urban men).

¹⁷⁶ *Id.* para. 64 (citing proposition that in 2002, 56% of the population lived below the poverty line, with a higher number of those impoverished people being women; and higher incidence of poverty among female headed households – 79.5% living beneath the poverty line) *id.* para. 194.

¹⁷⁷ *Id.* para. 73. Although Kenya introduced a cost exemption plan for people who could not afford service fees for reproductive health and treatment for HIV/AIDS, most service providers do not know about the measures. The Center for Reproductive Rights and FIDA Kenya, *Failure to Deliver: Violation of Women’s Human Rights in Kenya Health Facilities* 54 (2007), *available at* http://www.reproductiverights.org/pdf/pub_bo_failuretodeliver.pdf

¹⁷⁸ See, e.g., Kenya Ministry of Health, *Access to HIV/AIDS related Essential medicines: A Framework for Measurement*, http://www.who.int/hiv/amds/countries/ken_AccessHIVEssentialMedicines.pdf (last visited Oct. 1, 2008).

¹⁷⁹ SOA, *supra* note 145, § 30.

¹⁸⁰ *Id.*

¹⁸¹ Over 58% of women employed in Kenya work in the community, social, and personal services. Kenya ICESCR Report, *supra* note 1, paras. 37–38.

¹⁸² See CEDAW Report 2006, *supra* note 3, paras. 64, 81 (blaming the continuous existence of prostitution on the disproportionate number of unemployed women living below the poverty line, 63% of urban women versus 49.2% of urban men).

¹⁸³ SOA, *supra* note 145, § 26(1).

¹⁸⁴ HPCA, *supra* note 156, § 24(1).

¹⁸⁵ See Joyce Chimbi, *Law on Aids should be realistic and practical for it to be effective*, The Standard [Kenya], Aug. 23, 2008; Matthew Weait & Yusef Azad, *The criminalization of HIV transmission in England and Wales: questions of law and policy*, HIV/AIDS Pol’y & L. Rev., Aug. 2005, at 6.

¹⁸⁶ ICESCR General Comment 14, *supra* note 23, para. 55.

¹⁸⁷ Scott Burris, et al., *The Criminalization of HIV: Time for an Unambiguous Rejection of the Use of Criminal Law to Regulate the Sexual Behavior of those with and at Risk of HIV*, Social Science Research Network (Aug. 2008), *available at* <http://ssrn.com/abstract=1189501>.

¹⁸⁸ See ICESCR, *supra* note 2, preamble.

¹⁸⁹ Edwin Cameron, Justice, South Africa Supreme Court of Appeal, HIV is a virus, not a crime: Criminal statutes and criminal prosecutions, Presented at the XVII International Aids Conference (Aug. 8, 2008). In fact, according to a recent consensus statement on behalf of the Swiss Federal Commission for HIV / AIDS, “in a case with total suppression of the viral discharge, the residual risk of transmitting HIV through sexual relations without protection is on the whole less than 1:100,000.” Vernazza P, Hirschel B, Bernasconi E, Flepp M., *Les personnes séropositives ne souffrent d’aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle*, 5 Schweizerische Ärztezeitung/Bulletin des médecins suisses 163, 167 (2008).

¹⁹⁰ In May 2005, in Montreal, Canada, police charged a woman with criminal negligence causing bodily harm for refusing to disclose her HIV status to hospital staff during and after her pregnancy. Glenn Betteridge, *Criminal charges laid in three new situations*, 10(2) HIV/AIDS Pol’y and L. Rev. 1, 19 (Aug. 2005).

¹⁹¹ See ICESCR General Comment 14, *supra* note 23, at para. 28 (“State Party which... restricts the movement of, or incarcerates, persons with transmissible diseases such as HIV/AIDS, ... on grounds such as national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in article 4.”).

¹⁹² Kenya ICESCR Report, *supra* note 1, para.. 30.

¹⁹³ Chimbi, *Law on Aids*, *supra* note 185.

APPENDIX A: BACKGROUND ON AUTHOR ORGANIZATIONS

The Federation of Women Lawyers Kenya (FIDA Kenya)

Established in 1985, the Federation of Women Lawyers - Kenya (FIDA Kenya) is a non-profit, non-partisan, and nongovernmental membership organization, committed to the creation of a society that is free of all forms of discrimination against women through provision of legal aid, women's rights monitoring, advocacy, education and referral.

FIDA Kenya works to achieve its mission through:

- Offering quality legal services to a limited number of women.
- Undertaking transformative public interest litigation.
- Creating awareness of legal rights and educating women on how to claim them through self-representation in court.
- Researching and reporting on women's rights violations, the effects and suggesting changes.
- Lobbying and advocating for reform of laws and policies.
- Monitoring the implementation and enforcement of legislation and policies.
- Engaging and nurturing linkages with strategic partners.

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The International Women's Human Rights Clinic (IWHRC)

The International Women's Human Rights Clinic (IWHRC), a legal clinic at Georgetown University Law Center in Washington DC, in the United States, utilizes law students and faculty to support and advance women's human rights globally through partnerships with local women's human rights organizations and attorneys. The Clinic provides national, comparative, and international legal analysis to support constitutional challenges, impact litigation, and legislative reform of sex-discriminatory laws, policies, and practices. During 2008, IWHRC has collaborated with FIDA Kenya to research and investigate legislative solutions and develop test case litigation addressing women's property and inheritance rights, as well as the gender impact of criminal laws that address HIV Transmission in Kenya.

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