

# Ensuring Justice for Vulnerable Communities in Kenya

A Review of HIV and AIDS–related Legal Services



LAW AND HEALTH INITIATIVE  
OSI'S PUBLIC HEALTH PROGRAM

OPEN SOCIETY INITIATIVE  
FOR EAST AFRICA



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*Kristin Kalla  
Jonathan Cohen*

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Published by  
Open Society Institute  
400 West 59th Street  
New York, New York 10019 USA  
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Design by Jeanne Criscola | Criscola Design  
Layout by Michael Winikoff | Andiron Studio  
Printed by Prestone.

Cover Photograph: Mathare Valley, Kenya. © Crispin Hughes / Panos Pictures

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# Preface

The Law and Health Initiative, a new division of the Open Society Institute's Public Health Program, supports legal assistance, litigation, and law reform efforts to advance public health goals worldwide. Among the Initiative's priorities is to integrate legal services into existing health programs, particularly those targeting vulnerable and marginalized communities, in order to improve the overall quality of the lives of patients and decrease their disease vulnerability. In Kenya, the Law and Health Initiative works with the Open Society Initiative for East Africa (OSIEA). OSIEA supports and promotes public participation in democratic governance, the rule of law, and respect for human rights in East Africa by awarding grants, developing programs, and bringing together diverse civil society leaders and groups to advance legal and human rights responses to the country's HIV and AIDS epidemic.

The experience of the Open Society Institute (OSI) in implementing public health programs worldwide has shown that access to legal services and legal advocacy are critical and often indispensable interventions for advancing public health and protecting human rights. The link between human rights abuses, social marginalization, and poor health outcomes underscores the need to protect a full range of human rights in order to ensure that all persons can fully benefit from health and other services. This is especially true for communities impacted by the HIV and AIDS epidemic.

In July 2006, the Law and Health Initiative commissioned an assessment of the existing state of legal services for people living with, affected by, and at risk of HIV infection in Kenya. *Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-related Legal Services* is the result of the documentary research and interviews conducted for this assessment.

We gratefully acknowledge the contributions and personal commitments of those interviewed for this report (see names below). We would also like to thank those who provided peer review: Alie Eleveld, Helen Epstein, Tamar Ezer, Sauyeh Jahann, Edward Miano Munene, Catherine Mumma, and Tara Polzer.

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## List of Acronyms

AIDS	Acquired Immune Deficiency Syndrome
GFTFATM	Global Fund to Fight AIDS, Tuberculosis, and Malaria
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
KANCO	Kenya AIDS NGO Consortium
KNASP	Kenya National AIDS Strategic Plan
NGO	Nongovernmental Organization
PEPFAR	President's Emergency Plan for AIDS Relief
PMTCT	Prevention of mother-to-child transmission (of HIV)
STD	Sexually transmitted disease
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNGASS	United Nations General Assembly Special Session (on HIV/AIDS)
WHO	World Health Organization

# Summary and Recommendations

Kenya has ratified major international treaties that guarantee the rights of people living with HIV and AIDS to nondiscrimination, to protection from violence, and to access to voluntary, affordable, and quality medical treatment. Kenya has also undertaken to protect the rights of those at high risk of HIV infection, such as women, whose vulnerability to HIV is fueled by violence, discrimination, and harmful customary practices. The rights of those affected by the epidemic, including orphans and vulnerable children, are also guaranteed by human rights treaties ratified by Kenya. In practice, however, these rights mean little without access to timely and affordable legal services on the part of Kenya's most vulnerable citizens.

In Kenya, a range of human rights abuses fuels HIV infection among the country's most socially disadvantaged populations. Abuses such as domestic violence, rape, early marriage, child sexual abuse, and trafficking into sexual exploitation help drive the epidemic among women and girls, and are indicators of the epidemic's impact on communities and livelihood security. Sex workers in Kenya face a particularly high risk of HIV and, as a criminalized population, may be driven from seeking health services by fear of arrest, harassment by police, and judgmental treatment by health providers. Discrimination against people living with HIV and AIDS and ignorance about the causes of HIV transmission continue to deter people from coming forward for testing and learning their HIV status. Inheritance and succession disputes, which often deprive people living with HIV and AIDS of their property, are reported to make up a large portion of the case loads at many legal service organizations.

While litigation and legal services can go a long way toward addressing these issues, both legal practitioners and AIDS advocates told OSI that the vast majority of Kenya's people living with HIV and AIDS do not feel able to access the formal legal system. Samuel Mwenda, general secretary of the Christian Health Association of Kenya (CHAK), which provides an estimated 40 percent of Kenya's health services through a national network of hospitals and clinics, understands the difficulty of assisting patients who report severe human rights abuses. He told OSI that CHAK health workers frequently encountered cases of women who had been beaten by their husbands upon disclosure of their HIV status. Yet when the health workers referred these women to the police, the women found it too hard to report their cases and often could not afford transportation to the police station. "There is a perception within the community that formal legal services are too complicated and commercially driven," Mwenda said.<sup>1</sup>

Research by the Kenya AIDS NGO Consortium in 2004 revealed that most Kenyans engage traditional structures such as councils of elders for mediating and arbitrating disputes, rather than seeking justice through the police and courts.<sup>2</sup> Few cases of HIV-related violence and discrimination have gone through the Kenyan courts.<sup>3</sup> In interviews,

informants cited a number of possible reasons why, in their estimation, the vast majority of Kenyans did not seek justice through the formal legal system:

- ▶ Lack of physical access to these systems, as most of Kenya's 71 districts have only one magistrate in the entire district, and the northeastern province does not have a visiting judge
- ▶ The high cost of taking cases through the courts, especially court filing fees and transportation
- ▶ Delays in processing matters before the courts, with civil matters taking between two and six years on average, and people who have suffered abuse (such as eviction or termination) not being able to withstand frequent adjournments of cases
- ▶ The intimidating formal court atmosphere, which consists of numerous technicalities and complex procedures, making it necessary for litigants to have legal assistance they cannot afford

Just as it is possible to scale up HIV-related health services such as condom distribution, antiretroviral treatment, and palliative care, so too is it possible to scale up HIV-related legal services. Several nongovernmental organizations (NGOs) in Kenya provide legal services related to HIV and AIDS, yet these organizations lack the resources and capacity to take such services to any meaningful scale. Individuals seeking legal services face a host of barriers—lack of information, poor proximity to courts, lack of faith in the justice system, corruption, and economic disempowerment—that can and should be addressed through targeted and integrated interventions.

Strengthening access to legal services requires several steps, including educating people about their legal rights, building the capacity of both governmental and traditional legal structures, linking legal services to opportunities for economic empowerment, and supporting partnerships between community-based legal services and national advocacy campaigns against corruption, gender discrimination, and other systemic abuses. Based on the assessment carried out for this report, OSI recommends that the government of Kenya and the bilateral and multilateral donors working in Kenya take the following immediate steps to improve access to legal services for people living with, affected by, and at risk of HIV and AIDS.

**Incorporate legal and human rights advocacy into existing HIV and AIDS programs:** AIDS service providers possess the motivation and ability to use legal and human rights tools to advocate for their clients, and should be supported in this effort. The government should train service providers to design projects integrating legal services, write grant proposals, monitor and evaluate legal services, and obtain sustainable sources of support. It should also support networks of lawyers and paralegals to which clients of health services can

be referred, and provide opportunities for continuing education in law and human rights to HIV and AIDS service providers.

**Provide support to informal or traditional structures:** In addition to the formal justice system, customary justice structures have great potential to protect the rights of people affected by HIV and AIDS. The government should support efforts to educate traditional leaders about human rights norms and formal laws governing HIV and AIDS in Kenya. It should also support lawyers and paralegals in taking HIV-related cases to traditional courts, support traditional leaders in establishing mechanisms for arbitrating civil cases affecting the most vulnerable in a timely manner, and support clients in covering basic costs such as transportation and filing fees. Lawyers, paralegals, judges, and magistrates should also be trained on statutory laws applicable to HIV and AIDS so that they can handle and adjudicate HIV-related cases competently and fairly within the formal justice system.

**Use legal services as the basis for participatory policy advocacy:** Providers of legal services are in a position to document and analyze the most common forms of human rights abuse against clients living with, affected by, and at risk of HIV and AIDS. This analysis will help to inform legal and policy reform at the national, regional, and international levels. Support for a national network or clearinghouse to document cases of HIV-related human rights abuse that would provide the evidence and motivation for advocacy campaigns is critical in Kenya. People living with HIV and AIDS and other vulnerable communities should be involved in the design of legal services projects and advocacy messages.

**Foster enabling environments and economic support for access to justice:** Community-based economic empowerment initiatives present a promising entry point for HIV-related legal services. Women participating in microlending projects, for example, may be more economically empowered to take cases to court or to traditional authorities. The Kenyan government should investigate and document the impact of combining legal services and economic support on HIV vulnerability, particularly among women and girls. It should develop strategies to integrate both legal services and economic support into existing HIV prevention, treatment, care, and support programs.

**Build capacity of existing legal and health service providers:** Existing legal services should be designed so that they are approachable and accessible for all types of vulnerable populations, including those affected by HIV and AIDS. Legal organizations serving women and children, in particular, should collaborate with HIV service providers and communities of people living with HIV and AIDS on joint projects. Service providers, in turn, need assistance to develop their own policies in alignment with national frameworks and laws and to train their staff to be sensitive to these issues.

# Background to the Study

OSI commissioned an assessment that included interviews with representatives of nongovernmental organizations, health providers, people living with HIV and AIDS, legal advocates, government officials, and international donors<sup>4</sup> in Kenya in July 2006 to ascertain the status of HIV-related legal services in the country. The aim of the assessment was to identify immediate opportunities for establishing programs to ensure access to justice through community-based legal services for people living with, affected by, and at risk of HIV and AIDS. In addition to conducting significant documentary research, a consultant traveled to two regions of Kenya to examine the underlying causes of HIV vulnerability and the human rights abuses driving the epidemic. She reviewed existing legal frameworks supporting national HIV and AIDS policy and programs, and attempted to estimate both the supply of and demand for legal services to address HIV-related human rights abuses. Based on this research, OSI generated recommendations on how best to improve access to HIV-related legal services and enable vulnerable groups to realize their rights.

This document does not claim to represent all experiences of HIV-related human rights abuses and legal services in Kenya. It is not comprehensive, but instead serves to highlight problems and concerns arising from information obtained during the interviews and by reviewing secondary documentation. The study also does not provide a comprehensive strategy for scaling-up access to HIV-related legal services, but rather seeks to identify immediate and promising opportunities for proving that such services are possible in a low-resource setting such as Kenya.

# The Obligation to Provide HIV-related Legal Services

Kenya is party to numerous international treaties protecting the human rights of people living with, affected by, and at risk of HIV and AIDS. Kenyan domestic law prohibits many human rights abuses that are linked to HIV, such as sexual violence, child abuse, and certain forms of discrimination. In January 2007, Kenya enacted landmark legislation providing a framework for the elimination of discrimination and other abuses on the basis of HIV status. In practice, however, mechanisms for enforcing HIV-related human rights protections in Kenya remain weak, and most people living with or affected by HIV do not enjoy access

to the legal services that are necessary to help them vindicate their rights.

**The United Nations Declaration of Commitment on HIV/AIDS sets concrete, time-bound targets for the introduction of national legislation and other measures to ensure the respect of rights in regard to education, inheritance, employment, health care, social and health services, prevention, support, treatment, information, and legal protection. In practice, these rights can be almost impossible to enforce.**

While there is no single international convention devoted to the issue of HIV and AIDS, several instruments provide a framework for protecting HIV-related human rights.<sup>5</sup> These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the Convention Against Torture, Inhuman and Degrading Treatment (CAT), the African Charter on Human and People's Rights (ACHPR), the Convention on the Rights of the Child (CRC), and the African Charter on the Rights and Welfare of the

Child (ACRWC). The *International Guidelines on HIV/AIDS and Human Rights* were issued jointly by the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the United Nations Office of the High Commissioner for Human Rights (OHCHR) following an expert consultation in 1996.<sup>6</sup> This document provides legal and policy guidance to governments on a range of human rights issues related to HIV.<sup>7</sup> Resolutions of the UN Commission on Human Rights in 1999 and 2001 have requested states to report on measures taken to promote and implement the guidelines.<sup>8</sup> Tools have also been prepared to help specific groups implement the guidelines in their areas of responsibility.<sup>9</sup> However, despite issuing a revised version of the guidelines in 2006, UNAIDS and OHCHR have not invested heavily in providing technical and financial assistance to governments in implementing them.

In addition to the guidelines, the United Nations General Assembly Special Session (UNGASS) Declaration of Commitment on HIV/AIDS, unanimously adopted by UN member states in 2001, provides nonbinding guidance to governments on how best to protect the rights of people infected and affected by HIV and AIDS. Although states are not legally bound to implement the promises made in the Declaration, the General Assembly reviews progress toward the Declaration's goals and has developed instruments to measure compliance with its provisions.

UNGASS put the world's leaders, including Kenya, on record as endorsing specific global targets in combating AIDS. The Declaration of Commitment explicitly underscores the links between poverty, underdevelopment, deprivation of human rights, and the spread and impact of HIV. It recognizes that "the full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic."<sup>10</sup> In 2006, the UN held a five-year review of progress since the UNGASS, during which a coalition of civil society groups reported that "on the one hand respect of human rights and promotion of gender dimensions contribute to slowing the epidemic; on the other, violations of basic rights and gender inequalities continue to perpetuate the spread and impact of HIV/AIDS."<sup>11</sup>

These international instruments recognize not only the importance of developing a national response to AIDS, but also of making legal services available to vulnerable communities. This obligation is especially strong in criminal cases. Among the minimum guarantees laid out in the ICCPR for persons charged with criminal offenses are the right to defend oneself through legal assistance of one's own choosing, to be informed of this right, and "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa also provides an effective guide for African countries to address the need to increase community access to legal services.<sup>12</sup> The document recognizes that most people in need of criminal defense are poor and have few resources with which to protect their rights.

At the domestic level, Kenya has undergone an ambitious legal reform program, for which it has set up more than 15 task forces and committees. The Kenya National Commission on Human Rights Act (2002) created an independent commission "to investigate complaints about human rights abuses, visit prisons and detention centers, educate the public about human rights, and recommend measures to promote human rights and formulate and implement programs to promote human rights, among other functions."<sup>13</sup> The Commission does not substitute for a formal legal aid system, although it plays a critical role in monitoring and investigating certain types of human rights abuses. The Kenyan government has ratified the protocol to the African Charter on Human and

People's Rights establishing the African Court of Human and People's Rights, and is considering ratification of the Optional Protocol to the ICCPR. These treaties will permit human rights complainants to lodge complaints with the African regional court and the UN Human Rights Committee once they have exhausted all available domestic remedies.

As in many other countries, the laws of Kenya influence the nature and progress of the HIV epidemic. Criminal laws against prostitution, illicit drug use, and sodomy, for example, may not explicitly mention HIV or AIDS, but nevertheless affect the HIV vulnerability of sex workers, people who use drugs, and men who have sex with men. This is particularly true when these populations face harassment and arbitrary arrest by police, driving them away from health and social services and often into prison where their vulnerability only increases.

Joanne Csete, executive director of the Canadian HIV/AIDS Legal Network, has called the criminalization of groups vulnerable to HIV an "intractable form of human rights abuse" that "creates the most direct impediments to meaningful participation and access to life-saving treatments."<sup>14</sup> The *International Guidelines* recommend that states "review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups." By the same token, some types of criminal laws can have a positive influence on HIV policy, depending on how they are worded and enforced. For example, laws against sexual violence can help reduce women's vulnerability to HIV if they are enforced strongly enough to deter rape (including marital rape), which is a major driver of HIV epidemics.

AIDS has also brought into reality the seriousness of rape and other forms of gender-based violence, both in Kenya and elsewhere. In July 2006, Kenya enacted legislation increasing penalties for rape and other sexual offenses, a development that has the potential to address the link between sexual violence and HIV risk among women. However, the law failed to criminalize marital rape, angering some women parliamentarians who accused their male counterparts of watering it down from its initial intention, which was to curb the rising incidence of sexual violence against women and children.<sup>15</sup> Exposure to rape and sexual coercion by husbands and intimate partners is a key factor in increasing women's vulnerability to HIV infection.<sup>16</sup>

In January 2007, Kenya enacted a comprehensive HIV and AIDS Prevention and Control Bill, which had been tabled by Kenya's Minister of Health, Charity Ngilu. The bill provides a legal framework for the prevention, management, and control of the epidemic. The bill contains measures mandating the promotion of public health and the provision of prevention, treatment, care, and support programs for persons living with or at risk of HIV and AIDS. It also recognizes the rights of persons with actual, perceived,

or suspected HIV status to protection from discrimination, and to access to quality and confidential health services. The bill bans forced HIV tests for employment, marriage, admission to educational institutions, entry into the country, and obtaining insurance or loans, although people charged with sexual offenses can be compelled to undergo HIV tests.

Controversially, the HIV bill imposes criminal penalties for failing to take “reasonable measures” to prevent transmitting HIV to others, or for knowingly failing to inform anyone with whom they have sexual contact or share needles that they are HIV-positive (section 24). Supporters of this provision view it as a well-intentioned effort to protect people, especially women, from contracting HIV from sex partners who know their HIV status but fail to disclose it. Members of a task force on legal and ethical issues on HIV and AIDS also explained in public hearings that they had received many views in support of this clause, particularly from a number of women living with HIV who felt that they had been intentionally infected.

One concern with these criminal penalties is that those who do *not* know their HIV status cannot (and should not) be prosecuted for knowingly or willfully transmitting HIV, thus creating a perverse incentive not to be tested. In a recent policy paper, UNAIDS recommended that criminal laws should only be used to prevent HIV in certain kinds of cases, as a last resort after public health laws and policies have failed to achieve the desired goals. UNAIDS further recommended that if the criminal law is used, “it should not be HIV specific, should not be applied to acts that pose no substantial risk of transmission of HIV, should not be applied to cases where the partner was aware of the defendant’s positive status and there was no deceit or coercion, should not be used for negligent transmission, and should require that the HIV positive person knew s/he was infected and knew that his/her conduct posed a significant risk of transmission of HIV.”<sup>17</sup>

Human rights advocates have argued that specific criminal laws against HIV transmission have the potential to disproportionately affect vulnerable groups, such as sex workers, HIV-positive pregnant women, and adolescent girls who have sex with older men for reasons of economic survival.<sup>18</sup> In an interview for this report, the Network of African People Living with HIV/AIDS (NAP+) emphasized that the newly formed Civil Society Coalition on HIV/AIDS, Tuberculosis, and Malaria was opposed to the HIV bill, as people living with HIV felt they were being singled out for criminal sanction because of their HIV status.

Although not part of formal law, Kenya’s new National HIV/AIDS Strategic Plan (KNASP) recognizes respect for rights as part of the country’s AIDS response.<sup>19</sup> Among the vulnerable communities listed in the plan are sero-discordant couples (meaning that one partner is infected with HIV and the other is not), commercial sex workers, orphans and vulnerable children, girls, migrant workers, members of uniformed services, the elderly, and victims of rape and sexual violence. The strategic plan provides

an important framework for engaging all key social and economic sectors, including the justice sector, in Kenya's national AIDS response.

Nations have signed on to achieve the goals outlined in UN conventions and legal frameworks and passed laws based on these international principles. Leaders and officials around the world have made statements about the importance of a rights-based approach to combating AIDS. But AIDS donors providing large amounts of resources, such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, the Bill and Melinda Gates Foundation, the World Bank, and the U.S. President's Emergency Plan for AIDS Relief (PEPFAR) do not monitor their funding against these conventions and legal frameworks for ensuring that governments are implementing what they have agreed to internationally. This discrepancy is an important dilemma, and this report is an exploration of how the vast gap between rhetoric and practice could be filled in Kenya.

# HIV, AIDS, and Human Rights in Kenya

In Kenya, HIV spread quickly during the 1990s, with national prevalence reaching 14 percent of the sexually active population in 1999.<sup>20</sup> That year, the Kenyan government declared AIDS a national emergency. The country is home to over 2.5 million people living with HIV or AIDS, of which 200,000 are children, 900,000 men, and 1.4 million women. In 2005, UNAIDS reported that HIV prevalence had declined in Kenya over the previous decade, due to documented changes in risk behavior, lower incidence, and HIV-related mortality.<sup>21</sup> The most recent sentinel surveillance data indicates that overall adult prevalence had fallen to 6.1 percent by the end of 2005.<sup>22</sup> Increasing HIV-related mortality is a particularly important cause of the lower overall prevalence of HIV in the Kenyan population: AIDS killed an estimated 150,000 Kenyans in 2005, double the rate of mortality in 1998.

The majority of new HIV infections in Kenya occur among young people, especially young women ages 15–24 and young men under the age of 30.<sup>23</sup> Among all 15- to 24-year-olds, the estimated number of young women living with HIV or AIDS was more than twice that of young men.<sup>24</sup> Women account for approximately two-thirds (65 percent) of adults estimated to be living with HIV or AIDS in Kenya, a higher percentage than the sub-Saharan African region overall (57 percent).<sup>25</sup>

An estimated 7.5 percent of married couples in Kenya are sero-discordant. It is not known what proportion of these couples is aware of each other's HIV status.<sup>26</sup> As in many other African countries, women's economic dependence on their husbands, combined with discriminatory property laws and customary practices such as polygamy and widow inheritance (forcing a woman to marry her deceased husband's brother), leaves women trapped in marriages that pose a high risk of HIV infection.

HIV targets people in the prime of their adult lives, impoverishing families and leaving behind a generation of orphans who are often cared for by aging grandparents. Families affected by HIV and AIDS typically experience a dramatic drop in household income, while businesses lose increasing profits to worker absenteeism. The very social services needed to mitigate the impact of AIDS, including health services, are themselves diminished by high rates of HIV among Kenya's workforce. With over half of Kenyans earning less than US\$1 per day as of 2005, experts have suggested that AIDS poses a threat to the nation's economic recovery efforts.<sup>27</sup>

AIDS in Kenya also has important geographic and cultural dimensions, "with certain locations having significantly higher risks of infection and greater vulnerability to impact."<sup>28</sup> There is significant variation in HIV prevalence rates across the country

with the highest rates in Nyanza province in one sub-district at 35 percent and the lowest in Kalulumo, Bamba, and Kilifi district at 4 percent. HIV prevalence rates are also much higher among urban residents than rural ones, and often much higher among women than men.<sup>29</sup> In Suba, 1 of the 12 districts around Lake Victoria, Merlin, a UK-based medical relief charity, recorded HIV rates of 60 percent among women and 26 percent in men in 2005. One of the main reasons for the high HIV prevalence was the *jaboya*<sup>30</sup> system, which requires female fish traders to engage in sexual relationships with fishermen and others to ensure a consistent supply of fish. To compete with other traders, women offer sexual incentives to fishermen to get the best fish; to *matatu*<sup>31</sup> drivers for transporting the fish; and to middlemen in the market to ensure a good price.<sup>32</sup>

Certain traditional customs and practices among Kenyan communities increase the vulnerability of women and young girls to HIV and infringe upon their human rights. HIV is perpetuated through the continued use of harmful traditional and cultural practices such as female genital cutting, child marriage, and polygamy. Widow inheritance and widow cleansing—the practices of forcing a woman to marry a relative of her deceased husband and also sometimes to have sex with a “village cleanser” in order to be accepted back into the community—are both linked to HIV infection in Kenya. Women face both legal and de facto discrimination in access to property and inheritance, often becoming destitute upon the death of their husband or dissolution of their marriage. This discrimination, in turn, increases their socioeconomic vulnerability leading to the risk of HIV infection and reinfection for them and their children. Many women are unable to seek justice for violations of their property rights in the courts, and the few who do often face a corrupt judicial system, sexist attitudes among magistrates, and local officials who are often biased and claim a desire ‘not to interfere with culture’ by taking on property rights cases.<sup>33</sup>

An estimated 1,100,000 Kenyan children under the age of 17 had lost their mother or father or both parents to AIDS by the end of 2005.<sup>34</sup> Children affected by AIDS—whether they are orphaned, have a sick parent with HIV, or are living with HIV themselves—are at high risk of dropping out of school and having to earn a living on the street or in other potentially dangerous situations. Kenya is one of numerous countries in sub-Saharan Africa where orphans affected by AIDS drop out of high school at a higher rate than their peers, a form of de facto discrimination on the basis of the HIV status of one’s parent.<sup>35</sup>

Whereas primary education is theoretically free in Kenya, the government has failed to address the difficult situation of vulnerable children including those affected and infected by HIV and AIDS. Orphaned children are unable to assume other mandatory costs of education such as books and uniforms. Unable to attend school regularly, they may be forced into hazardous labor, prostitution, and labor trafficking. Authorities often fail to prosecute these offenses adequately and afford little protection to these young victims.<sup>36</sup>

These abuses, combined with a lack of youth-oriented information and other services to prevent HIV, can render young people more vulnerable to HIV infection.

A frequent abuse faced by AIDS-affected children in Kenya is the unlawful appropriation of property they are entitled to inherit from their parents. Despite succession law governing the proper administration of a child's estate, children in Kenya are rarely able to take legal action to protect their inheritance rights.<sup>37</sup> In many cases, surviving relatives grab the very estate they are meant to administer for a child; in other cases, relatives seeking to safeguard a child's inheritance face numerous obstacles, such as bureaucratic run-around, difficulty establishing a child's identity, legal challenges by other relatives, corruption, and lack of awareness of the available legal protections.<sup>38</sup>

Kenya does have an Office of the Public Trustee, which is supposed to help in the fair administration of the lower-valued estates of the deceased. But the office is not accessible to most people living in rural areas. Access to legal services would go a long way toward addressing these obstacles; yet, as described below, there is no government-supported legal aid program in Kenya, and most Kenyans cannot afford private lawyers.

Not only children, but also the elderly who are left to care for them, face human rights abuses related to HIV. According to Ephraim Gathaiya and Thadeyo Waweru, representatives from HelpAge Kenya, a nonprofit organization dedicated to improving the lives of disadvantaged older people, negative social attitudes toward the elderly in Kenya contribute to the denial of essential services such as health, housing, justice, and social assistance.<sup>39</sup> The elderly face discrimination and marginalization both within their families and by society at large. HelpAge has encountered cases of elderly people living with HIV who have no access to programs that target their special needs. Older people must take on the burden of caring for their children suffering from AIDS, and for their orphaned grandchildren, at the very time of life when their own health is declining and they are facing economic insecurity due to their age and failing health.

There are few programs focused on the intergenerational dimensions of AIDS and human rights in Kenya. HelpAge Kenya has documented cases of domestic and sexual violence against elderly people caring for children often orphaned by AIDS. Elderly grandmothers have been sexually assaulted or beaten by orphans placed in their care. Several cases of rape have also been documented in which both a grandmother and her granddaughters have been raped by men in the community. The elderly receive little targeted support for their psychosocial, health, or legal needs, and often live in silence because of the additional stigma associated with both aging and rape in the community.<sup>40</sup>

Finally, for people living with (or perceived to be living with) HIV and AIDS in Kenya, widespread stigmatization still contributes to violations of human rights. This is especially true for women, who comprise a majority of people living with HIV in the country.

Numerous reports have found that the epidemic in Kenya has led to increased gender-based violence as HIV-positive women are assaulted, dismissed from employment, disinherited, disowned, and shunned by their families and communities.<sup>41</sup> Women are also more likely than men to be labeled as promiscuous and held responsible for spreading the virus. Fearing violence and ostracism, many women do not take HIV tests in order to avoid the negative repercussions of AIDS stigmatization for themselves and their children, thus denying themselves critical information about their health.<sup>42</sup> These and other abuses make it necessary to place human rights and legal protection at the center of the AIDS response, both in Kenya and globally.<sup>43</sup>

# Local Efforts to Address HIV-related Human Rights Abuses

Despite widespread anecdotal evidence of HIV-related human rights abuses, such as discrimination in the workplace, abandonment by extended families, and gender-based violence, documentation of rights abuses related to the epidemic is sporadic. Unlike in other countries, Kenya does not have a clearinghouse for documenting these cases. There also is no legal services organization dedicated to addressing cases of HIV-related human rights abuse. Kenya is home to a loose network of lawyers in private practice working on AIDS issues, as well as some human rights and women's rights organizations taking cases on related issues. However, unlike in numerous countries of southern Africa, Kenya lacks a strong network of advocates dedicated to addressing the legal, ethical, and human rights dimensions of the HIV epidemic through research, litigation, and other advocacy.

In 2004, the Kenya AIDS NGOs Consortium, a national membership network of nongovernmental, community-based, and faith-based organizations involved in AIDS activities, conducted a baseline survey to determine the extent of legal and human rights violations related to HIV in Kenya. This survey was the only one in Kenya of its kind geared toward creating a community framework within which the rights of the infected and the affected could be respected. The survey sought to explore communities' knowledge and awareness of legal and human rights issues, identify specific human rights violations related to the epidemic in Kenya, and identify sociocultural and economic factors influencing rights abuses. The survey also identified organizations, institutions, and agencies working on HIV-related legal and human rights issues in Kenya.

The survey covered each of the nine regions of Kenya identified in the Kenyan government's HIV/AIDS Strategic Plan 2000–2005. This survey used two sets of questionnaires, one targeting individual respondents and the other targeting organizations in each region involved in community AIDS programs.

Data from the baseline survey suggested that human rights violations related to HIV in Kenya were prevalent and widespread. Approximately 72 percent of all organizations interviewed reported that at least one case of a legal or human rights violation had been reported to them or that a client had sought advice on such a violation. Of these organizations, 40 percent had received more than 10 complaints, while 34 percent had received between 2 and 5. Among the individual respondents, 70 percent knew of at least one person whose legal or human rights had been violated as a result of his or her HIV status.<sup>44</sup>

## Women face the greatest risks

The KANCO survey provided a quantitative perspective on widespread reports of violations of women's rights in the context of AIDS in Kenya, particularly rights related to property and gender-based violence.

### Legal Cases Often Related to HIV and AIDS

#### Labor-related cases, including issues such as:

- ▶ unlawful termination
- ▶ not being remunerated for work completed
- ▶ not being remunerated for overtime work, travel allowance, or commission earnings
- ▶ lack of worker's compensation coverage or severance benefits
- ▶ abuse of pension privileges
- ▶ protection from hazardous employment
- ▶ child labor

#### Domestic-related cases, including issues such as:

- ▶ inheritance
- ▶ land and property rights
- ▶ child custody disputes
- ▶ appeal applications for cases related to domestic abuse
- ▶ adultery
- ▶ maintenance support for women and children
- ▶ divorce
- ▶ sexual violence, abuse, exploitation, and rape
- ▶ discrimination

#### Civil-related cases, including issues such as:

- ▶ non-payment of accounts
- ▶ breach of contract
- ▶ quality of health/treatment services
- ▶ professional negligence
- ▶ violation of human rights in the health sector (e.g. violation of the right to confidentiality, equal access to healthcare services)

*Source: Botswana Centre for Human Rights Paralegal Programme*

the community's traditional responsibility to care for the vulnerable within the society. Many women widowed by AIDS in Kenya have been excluded from inheriting property, evicted

Despite some (albeit unequal) recognition of their property and inheritance rights under the law, Kenyan women traditionally gain access to property through their male relatives.<sup>45</sup> When these relationships end through divorce or the death of a spouse, women face the prospect of abandonment and destitution. While women may attempt to assert their property rights through the formal legal system, a combination of discriminatory laws, biased attitudes, corrupt judiciaries, and other obstacles conspire to elevate customary law above women's legal rights. Efforts to work with traditional leaders have shown some success at vindicating women's property rights under customary law, but Kenya has a very long way to go toward achieving equality in this area.

Increasing mortality due to AIDS in Kenya has also increased violations of women's property rights. Many observers have noted a gradual erosion of

from their lands and homes by in-laws without the benefits of keeping their possessions, and forced to engage in risky sexual practices in order to retain their property or ensure a livelihood for themselves and their children.<sup>46</sup>

Women who are economically dependent on their husbands due to discriminatory property laws may be especially reluctant to leave violent marriages. Dorothy Onyango and Pauline Odaa from Women Fighting AIDS in Kenya (WOFAK), a nongovernmental organization that manages referrals from the Federation of Women Lawyers Kenya (FIDA), stressed that the only “safe house” in Nairobi for survivors of domestic violence lacks sufficient resources to remain open. Organizations like WOFAK often do not have legal staff to help survivors of gender-based sexual violence gain access to the justice system, despite the fact that they are regularly faced with requests for legal assistance from their clients.

Perhaps what was most startling about the KANCO baseline study were the extremely high prevalence rates for domestic violence in Nairobi and Nakuru with 94 percent and 90 percent percent of women interviewed experiencing at least one episode in the previous year. These rates were followed by Kisii at 88 percent, and Kisumu, Garissa, and Kakamega all at 78 percent. Isiolo and Uasin Gishu each had rates of 67 percent. Meru and Nyeri had 56 percent and 57 percent respectively.<sup>47</sup> Sexual assault, rape, battering of wives and girlfriends, and sexual coercion emerged as the most common forms of gender-based violence that contributed to the spread of HIV.

## **Other vulnerable communities**

Qualitative information gathered for the KANCO survey indicated that children orphaned or affected by AIDS, including those living with HIV or AIDS, had been denied their right to education in some cases. The survey suggested that violations of children’s rights were more prominent among communities in Kenya’s northeastern region. Girls faced particular vulnerabilities, with 46 percent of respondents indicating that child marriage was a major problem for girls in their target regions.

Another major finding of the KANCO study was that people living with HIV and AIDS faced vulnerability to human rights abuse due to a lack of basic necessities and economic livelihood. Those seeking redress for human rights abuses were limited in their ability to do so by the cost of legal services and related costs such as transportation to court. To address this issue, representatives from CARE International and CARE Kenya, Millicent Obaso and Elizabeth O. Oyugi, suggested that people with HIV need not only legal support, but also assistance starting income-generating activities so they might afford the services of a lawyer when their rights are violated.

The kinds of abuses documented against people with HIV and AIDS in the KANCO survey included denial of employment and summary dismissal; abuses in medical institutions, such as violations of confidentiality and ridicule from health workers; and difficulties openly and freely assembling and associating with other people with HIV and AIDS.

Research data in Kenya could not be found on HIV-related human rights abuses against sex workers, injecting drug users, and men having sex with men. However, most interviewed suggested these groups experienced abuses within both the criminal justice and health systems in Kenya, in addition to significant violence and discrimination by private actors. Kamau and Ochieng from FIDA-Kenya stated that sex workers were a neglected group, and that they had heard of several cases in which police had abused or raped sex workers. According to Kamau and Ochieng, these women (and sometimes children) typically felt they had nowhere to go for help and support.

# How Kenyans Typically Gain Access to Legal Services

The difficulty of measuring access to legal services in Kenya is compounded by the fact that Kenyans seek justice through a combination of governmental and traditional legal mechanisms. The former involves taking cases to court with the assistance of a lawyer or magistrate. Traditional mechanisms include elders, traditional courts, or even members of the community such as the police, religious leaders, or family members.

## Formal legal services

The great majority of Kenyans do not have access to legal services in the formal justice system. Clement Ochola, an official with Kenya's Ministry of Justice, estimated that Kenya had fewer than 5,000 lawyers, most of whom charge for their services.<sup>48</sup> There is no national free legal aid program in Kenya, and there are few organizations established as legal aid clinics through which people can obtain free or low-cost legal services. Few cases related to HIV have come before Kenyan courts, and the country has very limited jurisprudence on issues around AIDS and human rights.

In the absence of a national legal aid program, most low-cost legal services fall to specialized nongovernmental organizations that are largely funded by outside donors. FIDA-Kenya, for example, has provided legal services to women since 1985. The Kituo Cha Sheria (Kiswahili for Legal Advice Centre) has existed since the 1970s, and continues to offer legal aid to men and women, mostly from the working middle class.

The Centre for Rehabilitation and Education of Abused Women offers legal aid in addition to providing a shelter for abused women and their children, but it is the only institution of its kind in Kenya. FIDA staff often refers survivors of gender-based violence to the center, though they expressed concern that it may soon be closed due to lack of financial support. Several organizations provide legal aid to children, including CLAN (Centre for Legal Action Network), CRADLE (Child Rights Advisory and Legal Centre), and the Africa Network for the Prevention of Child Abuse and Neglect. However, both legal restrictions and objections from private practitioners make it difficult for NGOs to provide effective legal aid. In some cases, NGOs are barred from representing clients on the grounds that they lack legal standing. As one long-time practitioner on behalf of women has observed, legislation governing legal practice in Kenya did not foresee the provision of legal aid by nontraditional actors such as NGOs.<sup>49</sup>

In the KANCO survey cited above, only 6 of 58 people interviewed stated that they would seek “legal advice” from a conventional legal source such as a lawyer, magistrate, paralegal, or legal aid office. Twelve said they would seek legal advice from family members, while others cited the police, traditional leaders, elders (*Wazee*), or traditional courts, friends or neighbors, social workers or councilors, and pastors. Two said they would not know where to turn. One young woman replied, “I would go to my grandmother. She is the only one that I trust.”<sup>50</sup>

FIDA-Kenya in both Nairobi and Kisumu stated that succession cases represent the largest number of cases from women and children seeking legal advice. According to Kamau and Ochieng from FIDA, the formal legal system is overloaded with these types of cases, and insufficient emphasis is placed on supporting informal methods of mediation and arbitration. FIDA takes clients who make less than 500 Kenyan shillings (US\$7.00) per month—well below the rate of extreme poverty. FIDA often incurs financial losses subsidizing transportation and court filing fees for their clients. FIDA stressed the importance of economic empowerment for their clients, noting that this would help women move their cases through the system.

It is important to note that legal services cannot claim to address the multiple burdens and vulnerabilities faced by people affected by HIV and AIDS, especially women. Women of all ages seeking justice for violence or abuses of their inheritance rights, for example, face what one lawyer in South Africa has termed “cumulative injustice.”<sup>51</sup> In addition to being denied her rights, a woman may be illiterate, forced to care for orphaned children, unable to produce birth certificates establishing registration or land ownership, and unemployed due to HIV-related illness. Faced with the prospect of destitution, she may feel her only option is to be “inherited” by her brother-in-law or to become a sex worker along the nearby trucking route. For such a woman, seeking legal advice to assert her property rights may be a low priority. She is faced with so many levels of vulnerability—chronic personal vulnerability through lack of education, customs and traditions that increase her vulnerability once her husband dies, discrimination on the basis of her gender, lack of protection of her equal right to employment, dependence on public health systems that have been slow to provide medication to the area where she lives—that it may not occur to her to seek legal representation even if such representation is available. Her multiple levels of vulnerability keep her in a “cycle of silence” in which she is hardly able to ask for help.

It is important to note, however, that sometimes just taking the first step to seeking justice can be empowering in itself. Accessible legal services could help poor women see themselves and their plight differently, so they might break out of this cycle. While it is impossible to address all of these issues at once, a holistic and long-term strategy toward justice is as necessary as the immediate availability of legal services to those who need them.<sup>52</sup>

## **Traditional legal services**

Mediation and arbitration by traditional leaders level provides a form of informal dispute resolution for Kenyans who do not have access to the formal justice system. While traditional justice can be gender-biased and suffer from other flaws, many prefer it not only because of the expense and unavailability of formal structures, but also because of the fear that going through formal courts will attract unwanted publicity and fuel discrimination and stigmatization against a complainant living with HIV or AIDS. Catherine Mumma, formerly of the Kenya National Commission on Human Rights, suggested that sensitizing chiefs, councils of elders, and family law judges about legal issues related to HIV might be a more promising strategy than taking cases to court or advocating for law reform. Passing new laws at the national level would be time consuming, and with national elections occurring in 2007, a focus on encouraging good decisions at the local level might ultimately inform the development and strengthening of new law.<sup>53</sup>

The KANCO study buttressed this view, showing that most Kenyans obtained legal services through traditional structures. The report indicated that chiefs and councils of elders wielded enormous power and moral authority, and if they were properly trained on issues such as gender, human rights, and the principle of Greater Involvement of People Living with AIDS (GIPA),<sup>54</sup> issues such as inheritance rights might be resolved at this level. If support were only provided to formal legal structures, even new laws protecting the most vulnerable might not take hold in the absence of support from chiefs and councils of elders.

In an interview, Adera Osawa, the deputy secretary-general of the Council of Elders for the Luo community, said that most councils are open to learning more about human rights, gender, and AIDS issues. Some of his council members had gone through awareness training, he said, but more training was needed throughout the country. Osawa added that more cases could be arbitrated and mediated at the community level, but that councils did not have access to a social fund to support the most vulnerable and destitute. In some cases, he claimed he was providing money from his own pocket to assist with transportation, food, and housing costs. Importantly, Osawa suggested that customary law could be interpreted so as not infringe upon people's rights even in cases where it is used instead of formal or statutory law.

## **Linking legal and health services**

Among the individuals who are most knowledgeable about HIV-related rights abuses in Kenya are those who provide health services to people living with HIV and AIDS. Samuel Rukunga Mwenda, the general secretary of the Christian Health Association

of Kenya (CHAK), an umbrella organization representing 230 health organizations operating throughout Kenya, said that CHAK had seen numerous cases of women reporting abuses such as disinheritance, rape, and domestic violence. In many cases, husbands and their extended families perpetrated such abuse after learning or suspecting the woman's HIV status. Asked how CHAK managed these cases, Mwenda said they told the women to bring complaints to the police or go to the Nairobi Women's Hospital for support. However, women typically told them they either found it too hard to locate and visit the police station or did not have money for transportation. In Mwenda's view, this reflected an overall lack of confidence in the ability of the criminal justice system to vindicate the rights of abused women.

Mwenda said there were also many cases of women coming to their health networks with complaints about loss of property and land disputes. CHAK had seen clashes between traditional and religious authorities at the community level; in these cases, formal law might be more helpful for managing disputes. Mwenda stressed that Kenyan policy and legal frameworks should be strengthened to address areas where cultural and religious traditions are interfering with issues such as inheritance and land ownership.

Not one organization interviewed felt women had adequate access to legal services in the formal justice system. Many stressed that women, who often did not have money for transportation, found it difficult to visit the police station.<sup>55</sup> Mwenda stated that there was a perception within the community that legal services were often too complicated and commercially driven. He felt there was a need to provide free legal services and advice to vulnerable communities such as women and children. He also cited poor quality health services as an issue for which there might be a legal remedy, as CHAK often heard about cases of health professionals mistreating patients or breaching confidentiality. It was not clear to Mwenda what the legal (if any) recourse would be in this kind of situation.

Just as health providers might benefit from increased capacity to provide legal services, so, too, might legal service providers benefit from increased awareness of health issues. Lawyers at FIDA, for example, noted that they did not have an AIDS specialist on staff, and that they had no training on the GIPA guidelines and other important HIV-related legal instructions. As noted above, there is no dedicated NGO working at the community level to provide legal services related to HIV. Many suggested that there was a need to empower committed organizations to challenge HIV-related discrimination in employment, health care services, and education.

# Working to Improve Access to HIV-related Legal Support

Providing meaningful access to legal services in the context of HIV and AIDS requires generating both a supply of these services and demand for them. Fostering an environment in which services can work effectively to reach the most vulnerable is part of this strategy.

The following three questions may thus serve to guide the provision of HIV-related legal services in Kenya:

1. Do individuals know and understand the law and their rights, including their right of access to justice?
2. Are legal services for governmental or traditional justice mechanisms available, and do individuals have access to them?
3. How supportive is the individual's environment—her/his family, community, and society—to ensuring she/he can utilize legal services effectively?

As these questions suggest, interventions to address HIV-related human rights abuses should include not only the provision of legal services, but also health, economic, and social support services to improve the quality of life, health, and well-being of those seeking these services. For example, interventions that empower vulnerable communities economically and address HIV-related stigmatization will vastly increase the likelihood that people will seek justice and remain determined to protect their rights. Such interventions, combined with access to effective health services, can sustain HIV prevention by providing legal protection against the human rights abuses that fuel HIV vulnerability.

Several models exist for delivering formal legal services to underserved communities in developing countries. In a recent paper, David McQuoid-Mason, a professor at the University of Kwa-Zulu Natal in South Africa, identified five models of government-funded legal aid in Africa, especially South Africa: referral networks of private attorneys; salaried public defenders employed by the government; student interns supervised by private attorneys; law clinics staffed by recent law graduates; and specialized “justice centers.” A sixth model is the provision of free (pro bono) services by private attorneys; however, McQuoid-Mason argued that “it is axiomatic that legal aid lawyers should be paid for their services, and that in democratic countries the duty to pay for such services rests with the State.”<sup>56</sup>

Unfortunately, in the absence of a government-funded legal aid system in Kenya, none of the models suggested by McQuoid-Mason will work. Pro bono legal services are a last resort, although they exist on a very limited scale in Kenya and function

in isolation from any government-provided legal aid. There are few incentives for private attorneys to assist people living with HIV and AIDS and other vulnerable groups for free. Those wishing to provide such services do not have access to resources, networks, or training institutes to build their capacity on issues related to AIDS. That being said, partnerships between private law firms and donor-funded legal aid structures may be a useful way of extending legal support to vulnerable communities in Kenya.<sup>57</sup> This model has been piloted in rural areas in South Africa, where state-funded legal aid has limited reach and thus relies on partnerships with private firms.<sup>58</sup>

Paralegals provide an important source of legal assistance in developing countries in the absence of a sufficient cadre of lawyers. Kenya is home to several paralegal networks, which have received some legal training and work for free in many communities. The role of paralegals in Kenya is typically to spread awareness of human rights and make referrals to appropriate services. In a few cases, paralegals serve as monitors for legal aid organizations, sending them information collected from the grassroots level and submitting monthly reports. However, there are not nearly enough paralegals in the country to take these important services to scale.

According to a review carried out for the United Kingdom Department for International Development (DFID), approximately 1,000 paralegals had been trained in Kenya as of 2005. Approximately 20 paralegal projects were operating nationwide supported by various donors and NGOs, of which 15 were located within a 250 kilometer radius of Nairobi.<sup>59</sup> There are virtually no programs in Kenya that provide salaries to paralegals beyond a small “motivational token,” or that support them after their training for costs such as transportation. Paralegals are rarely linked to existing health services in the community and often rely on referrals by colleagues and friends to identify HIV and AIDS-affected individuals in need of legal support.

Financial support and institutional strengthening of paralegal projects would enable them to continue providing legal support to those most in need and in remote areas. Paralegal education should also include knowledge on how to work with cultural structures to promote human rights and ensure justice in communities. FIDA has suggested that a priority in legal service provision should be succession planning, including the writing and custodianship of wills and other key documents for the protection of the property rights of women and children.

Based on the research carried out for this report, several immediate steps would help to strengthen access to HIV-related legal services in Kenya. These include incorporating legal advocacy into existing AIDS programs, providing support for informal or traditional structures, using legal services as the basis for participatory policy advocacy, fostering enabling environments and economic support for access to justice, and building the capacity of existing legal and health service providers.

## **Incorporate legal and human rights advocacy into existing HIV and AIDS programs**

AIDS service providers are often encouraged to adopt a “rights-based approach”, though they are rarely given the tools or support from donors to put this approach into practice. Providing legal services to their clients is one of the most concrete ways that service providers can implement the rights-based approach. This approach recognizes that all members of society have inherent rights essential to political freedom and economic security, and that those who enjoy these rights are vastly less likely to become infected with HIV than those who do not. Perhaps more to the point, these rights are recognized by international standards and laws and can often only be enforced through a country’s formal or traditional legal system. By linking their clients to legal services to defend against human rights abuses, AIDS service providers can help to shape an environment in which people are less vulnerable to HIV and more likely to enjoy the benefit of prevention, treatment, care, and support services.

In practice, this means that the Kenyan government should provide AIDS service providers with the tools they need to advocate legally for the rights of their clients. Establishing referral networks, training health workers in human rights, providing opportunities for continuing education in law and human rights, and integrating legal services directly into health and social services are concrete ways in which this can be accomplished. While there are many other ways in which service providers can mainstream the rights-based approach—such as adopting workplace human rights policies, developing advocacy strategies based on human rights standards, and monitoring and documenting human rights abuses—providing clients with actual legal services is likely to yield a tangible benefit for both human rights and health. A rights-based approach also recognizes that ultimately it is the responsibility of governments to provide legal services, as well as to ensure that fair, timely, and effective mechanisms exist for seeking justice for human rights abuses.

## **Provide support for informal or traditional justice**

Many of those interviewed for this report agreed that most of the poor in Kenya seek redress from traditional structures in the community, such as chiefs and councils of elders. Traditional justice is carried out by members of society exercising justice as they perceive it, often on the basis of customary or religious law. This system has several disadvantages: limited knowledge among traditional leaders of the formal laws and policies governing a particular issue; poor quality of services; lack of gender sensitivity; lack of knowledge of AIDS issues; susceptibility to local politics and corrupt influences; and reliance on traditional

values that may undermine human rights. Even so, interventions that revive and strengthen cultural structures and practices may have the potential to protect the vulnerable in society, especially women and children.

The traditional justice system can offer immediate and inexpensive results if properly supported and informed by normative principles. As Catherine Mumma has argued, more research needs to be done to understand the cultural norms relevant to AIDS in Kenya, particularly those governing the care of widows and orphans and their rights to ownership and inheritance of property and land. Such research would include the identification of the *positive* aspects of the cultural framework that can be effectively used to secure and strengthen women's ability to own, inherit, and enjoy property. Advocacy before traditional leaders can also help to ensure that customary law is applied fairly and not manipulated so as to favor the property rights of men over women. A multidimensional approach that uses both formal and customary law can help to secure a woman's right to ownership, inheritance, access, use and control of property, in particular family land. This approach can be expanded and applied in resolving other human rights issues in Kenya.<sup>60</sup>

### **Use legal services as the basis for participatory policy advocacy**

Community-based legal services must be linked to a national-level policy dialogue if real changes are to take place at all levels. By the same token, policy advocacy at the national level can be much more effective if it draws on the experience gained from providing legal services at the grassroots and, by extension, the lived experiences of vulnerable communities. Legal services should be used to identify the most common abuses against vulnerable communities and to analyze the gaps in the legislative and policy framework that permit these abuses to occur.

To intervene effectively in matters relating to property and inheritance rights, advocates can and should draw upon the experience gained from providing direct legal services to widows and orphans before both governmental and traditional structures. Using the GIPA principles as a foundation, programs should involve people living with HIV and AIDS and other vulnerable communities (e.g. widows, sex workers, the elderly, orphans, men who have sex with men, and injecting drug users) in both the design and implementation of legal services projects, as well as in the shaping of advocacy messages based on these projects. Such an approach would enable affected communities to take the lead in articulating, defending, and securing their human rights in the context of AIDS.

## Foster enabling environments and economic support for access to justice

An enduring challenge in providing legal services to underserved communities is ensuring that they remain able and motivated to take their cases through the justice system. Even if legal services are free, poverty poses an enormous obstacle to justice. A widow seeking justice for disinheritance, for example, may be so completely stripped of her property that she cannot afford transportation to court. A woman experiencing domestic violence may fear retaliation if she takes her case to court, yet may lack the resources to move out of her house. A grandmother of a disinherited orphan may be forced to choose between paying for court fees to reclaim her grandchild's property and paying for school fees to keep the child in school.<sup>61</sup>

These examples suggest that streamlining economic empowerment initiatives into community-based HIV-related legal services is essential to providing the financial safety net required to move cases through the justice system. Microfinance and microenterprise schemes, for example, can empower vulnerable communities to take legal cases where otherwise such cases might feel like a luxury. These initiatives can also generate social networks through which HIV prevention and legal advocacy messages can be transmitted and reinforced. Addressing gender concerns is central to this response. Effective programming should require a comprehensive understanding of how gender issues affect vulnerability, empowerment, and human rights abuses.

In addition to facilitating the provision of legal services, economic support can also prevent human rights abuse by empowering vulnerable people to leave situations (e.g., violent marriages, sexual exploitation, and hazardous labor) that place them at risk. A recent baseline study conducted by CARE Kenya in connection with the Canadian Coalition on HIV/AIDS and Youth in Africa Kungo kod Hola project in 2005 illustrates this point.<sup>62</sup> By integrating an economic empowerment activity into an existing USAID-funded project on prevention of mother-to-child transmission (PMTCT) in Kisumu, CARE was able to show a decrease in domestic violence and sexual abuse against women due to their improved economic situation. This finding, which can easily be tested across a number of contexts and populations, supports the view that linking microfinance and microenterprise with traditional health services should be part of any comprehensive intervention to provide HIV-related legal support to vulnerable communities.

## **Build capacity of existing legal and health service providers**

Providing HIV-related legal services requires two kinds of capacity-building: building the capacity of legal service providers to better address the needs of HIV and AIDS-affected populations; and building the capacity of health providers to better use the law to advocate for their patients. Legal services must be designed so they are accessible for all types of vulnerable populations and institutions. AIDS service providers, for their part, need help developing their own policies and training to align to national laws and, in turn, sensitize staff to these issues. Staff need training on how to provide client-centered counseling and protect individuals' rights to privacy, and on understanding the laws and policy frameworks governing HIV prevention, treatment, care, and support services.

Assistance for linking services through referral networks will help to build bridges between traditional HIV-related health services and legal support. Referrals should include HIV counseling, testing, and treatment as well as STD treatment, family planning, violence prevention, drug abuse treatment, social support, and housing. For example, there is currently only one safe house in Kenya for abused women and their children to receive holistic services including legal services and advice, shelter, food, clothing, health services, psychosocial support, security, microcredit services, and transportation. More integrated services like this need to be established throughout the country in order to provide support and a safe haven for those most vulnerable to human rights abuses.

# Conclusion

Widespread human rights abuses linked to HIV in Kenya will continue with impunity so long as people living with HIV and AIDS and other vulnerable communities are either ignorant of their rights, or cannot afford to seek justice in the courts or before traditional justice mechanisms. Such impunity not only makes a mockery of justice, but also can have dire public health consequences, as those vulnerable to human rights abuse face a higher risk of HIV infection. For this reason, access to justice should be seen as both a human rights and a public health imperative.

Increasingly, access to justice in Kenya is viewed more broadly than simply justice as dispensed by the formal legal system through the courts. It is also seen to include justice as dispensed by traditional structures that rely more on customary and religious law. The legal empowerment of people living with HIV and AIDS and other vulnerable groups is more likely to be achieved where a combination of governmental and traditional mechanisms is available, and where judges and traditional leaders alike are educated about the legal and human rights dimensions of AIDS. Economic empowerment and access to vital public services, moreover, must be at the heart of any effort to provide justice for vulnerable communities.

Establishing HIV-related legal services in a country that lacks a government-sponsored legal aid system is an enormous challenge. Practitioners with the motivation to provide legal services must be supported with training, financial resources, and ongoing mentorship. Health providers also require training and support to integrate legal and human rights principles into their work. The few NGOs dedicated to providing legal services to poor clients require increased support from the Kenyan government. Ultimately, the government must take conscientious steps to fulfill its obligation to make legal services available to all who need and cannot afford them, particularly those who stand to be deprived of their liberty by the criminal justice system.

There is no single approach to providing HIV-related services to vulnerable groups in Kenya or elsewhere. The factors fueling HIV vulnerability and transmission vary across regions and populations, and there are vast differences in the capacities of community-based organizations and governmental and traditional legal structures. However, there are common themes found across the organizations and individuals surveyed for this report and clear lessons to be learned from other contexts. These themes and lessons should help to demystify the complexity of providing HIV-related legal services in Kenya, and should embolden the Kenyan government and its donors to rise to the challenge.

# Notes

1. Interview with Samuel Rukunga Mwenda, Christian Health Association of Kenya, Nairobi, July 11, 2006.
2. Kenya AIDS NGO Consortium, *Baseline Survey Report on Legal and Human Rights Violations Related to HIV/AIDS in Kenya* (Nairobi: KANCO, November 2004).
3. There are only three widely known cases of HIV-related violence and discrimination in Kenya: a case of homicide against a teenage boy living with HIV; a case of employment discrimination against an HIV-positive woman; and a case of education discrimination against a group of HIV-positive orphans. Interviews with Dorothy Onyango, Women Fighting AIDS in Kenya (WOFAK), Nairobi, Pauline Odaa, WOFAK, Nairobi, and Ambrose Rachier, Rachier & Amollo Advocates, Nairobi, July 12-13, 2006.
4. Please see Preface for a full list of stakeholders interviewed.
5. Joint United Nations Programme on HIV/AIDS (UNAIDS), *The UNAIDS Guide to the United Nations Human Rights Machinery for AIDS Service organizations, People Living with HIV/AIDS, and Others Working in the Area of HIV/AIDS and Human Rights* (Geneva: UNAIDS, 1997).
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10. United Nations General Assembly, *Declaration of Commitment on HIV/AIDS*, UN Doc. A/RES/S-26/2 (New York: United Nations, 2001), paragraphs 16, 58.
11. United Nations General Assembly Special Session/High-level meeting on HIV/AIDS, *Civil Society Report/Recommendations*, New York, June 2, 2005.
12. "The Role of Lawyers, Non-Lawyers and Other Service Providers in Africa," conference on legal aid in criminal justice, Lilongwe, Malawi, November 22-24, 2004.
13. Human Rights Committee, 2256th and 2257th Meetings, Eighty-third session, March 15, 2005.
14. Presentation by Joanne Csete, executive director, Canadian HIV/AIDS Legal Network, AIDS 2006 - XVI International AIDS Conference, Toronto, Canada, August 2006.
15. Interviews with female lawyers in Kenya, July 8-23, 2006 (names withheld upon request).
16. See, e.g., Human Rights Watch, *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, vol. 15, No. 15(A) (August 2003).
17. Richard Elliot, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper* (Geneva: UNAIDS, 2002).

18. Interviews with Michael Angaga and staff of Network of African People Living with HIV/AIDS (NAP+), Nairobi, July 21, 2006.
19. *Kenya National HIV/AIDS Strategic Plan (KNASP)*, 2005/06-2009-10.
20. National AIDS and STDs Control Programme (NASCO), *AIDS in Kenya: Background, Projections, Impact and Interventions*, 5th ed. (Nairobi: Kenya Ministry of Health, 1999).
21. UNAIDS and World Health Organization, *AIDS Epidemic Update: July 2005* (Geneva: UNAIDS and WHO), 27.
22. *Kenya HIV and AIDS Data Booklet*, National AIDS Control Council, 2005.
23. UNAIDS, *UNAIDS at Country Level: Progress Report*, 2004.
24. UNAIDS, *Youth and HIV/AIDS: Opportunity in Crisis*, 2002.
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27. Ibid.
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29. UNAIDS and WHO, *Kenya: Epidemiological Fact Sheet on HIV/AIDS and Sexually Transmitted Infections—2004 Update*.
30. “Jaboya” is a Luo term referring to a customer who is also a sex partner.
31. A “matatu” is a minibus taxi.
32. UN Office for the Coordination of Humanitarian Affairs, “KENYA: Fish Trade Aiding the Spread of HIV/AIDS,” *Integrated Regional Information Networks (IRIN) News*, November 30, 2005.
33. Interview with Allan Ragi and Miano Munene, Kenya AIDS NGOs Consortium (KANCO), July 11, 2006.
34. UNAIDS, *2006 Report on the Global AIDS Epidemic* (Geneva: UNAIDS, May 2006).
35. Human Rights Watch, *Letting Them Fail: Government Neglect and the Right to Education for Children Affected by AIDS* Vol. 17, No. 13(A) (October 2005).
36. Documented by paralegals as part of a children’s rights program implemented by Pathfinder International in Kakamega, Kenya. This issue was also raised during the 83rd Session of the UN Human Rights Committee meeting in 2005. See The Lutheran World Federation, Office for International Affairs and Human Rights, Report on Civil and Political Rights in Kenya. See online: [http://www.lutheranworld.org/What\\_We\\_Do/OIAHR/UN\\_Bodies/HRC83-Kenya.pdf](http://www.lutheranworld.org/What_We_Do/OIAHR/UN_Bodies/HRC83-Kenya.pdf) (accessed on February 7, 2007). The submission of Kenya’s next periodic report on this issue is scheduled for April 1, 2008.
37. Human Rights Watch, *In the Shadow of Death: HIV/AIDS and Children’s Rights in Kenya*, Vol. 13, No. 4(A), June 2001.
38. Ibid.
39. Interviews with Ephraim Gathaiya and Thadeyo Waweru, HelpAge Kenya, July 14, 2006.
40. Ibid. The cases cited occurred in the Nairobi and Kisumu areas of Kenya.
41. See, e.g., United Nations Development Fund for Women (UNIFEM), *Turning the Tide: CEDAW and the Gender Dimensions of the HIV/AIDS Pandemic* (New York: UNIFEM, 2001); International Community of Women Living with HIV/AIDS (ICW), *ICW Vision Paper 4: HIV Positive Women and Human Rights 4-5* (2004).
42. POLICY Project—Kenya and Kenya National Commission on Human Rights (KNHCR), *From Despair to Hope—Women’s Right to Own and Inherit Property* (2005); Human Rights Watch, *Double Standards: Women’s Property Rights Violations in Kenya*, Vol. 15, No. 5 (A) (March 2003).
43. See, e.g., Julie Hamblin, “People Living With HIV: The Law, Ethics and Discrimination,” presented to 2nd International Congress on AIDS in Asia and Pacific (New Delhi: UNDP, 1993).

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46. Ibid.; Human Rights Watch, *Double Standards*.
47. Kenya AIDS NGO Consortium, *Baseline Survey Report on Legal and Human Rights Violation Related to HIV/AIDS in Kenya*.
48. Interview with Clement Ochola, Kenya Ministry of Justice, July 14, 2006.
49. J. Thongori, “Nongovernmental Experiences in the Provision of Legal Aid Services in Kenya: A Practitioner’s Perspective” (unpublished manuscript, copy on file at Open Society Institute).
50. Ibid.
51. As defined by Tara Polzer, director of the Acornhoek Advice Centre, South Africa, from 2002-2004 and current advisor to the program.
52. Example adapted from Tara Polzer, “Breaking the Cycles of Silence: Community Justice for the Rural Poor,” (Wits Acornhoek Advice Centre, Forced Migration Studies Programme).
53. Interview with Ambrose Rachier, Rachier & Amollo Advocates, Nairobi, July 12, 2006.
54. Formally adopted at the Paris AIDS Summit in 1994, the principle of Greater Involvement of People Living with AIDS (GIPA) provides that the personal experience of people living with HIV can and should be translated into helping shape a response to the AIDS epidemic. See online: [http://www.unaids.org/en/Issues/Affected\\_communities/gipa.asp](http://www.unaids.org/en/Issues/Affected_communities/gipa.asp) (accessed on January 5, 2007).
55. Interviews with Jean Kamau and Christine Ochieng, FIDA Kenya, and Samuel Mwenda, Christian Health Association of Kenya, July 11 and 20, 2006.
56. D. McQuoid Mason, “The Supply Side: The Role of Private Lawyers and Salaried Lawyers in the Provision of Legal Aid–Some Lessons from South Africa,” (Association of University Legal Aid Institutions (AULAI) Trust (undated, copy on file at Open Society Institute).
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58. D. McQuoid Mason, “The Supply Side.”
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62. Kungo kod Hola is a three-year project that is supported by the Canadian International Development Agency and whose goal is to empower Siaya community members to effectively respond to the negative socio-economic impact of HIV/AIDS.

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# About OSI and its Programs

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The Open Society Institute works to build vibrant and tolerant democracies whose governments are accountable to their citizens. To achieve its mission, OSI seeks to shape public policies that assure greater fairness in political, legal, and economic systems and safeguard fundamental rights. On a local level, OSI implements a range of initiatives to advance justice, education, public health, and independent media. At the same time, OSI builds alliances across borders and continents on issues such as corruption and freedom of information. OSI places a high priority on protecting and improving the lives of marginalized people and communities.

Investor and philanthropist George Soros in 1993 created OSI as a private operating and grantmaking foundation to support his foundations in Central and Eastern Europe and the former Soviet Union. Those foundations were established, starting in 1984, to help countries make the transition from communism. OSI has expanded the activities of the Soros foundations network to encompass the United States and more than 60 countries in Europe, Asia, Africa, and Latin America. Each Soros foundation relies on the expertise of boards composed of eminent citizens who determine individual agendas based on local priorities.

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The Open Society Institute's Public Health Program aims to promote health policies based on social inclusion, human rights, justice, and scientific evidence. The program works with local, national, and international civil society organizations to combat the social marginalization and stigma that lead to poor health, to facilitate access to health information, and to foster greater civil society engagement in public health policy and practice. The **Law and Health Initiative** works with the Soros foundations network and other Public Health Program initiatives to promote legal action in support of these goals.

## **Open Society Initiative for East Africa**

The Open Society Initiative for East Africa supports and promotes public participation in democratic governance, the rule of law, and respect for human rights in Kenya by awarding grants, developing programs, and bringing together diverse civil society leaders and groups.

The promise of increased HIV prevention, treatment, and care services is providing hope to millions of people living with HIV and AIDS in Kenya. But what if a person with HIV is evicted from her home for being HIV-positive, or unlawfully stripped of her property on the death of her spouse? What if a child born to HIV-positive parents is kicked out of school or recruited into forced labor? For these people, access to justice can be as important as access to health care.

Based on interviews with people living with HIV and AIDS and others working on these issues, *Ensuring Justice for Vulnerable Communities in Kenya* argues for vastly expanded access to HIV and AIDS-related legal services. Kenya lacks a national legal aid system, leaving the delivery of legal services to private attorneys, paralegals, and foreign-funded nongovernmental organizations. People whose rights are violated face slow and corrupt courts, expensive legal fees, and traditional authorities unaware of or unwilling to apply statutory law. For people living with and affected by HIV, this means not only the denial of justice. It means the denial of conditions in which they can enjoy their right to the highest attainable standard of health.

The Law and Health Initiative of OSI's Public Health Program promotes legal action to advance the health and human rights of society's most marginalized people.

The Open Society Initiative for East Africa promotes public participation in democratic governance, the rule of law, and respect for human rights in Kenya.

