

TOWARDS THE REALIZATION OF ECONOMIC SOCIAL AND CULTURAL RIGHTS IN KENYA

JOINT CIVIL SOCIETY ALTERNATIVE REPORT TO THE 2ND-5TH STATE REPORT OF THE REPUBLIC OF KENYA ON THE IMPLEMENTATION OF THE COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS



KENYA SECTION | Since 1959



Elizabeth Glaser
Pediatric AIDS
Foundation

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LIST OF ABBREVIATIONS AND ACRONYMS

ADR	Alternative dispute resolution
AIDS	Acquired Immunodeficiency Syndrome
ART	Antiretroviral treatment
ATPU	Anti-terror police unit
BOR	Bill of rights
BPU	Border patrol unit
CDC	Center for disease control
COK	Constitution of Kenya
CSOs	Civil Society Organizations
FGM	Female genital mutilation
HIV	Human-Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Right
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ- Kenya	The Kenya Section of International Commission of Jurists
IDPs	Internally Displaced Persons
KDF	Kenya defense forces
KPR	Kenya police reservists
KWS	Kenya wildlife service
MDG	Millennium Development Goals
NACC	National Aids Control Council
NGOs	Non-Governmental Organizations
NIS	National intelligence service
PMTCT	Prevention of Mother to Child Transmission
RDU	Rapid deployment unit
TDR	Traditional dispute resolution
UNAIDS	Joint United Nations programme on HIV and AIDS
UNICEF	united Nations children's education fund
WHO	World Health Organization

ABOUT THE ORGANIZATIONS

The Kenya Section of the International Commission of Jurists

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental, non-profit and a member based organization. ICJ Kenya is the oldest human rights organization in Kenya. Its membership is drawn from the Bar as well as the Bench and currently constitutes of over 300 jurists as members. ICJ Kenya is dedicated to the legal protection of human rights in Kenya, and the African region. ICJ Kenya has observer status with the African Commission on human and Peoples' rights. ICJ Kenya actively participates in promoting and monitoring State compliance and implementation of civil, political, economic, social and cultural rights, including through developing alternative reports to the respective committees.

Human Dignity

Human Dignity is an independent, non-profit and non-governmental organization founded in January 2014. Its mission is to contribute to the respect, protection and realization of economic, social and cultural rights in sub-Saharan Africa. Human Dignity works to strengthen human rights through capacity building, research, documentation and advocacy to achieve the full implementation of the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.

Human Dignity works with civil society partners in strengthening their role as key monitors of the State implementation of human rights obligations. Together with national CSOs, Human Dignity advocate for governments to take effective measures to meet their human rights obligations in relation to economic, social and cultural rights.

The Elizabeth Glaser Pediatric Aids Foundation

The Elizabeth Glaser Pediatric AIDS Foundation (EGPAF) was created in 1988, and is now the leading global nonprofit organization dedicated to eliminating pediatric HIV and AIDS. EGPAF has been working in Kenya since 2000 to increase women's access to high-quality services to prevent mother-to-child HIV transmission, as well as to expand access to HIV prevention, care, and treatment for women, children, and their families. EGPAF is a key partner of Kenya's Ministry of Health and collaborates with multiple partners to support mother-to-child HIV transmission prevention and other HIV prevention, care, and treatment services in Kenya.

KELIN

KELIN is a human rights NGO working to protect and promote health related human rights in Kenya. We do this by; facilitating access to justice to those who have faced human rights violations, creating partnerships with key stakeholders, building capacity of communities to know their rights and analysis of laws and policies to ensure they integrate human rights principles.

Save the Children Kenya

Save The Children is contributing to strengthening the national child protection system that will benefit all children in Kenya. Through collaboration with the Ministry of Education, the Department of Children Services, and the National Council for Children Services and National CSOs, we are supporting ongoing actions and process that strengthen the Child Protection System in Kenya which is important in promoting the well-being of children. The focus for this approach is contribution to prevention of physical and humiliating punishment, promoting mechanisms for response and prevention of abuse and neglect and contributing to efforts of ensuring prompt and coordinated action and response to reported acts of abuse.

INTRODUCTION

Since the promulgation of the Kenyan constitution in 2010, ESCR are now constitutionally guaranteed. However very few measures have been put in place to effectively fulfil these rights and are mostly framed as directive principles of State policy.

During its 57th session, from 22 February to 4 March 2016, the Committee on Economic, Social and Cultural Rights (the Committee) will review the second to fifth periodic reports of Kenya combined in a single document.

The Kenya Section of International Commission of Jurists (ICJ Kenya), Human Dignity, Save The Children-Kenya, The Elizabeth Glaser Pediatric AIDS Foundation (EGPAF) and KELIN welcome the opportunity to contribute to the Committee's review of the implementation of the ICESCR by Kenya.¹ In this submission, our organizations reply to certain issues raised by the Committee in November 2015. In particular, we bring to the attention of the Committee concerns related to the implementation of articles 1, 2, 3 and 12 of the ICESCR and make recommendations to the State in that regard.

¹ We gratefully acknowledge the technical support and collaboration received from the following individuals: Anita Nyanjong' and Teresa Mutua (ICJ Kenya), Seynabou Benga (Human Dignity), Josephine Gitonga (Save The Children-Kenya), Tamar Gabelnick (EGPAF) and Sandra Ochola (KELIN). They played a significant role in the preparation of this report and drafting to its completion.

GENERAL INFORMATION

The paragraphs below reply to paragraphs 1 to 3 of the List of issues adopted by the Committee on Economic, Social and Cultural Rights in relation to the combined second to fifth periodic reports of Kenya.²

Positive court orders but non-compliance by the Executive

Kenya, as a state party to the ICESCR committed to taking progressive steps towards achieving the full implementation of rights under this covenant. In doing so, Kenya committed to using the maximum available resources. More so, Kenya committed that its citizens without discrimination of any kind shall enjoy the rights under the ICESCR.

Notably, within the reporting period, Kenya passed the 2010 Constitution³ and included in it a comprehensive section on the Bill of Rights⁴ that reiterates and strengthen the provisions of the covenant. This Constitution specifically provides for economic and social rights⁵ and provides that the same shall be progressive⁶. It guarantees every person the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care and emergency medical treatment; the right to accessible and adequate housing, and to reasonable standards of sanitation; the right to be free from hunger, and to have adequate food of acceptable quality; the right to clean and safe water in adequate quantities; the right to appropriate social security to support oneself and their dependants; and the right to education⁷.

Additionally, the Constitution places the burden on the State to use the maximum available resources in implementing these rights and the responsibility to show that resources are not available⁸. In the latter instance the State must show that it has given priority to vulnerable groups within the society⁹. The Constitution forbids the State or any person from discriminating against another, directly or indirectly, on any ground¹⁰. Further, it provides for the enforceability of

² See Committee on Economic, Social and Cultural Rights, List of issues in relation to the combined second to fifth periodic reports of Kenya, 4 November 2015, E/C.12/KEN/Q/2-5.

³ The Constitution may be accessed at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>

⁴ Chapter four of the Constitution, 2010

⁵ Article 43 of the Constitution, 2010

⁶ Article 21(2) of the Constitution, 2010

⁷ Article 43 (1) (a) to (f), (2) and (3) of the Constitution, 2010

⁸ Article 20(5) of the Constitution, 2010

⁹ Article 20(5) (b) and 21(3) of the Constitution, 2010

¹⁰ Article 27(4) of the Constitution, 2010

economic and social rights, by providing that any person can institute court proceedings when their right has been denied, violated, infringed or threatened¹¹.

Indeed, several legislations have been passed in keeping with the provisions of the Constitution and the ICESCR. Among them, the Basic Education Act no 14 of 2013¹² which among other things, provides for the promotion and regulation of free and compulsory basic education, the Land Act no 6 of 2012¹³ which provides for the sustainable administration and management of land and land based resources, the Matrimonial Property Act no 49 of 2013¹⁴ which provides for division of matrimonial property without discrimination, the National Social Security Fund Act no 45 of 2013¹⁵ which provides for the establishment of a fund which will provide basic social security for its members and their dependants, and the Prohibition of female genital mutilation Act no 32 of 2011¹⁶ to protect women and young girls from the practice of female genital mutilation.

However, implementation of these legislations beyond passing of the laws has become a problem. Therefore economic, social and cultural rights remain unrealized as good laws sit in shelves without being implemented.

With the passing of the Constitution, economic and social rights became justiciable¹⁷, and international and regional treaties that Kenya had ratified prior to the passing of the Constitution form part of the laws of Kenya¹⁸. Through these provisions, several cases on various economic and social rights issues have been filed in court over time; some of which have had positive rulings.

However there has been an unfortunate trend where the State delays, ignores and sometimes refuses to implement Court orders issued against the State in relation to economic, social and cultural rights.

In the cases of *Mitu- Bell Welfare Society v. The Attorney General*¹⁹ and *Satrose Ayuma and 11 Others v. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 2 others*²⁰ the subject matter was about forced eviction of vulnerable and disadvantaged groups and the effects of demolition on their right to property. In both cases, the court highlighted the obligation of the State to promote, protect and fulfil the economic, social and cultural rights of the vulnerable in the community, especially the right to adequate and accessible housing.

¹¹ Article 22(1) of the Constitution, 2010

¹² See <http://www.education.go.ke/Documents.aspx?docID=5216>

¹³ See <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Land Act No 6 of 2012 1 .pdf>

¹⁴ See <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MatrimonialPropertyAct2013.pdf>

¹⁵ See <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/NationalSocialSecurityFundAct2013.pdf>

¹⁶ See

http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProhibitionofFemaleGenitalMutilationAct_No32of2011.pdf

¹⁷ Article 22(1) of the Constitution, 2010

¹⁸ Article 2(6) of the Constitution, 2010

¹⁹ Petition 164 of 2011, accessed at <http://kenyalaw.org/caselaw/cases/view/80426>

²⁰ Petition 65 of 2010, accessed at <http://kenyalaw.org/caselaw/cases/view/90359/>

The Court encouraged engagement and dialogue between all the parties and asked the State to develop programmes and policy on housing. The court ordered that the squatters' be compensated for unlawful eviction. Although the State did develop programmes to address the issues of squatters in urban areas such as the slum upgrading²¹, most of these houses have been taken over by the middle class while the squatters have gone back to live in the slums²². More so, almost five years later, the squatters in these petitions have not been compensated for the destruction of their property during their eviction.

In *Patricia Asero & Others v. Attorney General*²³ the Court determined that sections²⁴ of the Anti-Counterfeit Act of 2008 affected or were likely to affect the accessibility of anti-retroviral drugs to persons living with HIV. The Court determined that this was a violation to their right to life, human dignity and health. The Judge in her ruling ordered that the State reconsider the contested sections 2, 32 and 34 of the Anti-Counterfeit Act 2008 alongside its Constitutional obligation to ensure that its citizens have access to the highest attainable standard of health and make appropriate amendments to ensure that the rights of petitioners and others dependent on generic medicines are not put in jeopardy. However, despite the letter and spirit of the ruling by the learned Judge, the Anti-Counterfeit (Amendment) Act, 2014²⁵ did not reflect any aspect of the issues brought out in the case. Most specifically, the definition of 'counterfeit' in the Act still includes 'generics' (including generic medicines) and therefore potentially risks the access to generic drugs by persons living with HIV. This is a denial of their right to life, dignity and health.

In the case of *JAO v. NA*²⁶ the court held that parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of marriage. It held that the applicant was entitled to one half of the matrimonial property.

In *Michael Mutinda Mutemi v. Permanent Secretary, Ministry of Education and 2 others*²⁷ the petitioner could not afford to pay secondary school fees for his son which was 50,000 shillings a year; even on application of bursaries and other government aid, he only got 4,000 shillings. Even though the right to education is to be achieved progressively, the court held that the State failed to show concrete policy measures, guidelines and progress it had made towards the realization of the right to education. It held that the State must be seen to take firm steps in achieving the right to basic education in a holistic manner.

²¹ Kenya Slum Upgrading Programme (KENSUP)

²² See researched story of Abby Higgins and Seattle Globalist on why slum dwellers are rejecting the upgrade programme by the State, accessed at <http://www.one.org/international/blog/why-residents-of-kibera-slum-are-rejecting-new-housing-plans/>

²³ Petition 409 of 2009, accessed at <http://www.aidslawproject.org/2010/07/31/79/>

²⁴ Sections 3,32 and 34 of the Anti- Counterfeit Act 2008

²⁵ Statute Law (Miscellaneous Amendments) Bill, 2014 assented by the president on 28/11/2014

²⁶ High court civil case number 86 of 2012, accessed at <http://kenyalaw.org/caselaw/cases/view/83538>

²⁷ High court Constitutional petition number 133 of 2013, accessed at <http://kenyalaw.org/caselaw/cases/view/91830/>

Despite the prima facie progress seen above, the State has failed to implement the decisions of the Court. This will act as a bar for judicial officers who are willing to give positive judgments but are fearful that such judgments will be reduced to merely good words, as they may not be implemented to the benefit of the petitioners.

Access to justice remains a promise

Despite the Constitutional requirement that the State shall ensure access to justice for all persons²⁸, high litigation costs, prolonged adjudication processes (usually 2-6 years), geographical locations, corruption (leading to lack of confidence in the formal system) and limited knowledge of the system have delayed and denied justice to many Kenyan citizens.

The National Legal Aid Awareness Programme, a government agency was established to institutionalize and coordinate national legal aid provision in the country. However, this body has not been able to reach the indigent Kenyans especially those in far flung areas of Kenya and as a result, its efforts have been limited to Nairobi and its environs.

Efforts to improve access to justice have culminated in the Legal Aid Bill (2013). The Bill introduces various promising strides for the establishment of a national legal aid framework. There is proposed a national legal aid service that would establish and administer a national legal aid scheme and alternative dispute resolution. Presently, legal aid in Kenya is only accorded to those accused of the offence of murder and those unable to afford their own lawyers are assigned lawyers by the Registrar of the High Court in what is termed as ‘pauper briefs’ on a voluntary basis. This Bill will therefore herald a new dawn in accessing justice for victims. However, we raise concerns to the fact that its enactment has dragged for over 10 years.

Protection of communities in mining areas

Despite the introduction of new regulations to ensure public participation in the management of community resources²⁹, there is still no practical engagement with communities to adhere to these regulations. These regulations require that during the process of conducting an environmental impact assessment study, the proponent shall in consultation with the National Environment Management Authority, seek the views of persons who may be affected by the project.

It also specifies the procedure for the same, by stating that in seeking the views of the public, after the approval of the project report by the National Environment Management Authority, the proponent shall: publicize the project and its anticipated effects and benefits by - posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project; publishing a notice on the proposed project for two successive weeks in a newspaper that has a nation-wide circulation; and making an

²⁸ Article 48, 50 (9) of the Constitution of Kenya, 2010

²⁹ See Legal Notice No. 101, the Environmental (Impact Assessment and Audit) Regulations, 2003

announcement of the notice in both official and local languages in a radio with a nation-wide coverage for at least once a week for two consecutive weeks; hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments; ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the National Environment Management Authority. Regulation 22 of these Regulations³⁰ state that upon receipt of both oral and written comments as specified Public hearing by section 59 and section 60 of the Environmental Management and Co-Ordination Act³¹, the Authority may hold a public hearing.

Increasing industrialization has led to concerns of health of the residents of Owino Oulu Slums located in Mombasa. The burgeoning solar industry in Kenya has increased demand for lead, recovered by recycling car batteries in smelters. Shanty towns across Mombasa, where poor, marginalized workers are desperate for work, are hotspots for such industrial activity. Among them is Owino Uhuru, where a smelter, Metal Refinery EPZ Ltd emitted fumes laden with lead, often at night to avoid detection, and released untreated wasted water that spilled into streams that residents use to wash, cook and clean.

According to the study, *Lead Poisoning in Owino Oulu Slums in Mombasa*³², residents of Owino Oulu Slums have experienced severe cases of lead poisoning. This was ascertained through medical diagnosis of the children from the slum by the Public Health Department; their blood lead levels were measuring as high as 23 µg/dl, 17 µg/dl and 12 µg/dl. These levels are very high compared to the WHO standards.³³

³⁰ See Legal Notice No. 101, the Environmental (Impact Assessment and Audit) Regulations, 2003

³¹ Revised in 2012

³² See <http://www.cofek.co.ke/Lead%20Poisoning%20in%20Owino%20Uhuru%20Slums%20Mombasa.pdf>

³³ Ibid Page 11

ARTICLE 1: THE RIGHT TO SELF DETERMINATION

External challenges to self-determination - The impact of terrorism on social economic rights

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.³⁴

Terrorism clearly has a very real and direct impact on the enjoyment of human rights, and threatens social and economic development. The State therefore has an obligation to ensure the human rights of its nationals by taking positive measures to protect them against the threat of terrorist acts and bringing the perpetrators of such acts to justice.

However, efforts to address the human rights implications of terrorism and counterterrorism measures have tended to focus on the protection of civil and political rights, with little attention paid to their impact on the enjoyment of economic, social and cultural rights. Yet it is clear that terrorism and measures adopted by States to combat it are both influenced by and have an impact on the enjoyment of the economic, social and cultural rights.³⁵ The realization of economic, social and cultural rights prevents the conditions conducive to the spread of terrorism. Similarly, adoption of specific counter-terrorism measures may also have a direct impact on the enjoyment of economic, social and cultural rights.

Some measures adopted by the State to counter terrorism pose serious challenges to human rights and the rule of law. In some instances, the States has engaged in torture and other ill-treatment to counter terrorism³⁶, disregarding the legal and practical safeguards available to prevent torture. Repressive measures have been used to stifle the voices of human rights defenders, journalists, minorities, indigenous groups and civil society.³⁷

These sanctions pose a number of serious challenges, in particular related to the lack of transparency and due process, which result in freezing assets, imposing travel bans and other

³⁴ Human Rights Committee, General Comment No. 12

³⁵ Office of the United Nations High Commissioner for Human Rights, "Human Rights, Terrorism and Counter-terrorism", Fact Sheet No. 32 accessed at <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>

³⁶ The Kenya National Commission Report titled *The Era Of Fighting Terror With Terror* reports that these acts have been well coordinated, systematic and widespread and of which 120 had egregious human rights violations, 25 extra judicial killings and 81 enforced disappearances. See pages 5 and 6 of the report accessed at <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf>

³⁷ Civil society organizations and human rights defenders, Haki Africa and Muhuri, labelled as supporting terrorism activities. Their bank accounts were frozen and their names dragged through the mad before courts intervened. See <https://www.hrw.org/news/2015/06/10/kenya-end-harassment-rights-groups> and petition 19 of 2015 Muhuri and Haki Africa versus The Inspector General of Police, The Cabinet Secretary at <http://kenyalaw.org/caselaw/cases/view/108933/>

restrictions, which may also have serious consequences for the ability of the affected individuals and their families to enjoy economic and social rights.

Recommendations for the State:

- **Put in place measures to address the conditions conducive to the spread of terrorism, including the lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, and socio-economic marginalization;**
- **Put measures to create a conducive environment to foster the active participation and leadership of civil society;**
- **Ensure that all measures taken to combat terrorism must themselves also comply with States' obligations under international law, in particular international human rights, refugee and humanitarian laws;**

ARTICLE 2: PROGRESSIVE REALIZATION AND NON-DISCRIMINATION

Corruption

Corruption in Kenya remains a challenge to development. According to the Kenya National Commission on Human Rights report of 2014, corruption in Kenya is high and that During the 2012/2013 financial year, the EACC recovered through court proceedings and out of court settlements, illegally acquired public assets valued at approximately Kenya shillings 567,408,217. The Commission averted the loss of approximately 55 billion shillings worth of public funds through various interventions.

Indeed corruption has persisted especially as against those holding public office despite the existence of laws governing leadership and integrity. This is further exacerbated by allegations of bribery with regard to government contracts especially within the top echelons of the current administration, and who continue to hold office despite public pressure for resignation.³⁸ Recently, the case of the Minister of Devolution, in which having been associated with grand corruption with regard to the National Youth Service Fund, refused to vacate office and only did so due to public pressure.³⁹ This shows a clear understanding of the holders of such public offices in protecting the Constitution of Kenya. Although the President has made pronouncements against corruption, there still continues to be challenge in the indictment of persons accused of corruption. The legal process has been slow allowing such persons to use the process to evade justice.

Non Discrimination

In addition, discrimination of marginalized communities and women is still abound. Representation of women in Kenya's parliament has been and remains minimal. Only 9.8% of the tenth parliament was comprised of women, and only 20.7% of the eleventh (sitting) parliament is women — the lowest in East Africa.⁴⁰ This is despite the Constitutional⁴¹ provisions for the realization of the affirmative action principle essentially increasing women's representation. The

³⁸ The government has been unable to full explain the whereabouts of 176 million borrowed from Europe and allegedly lost in the recent financial scam Eurobond Saga and financial see <https://www.youtube.com/watch?v=acow6DdkEdc> and <http://www.businessdailyafrica.com/Treasury-queried-over-secret-US-bank-account/-/539546/2925942/-/t4a5m0/-/index.html>

³⁹ See <http://www.nation.co.ke/news/21-government-officials-named-NYS-scam-report/-/1056/2866948/-/stxpgq/-/index.html> and <http://www.kenya-today.com/business/auditor-general-confirms-ann-waiguru-ministry-lost-kshs-8-billion-via-alleged-corruption-network-deals>

⁴⁰ The Cost of Implementing the 2/3 gender principle in Kenya Institute of Economic Affairs Report, May 2015 page 4.

⁴¹ Article 27 (8) of the Constitution, 2010

government is yet to comply with the court decision in this case.⁴² Also, the Kenyan community is predominantly patriarchal and despite the development of laws to ensure non-discrimination and protection of women, there still remains the challenge in implementation of those laws

Discrimination of persons living with HIV

Kenya suffers from widespread stigma and discrimination against persons living with or affected by HIV/AIDS despite a clear legal prohibition on discrimination against persons with HIV and the establishment in 2009 of an HIV and AIDS Equity Tribunal.⁴³ Stigma and discrimination are recognized by the government of Kenya and civil society actors as significant barriers to access to HIV testing, treatment, and care.⁴⁴ The real or perceived stigma in communities and within families has led some HIV patients to hide their medicines, and has promoted others to stop treatment altogether or even throw pills away.⁴⁵ Children living with HIV in particular suffer from the impact of stigma as they are more sensitive than adults to negative feedback from others, especially from peers or authority figures. Children are also impacted by stigma and discrimination targeted against adults as they are dependent on parents or healthcare workers for their treatment.

On 17 September 2015, President Kenyatta announced a new presidential campaign against stigma and discrimination, especially against children and young people. President Kenyatta had announced in February 2015 another initiative to reduce stigma against children in schools and to improve access to treatment, which included a directive to collect data on the HIV status of children in school and their guardians.⁴⁶ As the names and HIV status of these individuals were to be stored in centralized records, the directive could have endangered the right to privacy of children and caregivers with HIV and increased the stigma and discrimination they face, prompting human rights groups to challenge the directive in court.⁴⁷

⁴² Supreme Court Case on the not more than 2/3 Principle at <http://kenyalaw.org/caselaw/cases/view/85286/>

⁴³ See “Punitive Laws and Practices Affecting HIV Responses in Kenya,” 2014 at <http://www.kelinkenya.org/wp-content/uploads/2010/10/punitive-laws-practices-affecting-HIV-responses-in-Kenya.pdf> ; “The National Symposium on HIV Law and Human Rights, October 2012 at <http://www.hivlawcommission.org/index.php/elibrary?task=document.viewdoc&id=154> ; and “The People Living with HIV Stigma Index: Kenya, November 2011, accessed at <http://www.stigmaindex.org/sites/default/files/reports/Kenya%20People%20Living%20with%20HIV%20Stigma%20Index%20Report%202009.pdf>

⁴⁴ See Robert Manyara KISUMU, “Stigmatization still haunts numerous HIV/ AIDS patients in Kenya,” 24 July 2015: <http://www.coastweek.com/3830-Stigmatization-still-haunts-HIV-AIDS-patients-in-Kenya.htm>

⁴⁵ Ibid

⁴⁶ See UNAIDS report, “*How AIDS changed everything—MDG 6: 15 years, 15 lesson of hope from the AIDS response*”, 2015, p. 158.

⁴⁷ See <http://kelinkenya.org/wp-content/uploads/2010/10/NOTICE-OF-MOTION-Anand-Grover-copy.pdf>

Suggested recommendations for the State:

- **In consultation with people living with HIV, take additional steps to combat and prevent stigma and discrimination against people living with HIV/AIDS, and provide adequate financial and other support for the HIV and AIDS Tribunal.**
- **Ensure that actions being taken to reduce stigma against children in schools are carried out in a manner that also protects their right to privacy.**

ARTICLE 3: EQUAL RIGHTS OF MEN AND WOMEN

The Constitution of Kenya 2010 provides for the equal treatment of men and women in the acquisition and ownership of land and property within the country.⁴⁸ It outlaws the discrimination of women in the access and enjoyment of economic, social and political opportunities.⁴⁹ However, most women are unable to access and enjoy their land and property rights especially in the cultural land tenure system. In particular, cultural norms give women secondary rights to land and property dictating that women can only live on the land or enjoy property in the lifetime of their fathers, husbands or sons.⁵⁰ Women are continually disenfranchised especially where the land is communally owned by a clan or family⁵¹.

The above is partly attributed to lack of formal legal frameworks to define the nature and scope of rights for that clan or community that jointly owns the land. The Community Land Bill 2015 seeks to establish a legal framework to govern communal land rights. The bill entrenches the right of women to community and customary tenure and provides for non-discrimination in the access and use of community land. It provides that women have the right to equal treatment in all dealings in community land and ensures the participation of women (that have been married into these communities) in decision making in the dealings on the land.⁵²

Despite these important provisions, the Community Land Bill 2015 is yet to pass into law. The Community Land Bill 2015 was among the bills that should have been passed five years after the promulgation of the Constitution in 2010⁵³. The State has failed to pass the law or even give an explanation as to what has occasioned the delay. The result is that the occasioned delays continue to affect the rights of women in communally owned land and the administration of communally owned land generally.

Impact of inequality on HIV and AIDS prevention and treatment

Inequality between males and females can contribute to a higher risk of HIV acquisition by females and can interfere with their ability to seek testing, treatment, and care.⁵⁴ Such inequalities include lower levels of schooling, unequal inheritance practices, unequal economic opportunities, lack of

⁴⁸ Article 35 Constitution of Kenya, 2010

⁴⁹ Ibid Article 27

⁵⁰ See KELIN, *Training Manual on Providing Effective Learning Experiences for Protecting Womens' Property Rights using Alternative Dispute Resolution Mechanisms: The place of Traditional Justice Systems*, 2015, page 10, accessed at http://www.kelinkenya.org/wp-content/uploads/2015/11/WLPR-TRAINING-MANUAL_2015.pdf

⁵¹ See Gaafa Reem, *Women's Land and Property Rights in Kenya*, accessed at http://landwise.resourceequity.org/guides/8/generate_pdf#enforcement-of-customary-law

⁵² Section 42, Community Land Bill 2015.

⁵³ Article 261(1) Constitution of Kenya, 2010

⁵⁴ UNAIDS model suggests that eliminating sexual violence alone could avert 17% of HIV infections in Kenya. See UNAIDS report, "[How AIDS changed everything—MDG 6: 15 years, 15 lesson of hope from the AIDS response](#)", 2015 p. 420.

freedom on health decisions within families, early and forced marriage, and economic pressure to engage in transactional sex, and gender-based violence. Such factors may contribute to the fact that women make up almost 60% of the people living with HIV in Kenya, and HIV prevalence among young women (aged 15-24) is 60% higher than among young men.⁵⁵

Kenya has laws that prohibit discrimination, physical abuse, and exploitation of women and girls, but Kenya acknowledges that such laws have not yet overcome longstanding cultural norms and societal practices.⁵⁶ Research shows that in Kenya, “Women are likely to be blamed by their intimate partners, families and communities for ‘bringing HIV into the home.’ This will increase the HIV related violence against women, increase evictions, ostracism, loss of property and inheritance and loss of child custody by women living with HIV.”⁵⁷ In addition, UNAIDS reports that over 30% of ever-married Kenyan women between 15-24 years old experienced intimate partner violence in 2014, which has been shown to increase the risk of HIV acquisition by 50%.⁵⁸ Indeed, modeling suggests that eliminating sexual violence alone could avert 17% of HIV infections in Kenya.⁵⁹

As Kenya notes in its report to the Committee, paragraph 59, “A systemic key challenge facing implementation of equal rights for women and men is that, despite any clarity in the law, Kenya’s cultural and societal realities still mean that women are de facto discriminated in fields such as inheritance.... Married women in Kenya have been at a disadvantage when it comes to matrimonial and family property, due to cultural practices that prioritize men’s claims over land and property over women’s claims.” Kenya reports that the Matrimonial Property Bill, now enacted into law, would help secure women’s access to matrimonial property during and after the marriage if properly enforced.

It is particularly important to protect girls’ equal access to education, including secondary education, to best prevent HIV among adolescent girls. Studies have shown that the longer girls stay in school, the later they are likely to begin sexual relations, get married, or get pregnant; the more likely they are to engage in safe practices when they do become sexually active; and the greater the chance of achieving economic independence – all of which will help protect them from

⁵⁵ UNAIDS, People living with HIV: <http://aidsinfo.unaids.org/>

⁵⁶ See State report by Kenya to the Committee on Economic, Social, and Cultural Rights, July 2013, E/C.12/KEN/2-5, p. 16 and 25. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fKEN%2f2-5&Lang=en

⁵⁷ KELIN, “Punitive Laws and Practices Affecting HIV Responses in Kenya,” p. 21. At <http://www.kelinkenya.org/wp-content/uploads/2010/10/punitive-laws-practices-affecting-HIV-responses-in-Kenya.pdf>

⁵⁸ See UNAIDS report, “[How AIDS changed everything—MDG 6: 15 years, 15 lesson of hope from the AIDS response](#)”, 2015, p. 338 and UNAIDS, “The Gap Report,” July 2014: p. 136. Accessible at http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS_Gap_report_en.pdf

⁵⁹ See UNAIDS report, “[How AIDS changed everything—MDG 6: 15 years, 15 lesson of hope from the AIDS response](#)”, 2015, p. 420.

HIV infection.⁶⁰ Primary education is free in Kenya, and Kenya has taken steps to make secondary education affordable to more children of poor families. Yet in 2013, only around 44% of girls attended secondary school, and in 2014, 25% of girls 18 and under had begun childbearing.⁶¹ Further steps to keep girls in secondary school as long as possible will maximize HIV prevention benefits.

Suggested Recommendations for the State

- **Take further steps to protect women from discriminatory customary practices, including disinheritance and other abusive practices.**
- **Take additional steps to ensure the full implementation of laws against gender-based violence, within and outside of marriage.**
- **Take further steps to ensure equal access to education among girls and boys, including through secondary levels.**

⁶⁰ Karen Ann Grépin and Prashant Bharadwaj, "Secondary education and HIV infection in Botswana," *The Lancet*, Vol.3, Number 8, August 2015.

⁶¹ UNICEF Country Statistics: Kenya, http://www.unicef.org/infobycountry/kenya_statistics.html and Kenya Demographic and Health Survey, 2014 http://www.knbs.or.ke/index.php?option=com_content&view=article&id=308:2014-kenya-demographic-and-health-survey-2014-kdhs&catid=82:news&Itemid=593

ARTICLE 12: THE RIGHT TO PHYSICAL AND MENTAL HEALTH

The Kenyan Constitution provides that every person is entitled to the highest attainable standards of health including the right to health services and reproductive health care. It also states that no person should be denied emergency medical treatment. Further, health services have been devolved to the county level to enhance access to and improve service delivery.⁶² However, citizens are yet to fully enjoy these standards due to human, financial and infrastructural crises within the health sector.

The health sector was allocated 4% of the national budget during the 2014/2015 financial year.⁶³ This falls short of the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases of 2001, that provides the minimum standard for budgetary allocation for health at 15% of annual budgets of all African Union member states.⁶⁴ Though not a legal instrument, the State expressed its political commitment to achieving this target.

The most glaring gap in Kenya's health system however is that lack of a legal framework to govern the sector. Guidelines for the provision of critical services such as emergency medical treatment are non-existent.⁶⁵ The Health Bill 2015, to a large extent, addresses these shortcomings. The bill is intended to establish a unified health system, provide for the regulation of health care service and health care service providers, products and technologies and coordinate the interrelationship between national government and county government health systems. This bill is however yet to be enacted risking the health of many citizens and occasioning further delays in the effective and efficient health service delivery. It also does not take into account the views of civil society that are fundamental in contributing to a more effective and efficient healthcare system. The Reproductive Health Bill 2014, which is yet another critical legislation to the healthcare system is also held up in parliament, since 2011.

Retrogressive legislations continue to exist despite progressive Constitution

The Prevention of Female Genital Mutilation Act

The Prohibition of Female Genital Mutilation (FGM) Act no 32 of 2011 prohibits the practice of female genital mutilation, as well as safeguarding against the violation of a person's mental or

⁶² Constitution of Kenya, article 43

⁶³ See <http://www.hapakenya.com/2014/06/12/highlights-kenyan-20142015-budget/http://dialogues.sidint.net/community/content/mjadala-vi-cost-corruption-kenyas-health-sector>

⁶⁴ Accessed at http://www.un.org/ga/aids/pdf/abuja_declaration.pdf

⁶⁵ See Press Statement by KELIN, Kenya Medical Practitioners, Pharmacists and Dentists Union, (KMPDU), Society for International Development and The Health NGOs Network (HENNET) 10 October 2015.

physical integrity through the practice of female genital mutilation. An Anti- FGM Board is established⁶⁶ to among other functions, design programmes aimed at eradication of FGM including designing public awareness programmes against the practice of FGM⁶⁷.

However, this practice is still rampant in parts of this country, 5 years after the passing of the Act. Kenya's prevalence rates for FGM is approximately 27 percent⁶⁸In Trans Mara in Narok County for example, the practice is conducted every year during the festive season when schools close. Since this practice is mostly perpetrated at night and in secret, police officers are only informed of it once it has occurred. Attempts by a few police officers to investigate this matter with a view of preventing its occurrence have often been greeted by threats from the community. However, the State responds in transferring the police officers and doing very little about the practice. What's more is that the communities that practice the outlawed FGM have devised ways of avoiding police detection. For example instead of targeting young girls in school, which is what the police will be looking out for, they will target married women including those with children. Cases have been reported⁶⁹ of medical doctors who assist the communities to perform FGM on women after delivery at the health facility⁷⁰.

Stigma and deep rooted negative culture is to blame in the most part for the continued practice of FGM. It is believed that this practice controls their sexuality and guarantees that the girls remain virgins until marriage. Girls who have not been circumcised are not considered fit for marriage in some communities, such as the Maasai, Pokot and Marakwet.

The State and the Anti- FGM Board, mandated by the Act⁷¹ to protect women and girls from FGM through developing programmes on awareness creation and abolition of FGM have failed to perform this role. State response to the outlawed FGM is clearly failing to the detriment of young women and girls in several parts of this country as the State has done very little if anything, beyond enactment of the Act.

⁶⁶ Section 3 of the Prohibition of FGM Act no. 32 of 2011

⁶⁷ Section 5 of the Prohibition of FGM Act no. 32 of 2011

⁶⁸ COUNTRY PROFILE: FGM IN KENYA May 2013, accessed at http://28toomany.org/media/uploads/final_kenya_country_profile_may_2013.pdf

⁶⁹ Testimony by David Arap Mugun, Chief of Murkan Location in Narok County.

<https://www.youtube.com/watch?v=DJB6Eniocml>

Chief David Arap Mugun says that in his location alone, he received reports about 12 girls and 8 married women who had undergone the outlawed FGM practice. <https://www.youtube.com/watch?v=DJB6Eniocml>

⁷⁰ See the full clip of investigative journalist, Enock Sikolia of the National Television Broadcast, NTV, titled slaves of culture on December 2015, accessed at <https://www.youtube.com/watch?v=DJB6Eniocml> and CNN's Nima Elbagir report on the FGM practice among the Samburu community in October 2015 accessed at

<https://www.youtube.com/watch?v=rW6nEWaQVEc>

⁷¹ Section 5 and 27 of the Prohibition of FGM Act no. 32 of 2011

What are the steps that the State is taking, towards implementation, and especially on initiatives geared towards public education and sensitization against the negative effects of the deep rooted culture of FGM? What support services has the State provided for victims of FGM?

The sexual offences Act

Kenya has established the Sexual Offences Act as a legal framework to mitigate against sexual and gender violence. However, this is still quite prevalent in Kenya. According to KDHS 2014 approximately 44% of ever-married women have experienced sexual or physical violence by their husband or partner,⁷² which is not a significant decrease from 2008-2009 KDHS where 47% of ever-married women reported to having experienced such violence.⁷³

This is further demonstrated by the data that about 28% women aged 20-29 have experienced some form of violence in the previous 12 months preceding the survey.⁷⁴ The very small difference in a span of 5 years indicates very minimal interventions if at all. Gender based violence which includes both physical and sexual violence, is a manifestation of gendered inequalities that women and girls encounter in their day-to-day lives. The Sexual Offences Act established to manage this menace is greatly hampered by ineffective application resulting to significant gaps access to justice for survivors of gender based violence.

Survivors of sexual and physical violence lack access to needed services and face a number of barriers that prevent them from receiving meaningful assistance from medical or legal professionals. One of the key documents known as P3 forms⁷⁵ are largely unavailable in many police stations across the country, to the point that survivors keen to report sexual and gender based violations have to purchase photocopies from private establishments strategically situated outside the police stations. More barriers include lack of comprehensive facilities where victims can report complaints and receive medical treatment, including emergency contraceptives; a lack of awareness among sexual violence victims of the services that are available; difficulties in proving sexual violence; and the high cost of obtaining services after sexual violence.⁷⁶

Further, most health care providers are not adequately trained in providing appropriate medical and gender-sensitive response toward sexual violence.⁷⁷ Reporting rates for GBV are very low because many survivors and their families are reluctant to engage in the justice system due to negative attitudes of law enforcement officer, albeit there being 'Gender Desks' established after

⁷² KDHS 2014

⁷³ KDHS 2008-2009

⁷⁴ KDHS 2014

⁷⁵ A P3 form is a legal document produced in court as evidence in cases, which involve bodily harm (e.g. rape or assault). It is obtained from a police station and completed by a registered government doctor or clinical officer

⁷⁶ KNCHR REPORT 2012 <http://www.state.gov/documents/organization/204343.pdf>

⁷⁷ Ibid

various child rights organizations trained police officers on gender sensitive assessment and reporting.

A national survey conducted in Kenya in 2012 under the support of UNICEF and Center for Disease Control (CDC) shows that that one in every three girl in Kenya experience some form of sexual violence before the age of 18⁷⁸. These violations rarely get addressed because the same survey determined that only 3% of sexually abused girls received professional help in the form of medical, psychological, or legal assistance. Sexual violence against girls and adolescents is also a significant problem in schools and other educational settings. According to the study, those interviewed and who had experienced physical or sexual violence, about 25% of them reported that the first incident took place in school.

Suggested recommendations for the State

- **The government should enact tangible programs and policies to reduce the incidence of sexual violence including in all sectors and especially ensure proper collection and preservation of evidence, accurate data collection and ensure tools like the P3 form are readily available for all.**
- **There is need for comprehensive measure to address FGM as a serious violation that continues to happen to the detriment of many girls in this country. There is need for the government to work consistently with the civil society to come up with innovative ways of tackling retrogressive and harmful cultural practices through legal, policy and meaningful dialogues with the custodians of the culture.**
- **The government and especially the Department of Children Services and the Ministry responsible should ensure that coordination of children services is well organized to ensure reported abuse is promptly addressed. Since the proposed Children's Act amendments have commenced, there should be strategies to ensure public participation and stakeholders input in enacting the new statute. Despite the office of the Chief Justice's gazettelement of this process, there is no provided timeframe of action and modalities for public participation.**
- **It is important that there be immediate measures to improve response and services to survivors of gender based violence.**
- **The government should ensure speedy prosecutions for survivors of sexual and gender based violence (SGBV)**

⁷⁸ Gok, UNICEF, CDC: *Violence Against Children in Kenya, Findings from a 2010 National Survey*; National Center for Injury Prevention and Control, U.S. Centers for Disease Control and Prevention, and the Kenya National Bureau of Statistics, 2012, accessed at http://www.unicef.org/esaro/VAC_in_Kenya.pdf

Pediatric health at risk: Impact of HIV and AIDS

Kenya is one of the countries that is most severely impacted by HIV/AIDS, with a prevalence rate of 5.3% among adults. In the context of HIV/AIDS, Article 12 of the Covenant entails a legal responsibility for each State Party to progressively ensure that quality HIV prevention, testing, treatment, and care services are available to everyone on an equal basis. However, data points to continued challenges in providing HIV prevention and treatment services, especially to women and children. For example, while children make up around 13% of the estimated 1.2 million people living with HIV in Kenya, they counted for 23% of total new HIV infections in 2014, and 25% of deaths from AIDS-related causes.⁷⁹ Such data signifies a need for Kenya to make a more determined effort to improve pediatric HIV prevention and treatment in order to meet its obligations under Article 12.

Looking first at prevention, despite significant progress made by Kenya in preventing new HIV infections among children, it still has the second highest number of annual new HIV infections in children in Africa.⁸⁰ The final transmission rate in 2014 was still 17%, whereas the WHO defines “elimination” of mother-to-child transmission after breastfeeding as under 5%. Numerous factors contribute to relatively high levels of new HIV infections among children, beginning with challenges related to primary HIV prevention and family planning among girls and women. Data shows low rates of HIV knowledge, HIV testing, and condom use among 15-24 year olds. Accordingly, Kenya announced in September 2015 a plan to scale up implementation of the HIV curriculum and age-appropriate sexual and reproductive health education in all secondary schools.⁸¹ Among HIV-positive women, reports show lower rates of modern contraception use in than among non-HIV positive women, as well as a higher rate of unintended pregnancies.⁸²

In order to prevent mother-to-child HIV transmission among pregnant women living with HIV, they must start anti-retroviral treatment (ART) as quickly as possible. They must adhere properly to treatment through the breastfeeding period in order to ensure prevention to their infant, as breastfeeding remains a high-risk period for HIV transmission. The latest WHO guidelines now recommend such women stay on treatment for life for their own health and that of any future children. Yet only 67% of pregnant women living with HIV received antiretroviral medicines in 2014, compared with an average of 75% in sub-Saharan Africa and rates of over 90% in eight

⁷⁹ UNAIDS: AIDInfo database: <http://aidsinfo.unaids.org/>.

⁸⁰ See UNAIDS report, “*How AIDS changed everything—MDG 6: 15 years, 15 lesson of hope from the AIDS response*”, 2015, p. 457-58.

⁸¹ Daniel Psirmoi, “New online tool launched to boost war against HIV,” *Standard Digital*, 17 September 2015 and Moses Nyamori, “Ministry gives nod on sex education in Kenya schools to reduce teenage pregnancies,” *Standard Digital*, 3 Sept. 2015. <http://www.standardmedia.co.ke/article/2000175108/ministry-gives-nod-on-sex-education-in-kenya-schools-to-reduce-teenage-pregnancies>

⁸² Kimani et al, “Family planning use and fertility desires among women living with HIV in Kenya,” *BMC Public Health*, 15:909 (2015), p.2, accessed at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4574729>

other African countries.⁸³ A recent study shows very low retention of women on ART within a year of initiation in Kenya, though poor record-keeping could also explain some of the low numbers.⁸⁴

Among the remaining challenges Kenya should address to improve PMTCT are insufficient human resources, supply chain capacity, and laboratory equipment. Policies are needed to increase ante-natal care visits, as many pregnant women are not completing the recommended four ante-natal care visits that enable health-care workers to test women for HIV, initiate HIV-positive women on treatment, monitor their adherence, check whether the ART is effectively suppressing the virus, and conduct further testing of HIV-negative women to determine if they have become newly infected with HIV. More effort is also needed to increase institutional birth deliveries, which would help ensure the baby is immediately given preventative treatment and would enable health care workers to better track mother-infant pairs after delivery. Other factors that discourage women from regular adherence are long distances to health clinics, the costs associated with travel or time away from economic activities, disrespectful treatment by health care workers, and stigma and discrimination.⁸⁵ Increasing male involvement in PMTCT would also improve uptake and adherence.

For those infants exposed to HIV during pregnancy or breastfeeding, it is critical to quickly test them for HIV and initiate them on medication. Yet progress on diagnosing children with HIV and putting them on treatment has been much slower in Kenya than for adults. HIV tests suitable for infants are usually only available in centralized laboratories, and long turn-around-times on such test results continue to be a problem in Kenya. As it can take weeks or even months to deliver results, it may be too late to save the baby's life by the time results are received. As well, poor follow-up of mother-baby pairs mean that many mothers or caregivers never receive test results or linkage to treatment for the baby.

Regarding HIV treatment for children, only 41% of children living with HIV were receiving ART in 2014 in Kenya, as opposed to 57% of adults.⁸⁶ Without treatment, 50% of children with HIV will die by their second birthday, and 80% will die before they turn five. A recent study showed extremely low retention rates for children one year after initiation on ARVs in Kenya, which again may be explained in part by data collection challenges.⁸⁷ Kenya has recognized and pledged to do

⁸³ See UNAIDS, *2015 Progress Report on the Global Plan towards the elimination of new HIV infections among children and keeping their mothers alive*, p.15.

⁸⁴ PEPFAR, USAID, HIV Core, "Secondary Analysis of Retention Across the PMTCT Cascade in Selected Countries: Rwanda, Malawi, Kenya, and Swaziland," January 2015, accessed at http://www.hivcore.org/Pubs/4CntryPMTCTRetention_Rprt.pdf

⁸⁵ Miriam Gathigah, "Divided Opinions on Feasibility of Kenya's Option B+ Roll Out," Inter Press Service, 26 May 2014, accessed at <http://www.ipsnews.net/2014/05/divided-opinions-feasibility-kenyas-option-b-roll/>

⁸⁶ See UNAIDS: AIDSinfo database: <http://aidsinfo.unaids.org/>.

⁸⁷ PEPFAR, USAID, HIV Core, "Secondary Analysis of Retention Across the PMTCT Cascade in Selected Countries: Rwanda, Malawi, Kenya, and Swaziland," January 2015, p.2, accessed at http://www.hivcore.org/Pubs/4CntryPMTCTRetention_Rprt.pdf

more to close the treatment gap for children. This will require scaling up early infant diagnosis in decentralized clinics to reduce turnaround times for test results; improving tracking and servicing of mother-infant pairs; increasing efforts to find undiagnosed children with HIV and to retain children of all ages on treatment; and training of health care workers on identifying, testing, treating and caring for children with HIV.

Kenya has shown strong political commitment at the national and international level to ending AIDS, including among children, adolescents, and young women. In a recent example, the Government of Kenya and UNAIDS launched on 17 September an “HIV Situation Room” to collect and analyze data on HIV service delivery, as well as a new campaign to reduce HIV among young people.⁸⁸ Kenya will also need to follow up on two recent decisions by its High Court to ensure proper care for persons with HIV: one which declared as unconstitutional Kenya’s anti-counterfeit legislation that might have prevented HIV-positive patients from accessing generic – and therefore affordable – antiretroviral drugs; and the second decision that ruled unconstitutional a section of the HIV and AIDS Prevention and Control Act making it a crime to “knowingly or recklessly” put another person at risk of becoming infected with HIV.⁸⁹ This latter provision could, according to the Court, “be interpreted to apply to women who expose or transmit HIV to a child during pregnancy, delivery or breastfeeding” and therefore deter them from seeking testing or treatment.⁹⁰

Finally, improving prevention and treatment of pediatric HIV will also require increasing domestic financing for health and improving the health care infrastructure. Kenya currently covers 16% of its AIDS response, though it has pledged to raise the amount to 50%.⁹¹ Under the Abuja Declaration of 2001, African Union heads of state pledged to allocate at least 15% of their domestic spending to the improvement of the health sector, with an emphasis on the fight against HIV/AIDS, tuberculosis and other related infectious diseases. Kenya appears far from meeting this goal, however, with only 4.5% of spending allocated to health care in 2013.⁹² In addition, the recent devolution of primary healthcare to the county level has put an additional strain on an already under-resourced healthcare system, with a risk of insufficient funding and health care worker capacity to implement HIV programs.

⁸⁸ UNAIDS, “UNAIDS and Kenya launch data and technology partnership to Fast-Track progress towards ending the AIDS epidemic by 2030,” 17 Sept. 2015.

⁸⁹ See State report by Kenya to the Committee on Economic, Social, and Cultural Rights, July 2013, p.41.

⁹⁰ “Kenya court urges change to law that penalises women who pass HIV to baby “ The Guardian, 1 April 2015, <http://www.theguardian.com/global-development/2015/apr/01/kenya-court-urges-change-law-penalises-women-pass-hiv-baby>

⁹¹ See UNAIDS report, “*How AIDS changed everything—MDG 6: 15 years, 15 lesson of hope from the AIDS response*”, 2015, p. 212 and 375.

⁹² WHO Global Health Observatory Data Repository: <http://apps.who.int/gho/data/node.main.75?lang=en>

Suggested recommendations for the State:

- **Take all necessary measures to eliminate mother-to-child HIV transmission, including through increasing availability of sexual and reproductive health services and education on HIV/AIDS; encouraging greater frequency and quality of antenatal care and institutional birth deliveries; and strengthening the health care system's capacity for testing and treating all pregnant and breastfeeding women living with HIV.**
- **Increase efforts to expand coverage of, and increase retention on, antiretroviral treatment, in particular to close the gap between pediatric and adult uptake.**
- **Increase domestic spending on healthcare, particularly on endemic diseases such as HIV/AIDS, and ensure sufficient allocation of resources at the county level to HIV/AIDS testing, treatment, and care.**