UNIVERSITY OF TORONTO
FACULTY OF LAW

INTERNATIONAL HUMAN RIGHTS PROGRAM

MEMORANDUM

TO: Julaine Eberhard, Stephen Lewis Foundation
FROM: Teresa MacLean, JD Student, International Human Rights Clinic, University of Toronto Faculty of Law
DATE: October 26, 2012
RE: **The Right to Health in International Law as it Relates to African Grandmothers**

Note: This memo was prepared by a law student. It is not legal advice and is not exhaustive. The information provided herein is not a substitute for legal advice or legal assistance.

Table of Contents

1. Purpose

The purpose of this memorandum is to explore the right to health, including access to information; facilities; goods and services; and essential medicines, and analyze the way in which these legal obligations can be applied to African Grandmothers[1] and the children they care for.

2. Summary of Conclusions

Based on the known facts, Grandmothers have strong arguments for violations of their rights to health and non-discrimination in the context of health under the various international treaties.

The right to health

Various international instruments could be relied on to establish violations of the right to health. The right to health is subject to progressive realization, however, States are under the obligation to take deliberate, concrete and targeted steps to ensure the right is realized.

- There is a strong argument for a violation of the right to health under Article 12 of the ICESCR. This right has been interpreted broadly to include a positive obligation on States to ensure access to health information, health services and essential medicines by using the maximum extent of their available resources.

- Articles 13, 17 and 24 of the CRC and Articles 10(h) and 12 of CEDAW could also be relied on. They have been interpreted to protect the right to health information and this could likely extend to health services.

The right to non-discrimination in the context of health

The right to non-discrimination is a stronger legal mechanism because it imposes immediate legal obligations on States parties. States must guarantee that the rights protected under various international Conventions, including the right to health, are exercised without discrimination of any kind, include *de facto* and *de jure* discrimination. This also includes positive obligations to ensure third parties do not discriminate.

- There is a strong argument based on gender discrimination under the various Conventions. Articles 24 and 26 of the ICCPR, Article 12 of CEDAW, Article 2 of the CRC and Article 2 of the ICESCR requires States to ensure their legislation and policies are not discriminatory or do not have the effect of being discriminatory. Discrimination against women in the field of health care and unequal access to services or information could be argued to be a violation of the aforementioned provisions.

[1] African Grandmothers are self-identified women from sub-Saharan Africa who are taking care of their orphaned grandchildren or other orphaned children in their community.

- The provisions mentioned above have also extended the prohibition on discrimination to include age as an enumerated ground. This includes protections for youth and children as well as elderly people. CEDAW has gone further and explicitly issued recommendations stating that elderly women must be considered when States are creating health legislation, policies and programmes.

- The ICESCR and the CRC have issued general recommendations that recognize health status, including HIV status, as a prohibited ground of discrimination. The UNHRC has also expressed concern with discrimination based on HIV status in the field of health care.

3. Background of the HIV/AIDS Pandemic and the Implications on African Grandmothers

Despite their immense contributions, there is a lack of documentation of the substantial role that older women or "grandmothers" have played in mitigating against the fallout of the HIV/AIDS pandemic in Sub-Saharan Africa.[2] As a result, grandmothers are often not being included in domestic institutional responses to the pandemic and denied the full enjoyment of their human rights.[3]

African grandmothers have come to testify at the *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa* ["the Grandmothers' Tribunal"] about their lives and the human rights violations they face.

The HIV/AIDS pandemic has claimed the lives of over 25 million people worldwide.[4] Sub-Saharan Africa remains one of the hardest hit areas with disproportionately high infection rates: 68% of people living with HIV reside in the region.[5] Tragically, 12 million children in sub-Saharan Africa have been orphaned by the pandemic.[6] One of the central challenges in addressing the pandemic is ensuring protection of the human rights of those living with, vulnerable to, or effected by HIV/AIDS.

---

[2] The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*, at 4 and 5.
[3] The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*, at 4 and 5. International law has recognized the contribution made by older women in terms of caregiving in the *Political Declaration and the Madrid International Plan of Action on Ageing* (para 78), but this is one of the few instances.
[4] UNAIDS, *Report on the Global AIDS Epidemic* (2008) at 31. Note: this is an estimate of deaths attributed to the pandemic from 1990-2007.
[5] UNAIDS, *GLOBAL HIV/AIDS RESPONSE: Epidemic update and health sector progress towards Universal Access Progress Report*, (2008) at 7.
[6] UNAIDS, *Report on the Global AIDS Epidemic* (2008) at 15. Note: that UNAIDS uses the term "orphan" to describe a child who has lost either one or both parents.

Women are also disproportionately affected and account for 59% of those living with HIV in sub-Saharan Africa.[7] Women bear the brunt of the HIV/AIDS pandemic because of pervasive gender inequality, which undermines their health, economic and political agency, as well as their ability to access education and information.[8] Elderly grandmothers have faced gender discrimination their whole lives.[9] This is exacerbated by ageing as well as the discrimination, stigma and hardship associated with the HIV/AIDS pandemic.[10] The result is that many grandmothers live in extreme poverty.

Despite the challenges facing them, including the loss of their own children, African grandmothers have stepped up to support and raise their orphaned grandchildren.[11] Grandmothers have nurtured, fed and put their grandchildren and other orphaned children through school.[12] They have helped these children through the loss of their parents.[13] The Grandmothers' Tribunal will bring together self-identified grandmothers who will testify about their lives and the human rights violations they face.

4. Findings

4.1 Protection of the Right to Health in International Law

The right to health has a long been recognized as a fundamental human right. It was first articulated in the 1946 *Constitution of the World Health Organization* (WHO), which states: "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."[14] The WHO constitution defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[15]

Health is also included as a component of the right to an adequate standard of

[7] UNAIDS, *Progress Report* (2011) at 6.
[8] The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*, at 1 and 5.
[9] *Committee on the Elimination of Discrimination Against* Women, General Recommendation No. 27 on older women and the protection of their human rights (2010) at para 11 and The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*, at 5.
[10] The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*, at 5.
[11] The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*, at 1 and 5.
[12] The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*, at 1 and 5.
[13] The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*, at 1 and 5.
[14] Preamble.
[15] *Ibid.*

living in the 1948 *Universal Declaration of Human Rights*.[16]

The ICESCR provides the most comprehensive guarantees on the right to health. Article 12:[17]

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
> (b) The improvement of all aspects of environmental and industrial hygiene;
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

South Africa has signed but not ratified the ICESCR, and the other 7 countries of focus, Ethiopia, Kenya, Malawi, Swaziland, Uganda, Zambia, Zimbabwe, have acceded to the Covenant.[18] The ICESCR Optional protocol has not been signed or ratified by any of our countries of focus to date.[19]

The right to health is also protected under CEDAW.[20] In General Recommendation 24, the CEDAW Committee elaborated on State obligations in relation to the right to health:[21]

> States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to

---

[16] Article 25(1) of the *Declaration* reads: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services."
[17] ICESCR, art 12.
[18] Multilateral Treaties Deposited with the Secretary General, Status of Treaties. Ch. IV, 3. International Covenant on Economic, Social and Cultural Rights. Available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en. See also Appendix A for the treaty ratification status of our countries of focus.
[19] Multilateral Treaties Deposited with the Secretary General, Status of Treaties. Ch. IV, 3(a). Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en
[20] CEDAW, art 11(1)(f) and 12.
[21] *Committee on the Elimination of Discrimination Against Women*, General Recommendation No. 24, Women and Health (Article 12), UN Doc A/54/38/Rev.1, (1999).

ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

All countries of focus have either signed, and ratified or acceded CEDAW.[22] The Optional Protocol to CEDAW has been signed
by Zambia and Malawi, and acceded by South Africa.[23]

The right to health is also recognized in other international treaties, including the *Convention on the Rights of the Child* (CRC),[24] *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD),[25] the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*[26] and the *Convention on the Rights of Persons with Disabilities*.[27] The bodies that monitor implementation of the core international human rights treaties have also adopted general comments or general recommendations on issues relating to health and the right to health. These comments and recommendations "provide an authoritative and detailed interpretation of the provisions found in the treaties."[28]

---

[22] Multilateral Treaties Deposited with the Secretary General, Status of Treaties. Ch. IV, 8. Convention on the Elimination of All Forms of Discrimination against Women. Available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en. See also Appendix A for the treaty ratification status of our countries of focus.

[23] Multilateral Treaties Deposited with the Secretary General, Status of Treaties. Ch. IV, 8(b). Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en

[24] CRC, art 24. The CRC has been signed and ratified by all countries of focus (available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en). The Optional Protocol has been signed by Ethiopia and Zambia; signed and ratified by Kenya, Malawi and South Africa; and ratified by Swaziland and Uganda (available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en).

[25] CERD, art 5(e)(iv). CERD has been signed and ratified or acceded by all countries of focus. (available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en).

[26] *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, art 28, 43(*e*) and 45(*c*). Uganda has acceded the Convention (available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en).

[27] *Convention on the Rights of Persons with Disabilities*, art 25. All countries of focus, except Zimbabwe, have signed and ratified the Convention (available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en). South Africa, Swaziland and Uganda have signed and ratified the Optional Protocol; and Zambia has signed the Optional Protocol (available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=en).

[28] United Nations Human Rights Fact Sheet No. 31, The Right to Health. Available online: http://www.ohchr.org/EN/PUBLICATIONSRESOURCES/Pages/FactSheets.aspx

Additionally, States have expressed a commitment to the right to health in other non-binding international instruments, including the *Vienna Declaration and Programme of Action*,[29] *Beijing Declaration and Platform for Action*,[30] *Copenhagen Declaration on Social Development and the Programme of Action of the World Summit for Social Development*,[31] *International Conference on Population and Development*,[32] *Political Declaration and the Madrid International Plan of Action on Ageing*[33] and *Millennium Development Goals*.[34]

The UN General Assembly has also issued resolutions that emphasize State's obligations to protect the right to health in the context of HIV and AIDS, including the Declaration of Commitment on HIV/AIDS.[35] These resolutions have recognized the importance of strengthening health systems and integrating HIV care into broader health services.[36] They have also emphasized gender equality and empowerment of women as fundamental to reducing the vulnerability of women and girls to HIV.[37] Additionally, combating stigma and discrimination is seen as a critical element to addressing the pandemic.[38]

The right to health is also recognized in various regional human rights instruments, including the *African Charter on Human and Peoples' Rights* (*African Charter*)[39] and is constitutionally recognized in over 60 States. The *African Charter* has been signed, and ratified or acceded to by all countries of interest.[40] The African Commission on Human and Peoples' Rights (African Commission) is a quasi-judicial body tasked with monitoring State compliance with the *African Charter*.[41] The Protocol to the *African Charter* created the African Court on Human and

[29] UN Doc. A/CONF.157/23, Art 18, 24, 31 and 41.
[30] Paras 17, 27, 30, 46, 57, 60(e), 62(d), 85(k) and (r), 91-112, 281, 282. All countries of interest were in attendance.
[31] UN Doc. A/CONF.166/9, Commmitment 2(b), Commitment 5 (d) and (f) and Commitment 6. All countries of interest were in attendance.
[32] Art 7.1 - 7.48; 8.1 - 8.35. All countries of interest were in attendance.
[33] Art 14. Ethiopia, Kenya, Malawi, South Africa, Uganda, Zambia and Zimbabwe were in attendance.
[34] Millennium Development Goal 6. All countries of interest were in attendance.
[35] General Assembly resolution S-26/2, *Declaration of Commitment on HIV/AIDS* (2001); General Assembly resolution 60/262, Political Declaration on HIV/AIDS (2006); General Assembly resolution 65/277, Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS (2011).
[36] Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS (2011) at paras 38, 42 and 43.
[37] Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS (2011) at paras 21, 22, 53 and 81.
[38] Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS (2011) at paras 21, 39, 57, 77 and 80-83.
[39] Art 16.
[40] List of Countries which have Signed, Ratified/Acceded to the African Charter on Human and Peoples' Rights. Available online: http://www.africa-union.org/root/au/documents/treaties/treaties.htm.
[41] African Charter on Human and Peoples' Rights (1981, entered into force 1986) at 9. Available online: http://www.africa-union.org/root/au/documents/treaties/treaties.htm.

Peoples' Rights and allows for individual complaints to be heard by the African Commission.[42] The Protocol has been signed but not ratified by Ethiopia, Swaziland, Zambia and Zimbabwe, and signed and ratified by Kenya, Malawi, South Africa and Uganda.[43]

4.1.1 State Treaty Obligations

States are under the immediate obligation to protect the rights enshrined in the *International Covenant on Civil and Political Rights* (ICCPR), including the right to non-discrimination (Arts. 2 and 26), equality between men and women (Art. 4), right to life (Art. 6), and right to security of the person (Art. 9).

Economic, social and cultural rights, such as the rights to health (Art. 12) or the right to education (Art. 13), are subject to progressive realization under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[44] While the ICESCR Committee acknowledges that resource constraints exist,[45] it has stressed that States parties have a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights."[46] Article 2(1) of the ICESCR requires that States "take steps" towards full realization of relevant rights. The Committee has stated that States must take such steps "within a reasonably short time after the Covenant's entry into force for the States concerned" and that "[s]uch steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."[47] There are also State obligations of immediate effect, including undertaking that economic, social and cultural rights are exercised without discrimination.[48]

The *Convention on the Elimination of Discrimination Against Women* (CEDAW) requires States parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."[49]

---

[42] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998, entered into force 2004). Available online: http://www.africa-union.org/root/au/documents/treaties/treaties.htm.

[43] List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights. Available online: http://www.africa-union.org/root/au/documents/treaties/treaties.htm.

[44] *Committee on Economic, Social and Cultural Rights*, General Comment No. 3, The nature of States parties obligations (Art 2, par.1) (1990).

[45] *Committee on Economic, Social and Cultural Rights*, General Comment No. 3, The nature of States parties obligations (Art 2, par.1) (1990).

[46] *Committee on Economic, Social and Cultural Rights*, General Comment No. 3, The nature of States parties obligations (Art 2, par.1) (1990), at para 10.

[47] *Committee on Economic, Social and Cultural Rights*, General Comment No. 3, The nature of States parties obligations (Art 2, par.1) (1990), at para 2.

[48] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009).

[49] CRC art 3.

The *Convention on the Rights of the Child* (CRC), the most widely ratified international human rights instrument, obliges States parties to "undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation" in relation to economic, social and cultural rights such as the right to health.[50] In the context of civil and political rights, such as non-discrimination and the right to life, States are required to "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."[51]

4.3 Key Components of the Right to Health

Human rights are inalienable, interdependent, indivisible, and interrelated. This basic premise is perhaps most apparent in the right to health context. The right to health is related to and dependent the realization of other human rights, including the rights to life, non-discrimination, equality, human dignity, housing, food, work, education, access to information, and privacy, among others.[52] For example, a child who does not have adequate health services or medication for the treatment of HIV will likely be unable to fully realize his or her right to education.

The right to health should not be understood as a right to be *healthy*.[53] Rather, "the notion of "the highest attainable standard of health" in article 12.1 of ICESCR takes into account both the individual's biological and socio-economic preconditions and a State's available resources."[54] The right to health is a right to the enjoyment of facilities, goods, services and conditions necessary to realize the highest attainable standard of health.[55] The right to health has also been articulated as an inclusive right that extends past timely and appropriate health care to the underlying determinants of health, including "access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health."[56]

---

[50] CRC art 4.
[51] CRC art 4.
[52] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 3.
[53] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 8.
[54] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 9.
[55] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 9.
[56] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 11.

The ICESCR Committee has elaborated on State obligations in relation to the right to health:[57]

> The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote. The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

States are required to "progressively realize" the right to health. This means that they have "a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 12."[58]

The right to health contains both freedoms and entitlements. Freedoms "include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference," including non-consensual medical treatment and interference.[59] Entitlements "include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health."[60]

4.3.1 The Right to Health for the Elderly

The right of older persons to health is well-established. States that signed the *Political Declaration and the Madrid International Plan of Action on Ageing* ["*Madrid Declaration"*] expressed a commitment to protect and guarantee the right to health of the elderly.[61] A main objective of the *Madrid Declaration* was to recognize the

---

[57] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 33.
[58] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 31.
[59] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 8.
[60] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 8.
[61] *Political Declaration and the Madrid International Plan of Action on Ageing*. All countries of focus except Swaziland were in attendance.

contribution made by older women in acting as caregivers and surrogate parents to children affected by HIV and to provide them with support.[62]

The ICESCR Committee has affirmed that, to ensure the full realization of the right to health of older persons, States should take an integrated approach, which combines elements of preventative, curative and rehabilitative health treatment.[63] The CEDAW Committee has emphasized that States should adopt comprehensive health policies aimed at addressing the needs of older women.[64]

The General Assembly has also adopted resolutions relating to the right to health of older persons,[65] including a resolution recognizing that older persons should have access to health care to "help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness."[66] This resolution emphasizes that UN member States should incorporate the provision of income, family and community support and self-help in their national programs to allow older persons to have access to health care.[67]

4.3.2 The Right to Non-Discrimination in the Exercise of the Right to Health

The right to non-discrimination is guaranteed in every human rights treaty and is a cornerstone to ensuring that individuals can fully realize their human rights. The *Universal Declaration of Human Rights* (UDHR) and various international human rights treaties establish that everyone is entitled to the rights and freedoms "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[68]

The right to be free from discrimination is enshrined in the ICCPR, which states:[69]

---

[62] *Political Declaration and the Madrid International Plan of Action on Ageing* at para 78.

[63] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 25. See also *Committee on Economic, Social and Cultural Rights*, General Comment No. 6, The economic, social and cultural rights of older persons, UN Doc E/C.12/2000/4 (1995) at paras 34 and 35..

[64] *Committee on the Elimination of Discrimination Against* Women, General Recommendation No. 27 on older women and the protection of their human rights (2010).

[65] General Assembly resolution 65/189, International Widows' Day (2010); General Assembly resolution 66/127, Follow-up to the Second World Assembly on Ageing

[66] General Assembly resolution 46/91, United Nations Principles for Older Persons (1991) Principle 11.

[67] General Assembly resolution 46/91, United Nations Principles for Older Persons (1991) Principle 1.

[68] UDHR art 2; ICESCR art 2(2); CCPR art 26; CRC art 2.

[69] ICCPR art 26. All States of focus have ratified the ICCPR (available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en). Malawi, South Africa, Uganda and Zambia have ratified the Optional Protocol to the ICCPR (available online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en).

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The right to health guaranteed in Article 12 of the ICESCR includes the immediate obligation to guarantee that the right is exercised without discrimination of any kind.[70] The ICESCR Committee has firmly established that under their obligation to *respect* the right to health, States must ensure equal access for all persons to preventative, curative and palliative health services and States must abstain from enforcing and imposing discriminatory practices and policies, including in relation to women.[71] Additionally, under their obligation to *protect* the right to health, States parties have the affirmative duty to adopt legislation or other measures to ensure equal access to health care and health-related services provided by third parties.[72]

Discrimination is defined by the ICESCR Committee as "any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights."[73] Direct discrimination includes detrimental acts or omissions "when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground."[74] Indirect discrimination occurs when laws, policies or programmes that appear neutral on their face have a disproportionate and discriminatory effect on the exercise of Covenant rights.[75]

States parties must eliminate formal or *de jure* discrimination, which means

---

[70] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 30

[71] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 34.

[72] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 35.

[73] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 7. See also CERD art 1; CEDAW art 1(7); UNHRC, General Comment No. 18, Non-discrimination (1989).

[74] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 10.

[75] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 10(b).

ensuring their constitution, laws and policies do not discriminate on prohibited grounds.[76] States are also obligated to "immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination," which can result from indirect discrimination.[77] States are also required to adopt measures, including legislation, to ensure that the private sphere does not discriminate on prohibited grounds.[78]

Grandmothers may face discrimination on many grounds, including their age, gender, and health status.[79] They have suffered from pervasive gender equality their entire lives, which undermines their health, economic and political agency, as well as their ability to access education and information.[80] Ageing and the HIV pandemic have exacerbated the discrimination and stigma they face.[81] This discrimination has resulted in extreme poverty and isolation for both the Grandmothers and the children they are now raising. [82] They have also been denied their right to health because of discrimination.[83] Discriminatory State policies or legislation or those that result in *de facto* discrimination against African grandmothers in terms of the right to health would the right to non-discrimination as guaranteed by various treaties.

4.3.2.1 Discrimination based on Sex

The prohibition on discrimination based on sex is guaranteed by Articles 2, 3 and 26 of the ICCPR, Article 2(2) of the ICESCR, and Article 2 of the CRC.

In *Broeks* v. *Netherlands*[84] and *Zwaan de Vries* v. *Netherlands*,[85] the UN Human Rights Committee (UNHCR) found violations of Article 26 of the ICCPR where there was unequal provision of social security between men and women.[86] This is significant because it establishes that the prohibition on discrimination in the ICCPR goes beyond providing protection on the basis civil and political rights, but also requires that legislation and policies related to other rights, including

[76] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 8(a).
[77] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 8(b)
[78] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 11.
[79] The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*, at 2 and 5.
[80] The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*, at 1 and 5.
[81] The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*, at 5.
[82] *Ibid*.
[83] *Ibid*.
[84] UNHRC, Communication No. 172/1984, UN Doc. CCPR/C/29/D/172/1984 (1984).
[85] UNHRC, Communication No. 182/1984, UN Doc. A/42/40 (1984).
[86] More recently, in *Young* v. *Australia*, the UNHRC found legislation providing pensions only to opposite-sex partners constituted a violation under Article 26 (Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000 (2003)).

economic and social rights, is non-discriminatory. In its General Comment No. 18, the UNHRC states that States are also required to take affirmative action to diminish or eliminate conditions that either cause or help to perpetuate discrimination prohibited by the ICCPR.[87]

The entire foundation of CEDAW is to ensure that women are free from discrimination in all areas of civil, political, social, economic and cultural life as discrimination "violates the principles of equality of rights and respect for human dignity."[88] CEDAW specifically guarantees the right to equality in health under Article 12, which requires States parties to eliminate discrimination against women in the field of health care and ensure equal access for men and women to health care services.[89]

The CRC Committee has expressed concern with gender discrimination facing girls in relation to HIV/AIDS.[90] Taboos and judgmental attitudes regarding the sexual activity of female adolescents has the effect of limiting their access to preventative measures and other services, which increases their vulnerability to HIV infection.[91] Harmful traditional practices, such as early and/or forced marriage, "violate [the girl child's] rights and make her more vulnerable to HIV infection, including because such practices often interrupt access to education and information."[92] The CRC Committee has stated that States parties must give careful consideration to prescribed gender norms within their societies with a view to eliminating gender-based discrimination in this regard.[93] Additionally, States are obligated to protect children under Article 24 of the ICCPR: the UNHRC has established that this requires that girls be treated equally to boys "in education, in feeding and in health care."[94]

4.3.2.1 Discrimination based on Age

The ICESCR Committee interprets the term "other status" as a prohibited ground of discrimination to include age.[95] This can refer to either young persons or older

[87] UNHRC, General Comment No. 18, Non-discrimination (1989) at para 10.
[88] CEDAW, preamble.
[89] *Committee on the Elimination of Discrimination Against Women*, General Recommendation No. 19, Violence Against Women, UN Doc. A/47/38 (1992) at para 19.
[90] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 8.
[91] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 8.
[92] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 11.
[93] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 8.
[94] UNHRC, General Comment No. 28, Equality of rights between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10 (2000) at para 128.
[95] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 29.

persons.[96] In their General Recommendation No. 25, the CEDAW Committee states that age is a ground on which women may suffer multiple forms of discrimination.[97] States parties are required to eliminate discrimination against older women and ensure that their legislation and policies consider the needs of older women.[98]

Although age is not specifically enumerated in the ICCPR, the UNHRC has considered cases where complainants have alleged discrimination based on age.[99] The Committee "takes the view that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of "other status" under the clause in question."[100]

4.3.2.1 Discrimination based on Health Status

Health status is not a specifically prohibited ground of discrimination under the ICCPR or the ICESCR. However, the ICESCR Committee has interpreted the term "other status" to include health status.[101] Health status refers to both real and perceived health status, physical or mental health status, and includes HIV status.[102] The Committee urges States to "ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant."[103]

The UNHRC has expressed concern with discrimination and stigmatization based on HIV status in the field of health care.[104] It has urged, for example, Moldova to take measures to address the stigmatization of those living with HIV/AIDS through awareness-raising campaigns, and to amend legislation and regulatory frameworks to eliminate any discriminatory laws or rules pertaining to HIV/AIDS.[105]

---

[96] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 29.
[97] *Committee on the Elimination of Discrimination Against* Women, General Recommendation No. 25 on temporary special measures (2004) at para 12. Committee *on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 29.
[98] *Committee on the Elimination of Discrimination Against* Women, General Recommendation No. 27 on older women and the protection of their human rights (2010).
[99] Human Rights Committee, *Love v Australia*, Communication No. 983/2001 and *Schmitz-de-Jong v The Netherlands*, Communication No. 855/1999.
[100] Human Rights Committee, *Love v Australia*, Communication No. 983/2001 at para 8.2.
[101] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 33.
[102] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 33. See also *Committee on the Righs of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 9.
[103] *Committee on Economic, Social and Cultural Rights*, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art 2, para. 2), UN Doc E/C.12/GC/20 (2009) at para 33.
[104] *Human Rights Committee*, *Concluding Observations Republic Of Moldova*, UN Doc. CCPR/C/MDA/CO/2 (2009) at para 12.
[105] *Human Rights Committee*, *Concluding Observations Republic Of Moldova*, UN Doc. CCPR/C/MDA/CO/2 (2009) at para 12.

The CRC Committee reports that children of parents living with HIV or AIDS face discrimination and stigmatization because they are often assumed to be infected.[106] As a result of this discrimination based on HIV status, children are denied access to education, information, health services, social services and, in the most extreme cases, abandonment by their families, communities and societies.[107] States are to ensure that laws, policies, strategies and practices address all forms of discrimination that contribute to increasing the impact of HIV/AIDS.[108] Strategies should include education and training programmes that are designed to eliminate discrimination and stigma associated with the pandemic.[109] If States fail to take affirmative steps to combat and eliminate widespread discrimination, then it could be argued that they have violated Article 2 of the CRC.

4.3.3 The Right to Health Information

The HIV/AIDS pandemic has been exacerbated by a lack of accurate health information. In particular, lack of knowledge surrounding modes of transmission and ways to prevent exposure has a disproportionate impact on women and youth.[110] The *Joint United Nations Program on HIV/AIDS* (UNAIDS) reports that youth between the ages of 15 and 24 make up the majority of new infections in some parts of the world.[111] Being young and female amplifies the risk. Infection rates among young women aged 15 to 24 are twice as high as young men of that age group, and account for 31% of new infections in Sub-Saharan Africa.[112] This is likely due to the fact that young women aged 15 to 24 are generally less informed than young men of the same age group about HIV/AIDS.[113] The 2008 UNAIDS study has found that while 70% of young men knew that condoms can prevent against HIV transmission, only 55% of young women were aware of this.[114] Certain developing States fare even worse. UNAIDS has reported that in Somalia only 4% of young women aged 15 to 24 possess accurate knowledge of HIV and only 11% of adult women know that condoms are able to prevent HIV transmission.[115] It is thus absolutely crucial that accurate information about how to properly prevent the HIV is disseminated.

The *Madrid Declaration* recognizes that older persons can be at an increased risk of

---

[106] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 7.
[107] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 7.
[108] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 9.
[109] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 9.
[110] UNAIDS Fact Sheet: Adolescents, young people and HIV (2012).
[111] UNAIDS Fact Sheet: Adolescents, young people and HIV (2012).
[112] UNAIDS, World AIDS Day report (2011).
[113] UNAIDS, Global Report (2008) at 98.
[114] UNAIDS, Global Report (2008) at 98.
[115] UNAIDS, Global Report (2008) at 98.

HIV infection "merely because they are typically not addressed by public information campaigns and thus do not benefit from education on how to protect themselves."[116] Additionally, in their General Recommendation No. 27, the CEDAW Committee reports that information on HIV/AIDS is "rarely provided in a form that is acceptable, accessible and appropriate for older women."[117] African grandmothers must have access to accurate information related to HIV. This includes health information necessary to protect themselves from infection and to educate those in their care about HIV transmission. Grandmothers also require access to the information necessary to address their health concerns, including HIV counseling and testing services.

States are specifically required to ensure access to information related to health under various international Conventions, including Articles 10(h) and 12 of CEDAW, and Articles 13, 17 and 24 of the CRC. The ICESCR Committee has firmly established that the right to health, protected by Article 12, includes the obligation of States to provide accurate health information.[118] Article 12(2)(c), the right to prevention, treatment and control of epidemic, endemic, occupational and other diseases, has been interpreted by the ICESCR Committee to require "the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS."[119] Under their obligation to *respect* the right to health, States are to refrain "from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information."[120]

CEDAW requires States parties to eliminate discrimination against women in the field of education (Art. 10) and health (Art. 12). In the context of HIV/AIDS, the CEDAW Committee recommends that States parties "intensify efforts in disseminating information to increase public awareness of the risk of HIV infection and AIDS, especially in women and children, and of its effects on them."[121] The Committee also recommends that States remove all barriers to women's access to health education and information and allocate resources for programmes directed

---

[116] *Political Declaration and the Madrid International Plan of Action on Ageing* at para 78.
[117] *Committee on the Elimination of Discrimination Against* Women, General Recommendation No. 27 on older women and the protection of their human rights (2010) at para 21.
[118] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at paras 11, 34 and 36.
[119] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 16. See also para 36, which says that States, under their obligation to *fulfil* the right to health, are required to promote health information and provide HIV/AIDS information campaigns.
[120] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 34.
[121] *Committee on the Elimination of Discrimination Against Women*, General Recommendation No. 15, Women and AIDS (1990).

at adolescents for the prevention and treatment of HIV/AIDS.[122] Additionally, in *Szijjarto v. Hungary*, the CEDAW Committee held that a failure to provide information and advice on family planning prior to conducting a sterilization procedure on the complainant violated Articles 10(h), 12 and 16 of the Convention.[123] Similarly, one could argue that a state's failure to provide information necessary to fully ensure one's health in the context of HIV/AIDS also violates Articles 10(h) and 12 of CEDAW.

Article 24 of the CRC requires that States parties develop "preventive health care, guidance for parents and family planning education and services." Article 13 protects the right of the child to "seek, receive and impart information and ideas of all kinds." Article 17 requires that States parties "ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health." This has been interpreted by the CRC Committee to include sex education.[124]

Children should have access to information related to HIV/AIDS prevention and care through formal channels, including educational opportunities and media targeted at children, and informal channels, which target children living on the street, in institutions and in difficult circumstances.[125] Such information should be "relevant, appropriate and timely," be tailored "appropriately to age level and capacity" and enable children "to deal positively and responsibly with their sexuality in order to protect themselves from HIV infection."[126] The CRC Committee has stated that to be effective, prevention programs must "acknowledge the realities of the lives of adolescents while addressing sexuality by ensuring equal access to appropriate information, life skills, and to preventive measures."[127]

4.3.4 The Right to Health Facilities, Goods and Services

The right to health facilities, goods and services is essential to ensuring that individuals fully realize their right to the highest attainable standard of physical and mental health.[128] Availability and accessibility of health facilities, goods and

---

[122] *Committee on the Elimination of Discrimination Against Women*, General Recommendation No. 24, Women and Health (1990) at para 31.
[123] *Committee on the Elimination of all forms of Discrimination Against Women*, *Szijjarto v. Hungary*, CEDAW Dec. 4/2004, OHCHROR, UN Doc. A/61/38 (2006).
[124] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 6.
[125] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 16.
[126] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 16.
[127] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 9.
[128] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 9.

services are large barriers to the full realization of the right to health for grandmothers and the children they care for, particularly for those who are living with HIV.[129] Facilities, goods and services in the context of HIV/AIDS include prevention methods, such as condoms; HIV testing; and treatment regimes, such as access to medicines.[130]

Grandmothers have suffered the loss of their children and have taken on the responsibility of caring for orphaned children, who are also under immense emotional trauma.[131] Access to appropriate mental health care and services, which could include counseling, bereavement and caregiver support, is necessary to ensure mental health.[132]

As states have failed to provide such health services, Grandmothers often rely on community-based services.[133] Community-based organizations provide access to free or low-cost home-based care, as well as provide transportation to medical clinics for testing, treatment, medicine disbursements and counseling services for adherence, prevention and emotional trauma.[134]

Access to health care services is a basic right guaranteed by Article 12(2)(d) of the ICESCR, Article 24 of the CRC and Articles 12 and 14 of the CEDAW.[135] Under Article 14(2)(b) of the CEDAW and Article 12(2)(d) of the ICESCR, States must ensure health facilities, goods and services are available without discrimination and provide equitable access, in terms of geographical location and affordability, to these services.[136,137] The ICESCR Committee has stated that States are also required, under their obligation to *fulfil* the right to health, to provide "a public,

---

[129] *Committee on the Elimination of Discrimination Against* Women, General Recommendation No. 27 on older women and the protection of their human rights (2010) at paras 11, 12, 14 and 21.
[130] United Nations Human Rights Fact Sheet No. 31, The Right to Health, at 15, 21. Available online: http://www.ohchr.org/EN/PUBLICATIONSRESOURCES/Pages/FactSheets.aspx. See also *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 17.
[131] The Stephen Lewis Foundation, *Global Tribunal on Violations of Older Women's Human Rights in the Context of the HIV and AIDS Pandemic in sub-Saharan Africa*.
[132] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 17.
[133] From Julaine, "Tribunal Main Issues"
[134] From Julaine, "Tribunal Main Issues"
[135] *Committee on the Elimination of Discrimination Against Women*, General Recommendation No. 24, Women and Health (Article 12), UN Doc A/54/38/Rev.1, (1999) at para 1.
[136] *Committee on the Elimination of Discrimination Against Women*, General Recommendation No. 24, Women and Health (Article 12), UN Doc A/54/38/Rev.1, (1999) at para 28.
[137] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 17.

private or mixed health insurance system which is affordable for all."[138] The Committee has confirmed that this also requires States to ensure equitable access to counseling and mental health services.[139]

The ICESCR Committee articulates that are four essential and interrelated components in the right to health facilities, goods and services, including:[140]

> (a) *Availability.* Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party.
>
> (b) *Accessibility.* Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:
>
> Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.
>
> Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas.
>
> Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.

---

[138] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 36.
[139] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 36.
[140] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000).

> Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.
>
> (c) *Acceptability.* All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.
>
> (d) *Quality.* As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

The ICESCR Committee has established that under their obligation to *protect* the right to health, States are to adopt legislation or other measures to guarantee that the components described above are met.[141] The right to health under article 12(2)(d) of the ICESCR also protects the right to the highest attainable standard of mental health, which has been interpreted to include the right to the provision of appropriate mental health treatment and care.[142]

The CEDAW Committee has stated that States should implement a comprehensive national strategy to promote women's health throughout their lifespan.[143] This strategy must include interventions aimed at the prevention and treatment of diseases and conditions affecting women to "ensure universal access for all women to a full range of high-quality and affordable health care, including sexual and reproductive health services."[144] Programmes aimed at combating HIV and AIDS should ensure that the rights, needs and vulnerabilities of women and children are taken into account.[145] The Committee also states that women should be involved in

---

[141] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 35.
[142] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 17.
[143] *Committee on the Elimination of Discrimination Against Women*, General Recommendation No. 24, Women and Health (Article 12), UN Doc A/54/38/Rev.1, (1999) at para 29.
[144] *Committee on the Elimination of Discrimination Against Women*, General Recommendation No. 24, Women and Health (Article 12), UN Doc A/54/38/Rev.1, (1999) at para 29.
[145] *Committee on the Elimination of Discrimination Against Women*, General Recommendation No. 15, Women and AIDS (1990).

the planning, implementation and monitoring of policies and programmes related to the health of women. [146]

The UNHRC has found State violations of Article 10 of the ICCPR, the obligation to ensure humane treatment of persons deprived of their liberty, in the context of failure to provide health services to detainees.[147] Additionally, the right to health services has been litigated successfully regionally in situations other than that of detainees.

In *Purohit and Moore v. Gambia*, the African Commission on Human and Peoples' Rights, found that the State violated Article 16, the right to the best attainable state of physical and mental health, guaranteed in the *African Charter.* This occurred in the context of failure to provide health facilities for mental health patients. The African Commission has read in the obligation under Article 16 of States parties to "to take concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind."[148] In *Free Legal Assistance Group and Others v. Zaire*, the African Commission found a violation of Article 16 by virtue of State failure to provide basic services, such as safe drinking water, electricity and medicine.[149]

The treaty-monitoring committees, including UNHRC, ICESCR, CEDAW and CRC have all expressed concern over lack of access to health services in their Concluding Observations on various countries, including all of our countries of focus.[150] They have also used these reports as a way to urge States to remedy these violations and provide access to health services.[151]

---

[146] *Committee on the Elimination of Discrimination Against Women*, General Recommendation No. 24, Women and Health (Article 12), UN Doc A/54/38/Rev.1, (1999) at para 31.

[147] *Human Rights Committee*, *Madafferi v. Australia*, Communication No. 1011/2001, UN Doc. A/59/40 vol. II, (2004). See also: *Howell v. Jamaica*, Communication No. 798/1998, UN Doc. A/59/40 vol. II, (2003).

[148] African Commission on Human and Peoples' Rights, *Purohit and Moore v Gambia*, Communication No. 241/2001 (2003) at para 84.

[149] African Commission on Human and Peoples' Rights, *Free Legal Assistance Group and Others v Zaire*, Communication No. 5/89, 47/90, 56/91, 100/93 (1995).

[150] For example, see Kenya, ICCPR, A/60/40 vol. I (2005) at para 15; Uganda, ICCPR, A/59/40 vol. I (2004) at para 14; Algeria, ICESCR, E/2002/22 (2001) 116 at para 826; Ethiopia, ICESCR, E/C.12/ETH/CO/1-3 (2012) at paras 21 and 25; Yemen, ICESCR, E/2004/22 (2003) 55 at paras. 358 and 364; Zambia, ICESCR, E/2006/22 (2005) at para 99; Ethiopia, CEDAW, CEDAW/C/ETH/CO/6-7
(2011) at para 34; Ethiopia, CEDAW, CRC/C/ETH/CO/3 (2006) at paras 53 and 55; Malawi, CEDAW, CEDAW/C/MWI/CO/6 (2010) at para 34, 40; South Africa, CEDAW, A/53/38/Rev.1 (1998) at para 133; Uganda, CEDAW, CEDAW/C/UGA/CO/7 at para 35; Zambia, CEDAW, A/57/38 part II (2002) at paras 242 and 244; Zimbabwe CEDAW/C/ZWE/CO/2-5 (2012) at para 33 and 35; Ethiopia, CRC, CRC/C/ETH/CO/3 (2006) at paras 54 and 56; Swaziland, CRC, CRC/C/SWZ/CO/1 (2006) at para 51; Guinea-Bissau, CRC, CRC/C/118 (2002) at paras 64 and 70; Botswana, CRC, CRC/C/143 (2004) at paras 149, 151 and 153.

[151] For example, see Kenya, ICCPR, A/60/40 vol. I (2005) at para 15; Algeria, ICESCR, E/2002/22

4.3.5 The Right to Access Essential Medicines

African grandmothers require essential medicines either because they are living with a disease such as HIV, or are the caregivers of children requiring essential medicines.

Access to medicine in the event of sickness is particularly crucial in the HIV/AIDS pandemic and international law is beginning to view it as an indispensable component of the right to the highest attainable standard of health.[152] Essential medicines are defined by the WHO as those that: "satisfy the priority health care needs of the population" and "are intended to be available within the context of functioning health systems at all times in adequate amounts, in the appropriate dosage forms, with assured quality, and at a price the individual and the community can afford."[153] Antiretroviral (ARV) treatment is recognized as an essential treatment, as it significantly reduces AIDS related mortality and allows people living with HIV have a much higher quality of life.[154]

One of the major barriers to ARV treatment in the developing world has been the World Trade Organization's (WTO) Agreement on *Trade-Related Aspects of Intellectual Property Rights* (TRIPS), which was introduced in 1994. Under TRIPS, member states of the WTO are obliged to provide 20-year patent protection in all fields of technology, including pharmaceuticals.[155] Due to TRIPS, access to ARVs have been severely restricted in developing nations because of the prohibitive cost associated, which averages about $10,000 to $15,000 US per patient per year.[156]

Global discontent with the implications of TRIPS on poorer nations resulted in the *Doha Declaration on the TRIPS Agreement and Public Health* (Doha Declaration). The Doha Declaration supports "WTO Members' right to protect public health and,

---

(2001) 116 at para 840, Ethiopia, ICESCR, E/C.12/ETH/CO/1-3 (2012) at paras 21 and 25; Republic of Moldova, ICESCR, E/2004/22 (2003) 49 at para 336; Yemen, ICESCR, E/2004/22 (2003) 55 at paras. 377 and 383; Zambia, ICESCR, E/2006/22 (2005) at para 122; Ethiopia, CEDAW, CEDAW/C/ETH/CO/6-7 (2011) at para 34; Malawi, CEDAW, CEDAW/C/MWI/CO/6 (2010) at para 35, 41; South Africa, CEDAW, CEDAW A/53/38/Rev.1 (1998) at para 134; Uganda, CEDAW, CEDAW/C/UGA/CO/7 at para 36; Zambia, CEDAW, A/57/38 part II (2002) at paras 243 and 245; Gambia, CEDAW, A/60/38 part II (2005) at paras 204-206; Zimbabwe CEDAW/C/ZWE/CO/2-5 (2012) at para 34 and 36; Ethiopia, CRC, CRC/C/ETH/CO/3 (2006) at paras 54 and 56; Swaziland, CRC, CRC/C/SWZ/CO/1 (2006) at para 52; Guinea-Bissau, CRC, CRC/C/118 (2002) at paras 65 and 71; Botswana, CRC, CRC/C/143 (2004) at paras 150, 152 and 154.

[152] General Assembly resolution S-26/2, *Declaration of Commitment on HIV/AIDS*, (2001) Para 15.

[153] World Health Organization, 'Essential Medicines: Definition', available at http://www.who.int/medicines/services/essmedicines_def/en/. See also World Health Organization, The selection and use of essential medicines, Technical Report Series 920:54 (2003).

[154] UNAIDS, Together we will end AIDS (2012) at 3,

[155] Art 33.

[156] Perez-Casas C, Mace C, Berman D, Double J. *Accessing ARVs: untangling the web of antiretroviral price reductions*, 1st edition, Geneva: Medecins Sans Frontieres/Campaign for Access to Essential Medicines (2001) available at http://www.msfaccess.org/fileadmin/user_upload/diseases/hiv-aids/Untangling_the_Web/UTW%201%20Sep%202001.pdf

in particular, to promote access to medicines for all."[157] This 'TRIPS flexibility' allows for the production of lower-cost generic pharmaceuticals on a large scale and in 2011, ARV medication was provided to approximately 8 million people in the developing world.[158] UNAIDS reports that AIDS related deaths have been steadily decreasing in sub-Saharan Africa, largely due to this provision of free ARV medications.[159]

The ICESCR Committee confirms that States have a core obligation, under Article 12(2), to "provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs."[160] In addition, Article 15(1)(b) of ICESCR guarantees the right to "share in scientific advancement and its benefits," which could be argued to include essential medicines.[161]

States are required to ensure that human rights take precedence over economic policies and agreements.[162] To this regard, the ICESCR Committee has stated that States must ensure that : "legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant."[163]

The Special Rapporteur on the Right to the Highest Attainable Standard of Health, Anand Grover, has stated that under their duty to respect, protect and fulfil the right to health, States are required to "ensure that medicines are available, accessible, culturally acceptable, and of good quality."[164] Additionally, member states agreed at the United Nations Millennium Summit to achieve, by 2010, universal access to HIV/AIDS treatment for all those who need it.[165] The

---

[157] *Declaration on the TRIPS Agreement and Public Health*. Doha Ministerial Conference, Doc. WT/MIN(01)/DEC/2 (2001) at para 4.
[158] UNAIDS, Together we will end AIDS (2012) at 9.
[159] UNAIDS, Global Report (2011) at 7.
[160] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 43.
[161] See Stephen P. Marks, "Access to Essential Medicines as a Component of the Right to Health" in *Swiss Human Rights Book Vol. 3: Realizing The Right To Health* (Zurich: Ruffer and Rub Pub, 2009) at 87.
[162] *Committee on Economic, Social and Cultural Rights*, General Comment No. 17, The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15(1)(c)) (2005) at para 35.
[163] *Committee on Economic, Social and Cultural Rights*, General Comment No. 17, The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15(1)(c)) (2005) at para 35.
[164] Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc. A/HRC/11/12 (2009) at para 10 (a)).
[165] *Millennium Development Goals*, Goal 6B. See also *Millennium Development Goals*, Goal 8E.

Commission on Human Rights (now the UN Human Rights Council) has also adopted a resolution to this regard.[166]

Furthermore, the UN General Assembly issued a declaration affirming that access to essential medicines if a fundamental component of the right to health:[167]

> Recognizing that access to medication in the context of pandemics such as HIV/AIDS is one of the fundamental elements to achieve progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

The ICCPR Committee, the ICESCR Committee and the CRC Committee, in their concluding observations on various states, have expressed concern with the lack of availability of generic medicines, including in Ethiopia, Kenya, Malawi, South Africa, Uganda and Zambia.[168] They have also strongly urged States, including Ethiopia, Kenya, Malawi and Uganda to make use of the flexibilities provided by the Doha Declaration in order to ensure access to generic, affordable medicines for its people.[169] There has been domestic litigation in South Africa, which has established a State responsibility to provide equitable access to essential medicines. In *Minister of Health and Others v. Treatment Action Campaign and Other*, the Constitutional Court of South Africa established that only providing nevirapine, a medication to prevent mother-to-child transmission of HIV/AIDS, to a subset of pregnant women was unconstitutional and ordered the government to ensure equitable availability of the medication.[170]

---

[166] *Commission on Human Rights*, *Intellectual property rights and human rights*, UN Doc. E/CN.4/Sub.2/RES/2000/7 (2000). See also the Report of the High Commissioner for Human Rights, *The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights*, UN Doc. E/CN.4/Sub.2/2001/13

[167] General Assembly resolution S-26/2, *Declaration of Commitment on HIV/AIDS*, (2001) Para 15.

[168] For example, see: Kenya, ICCPR, A/60/40 vol. I (2005) 44 at paras. 86(15); Uganda, ICCPR, A/59/40 vol. I (2004) at para 14; Namibia, ICCPR, A/59/40 vol. I (2004) 64 at para. 74(10); Zambia, ICESCR, E/2006/22 (2005) 19 at para 99; Jamaica, ICESCR, E/2002/22 (2001) 130 at paras. 939; Ethiopia, CEDAW, CEDAW/C/ETH/CO/6-7 (2009) at para 34; South Africa, CEDAW, CEDAW/C/ZAF/CO/4 (2011) at para 35; Malawi, CRC, CRC/C/MWI/CO/2 (2009) at para 58; Jamaica, CRC, CRC/C/132 (2003) 86 at paras. 434; Philippines, CRC, CRC/C/150 (2005) 24 at paras.161; Nicaragua, CRC, CRC/C/150 (2005) 132 at para 640.

[169] For example, see: Kenya, ICCPR, A/60/40 vol. I (2005) 44 at paras. 86(15); Uganda, ICCPR, A/59/40 vol. I (2004) at para 14; Namibia, ICCPR, A/59/40 vol. I (2004) 64 at para. 74(10); Ecuador, ICESCR, E/2005/22 (2004) 39 at para 321; Chile, ICESCR, E/2005/22 (2004) 67 at para 586; Malawi, CRC, CRC/C/MWI/CO/2 (2009) at para 59; Uganda, CRC, CRC/C/UGA/CO/2 (2005) at para 51 Jamaica, CRC, CRC/C/132 (2003) 86 at paras. 435; Philippines, CRC, CRC/C/150 (2005) 24 at paras.162 (g); Botswana, CRC, CRC/C/143 (2004) at para 152; Ethiopia, CEDAW, CEDAW/C/ETH/CO/6-7 (2009) at para 35; Democratic People's Republic of Korea, CEDAW, A/60/38 part II (2005) at para 66.

[170] *Minister of Health and Others v. Treatment Action Campaign and Other* [2002] ZACC 16, 2002 (5) SA 703 (Constitutional Court of South Africa).

4.4 Evidence required to find Right to Health violations

A State violates its obligations under Article 12 when it is "unwilling to use the maximum of its available resources for the realization of the right to health."[171] To establish a State violation of the right to health, one must show that the State failed to provide a critical component of the right to health. For our purposes, this can include information, facilities, goods, services or essential medicines. As the right to health is subject to progressive realization, States may argue that resource constraint prevented them from ensuring the right to health. However, States have the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, [its treaty] obligations."[172] Thus, information on State spending related to health compared to other areas of expenditure, such as military or education, would be useful to this regard.

In *Szijjarto v. Hungary*, the CEDAW Committee found a right to health violation where the evidence before the Committee showed that State actors proceeded with a procedure even thought it was clear the complainant did not have the information necessary to agree to the procedure.[173] Evidence showing that States provided inaccurate health information may also help to establish a violation, as States are required to provide accurate information.[174] Evidence showing that people are prevented from accessing low-cost or free essential medicines because States have failed to make use of the TRIPS flexibilities, or States have provided medicines in a discriminatory or arbitrary way, may be sufficient to establish a violation of the right to health in the context of essential medicines.

Establishing discrimination under international law requires proof of differential treatment in State legislation, policies or programmes or proof that a State law (de facto discrimination), policy or programme had the effect of discriminatory treatment (*de jure* discrimination).[175] This can include situations such as health clinics that are not accessible to rural communities, a State providing only certain

---

[171] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 47.
[172] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 47.
[173] *Committee on the Elimination of all forms of Discrimination Against Women*, *Szijjarto v. Hungary*, CEDAW Dec. 4/2004, OHCHROR, UN Doc. A/61/38 (2006)
[174] *Committee on the Rights of the Child*, General Comment No. 3, HIV/AIDS and the Rights of the Child, UN Doc CRC/GC/2003/3 (2003) at para 9; *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 34.
[175] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 30

hospitals with medicines, or bars on access for non-parents. However, if the criteria for such differentiation are reasonable and objective, this will not amount to discrimination.[176] Additionally, States are also under the positive obligation to ensure that third parties do not discriminate under the enumerated grounds.[177] Evidence which may be sufficient to establish a violation could include proof that a State was aware of discrimination by a third party in the context of the right to health, but did not act to remedy it. For example, a third party that provides health information only in the language of the majority and not local languages.

4.5.1 Complaint Procedure

Of relevance to this memorandum, the ICCPR and CEDAW have optional protocols, which allow them to hear individual complaints in certain circumstances. See Appendix A for a chart of our countries of focus that have signed these optional protocols.

For individual complaint communications, the complaint must be submitted by the alleged victim or if one is submitting on behalf of the alleged victim, the person submitting the communication must show the proper authority to do so.[178] The complainant should, to the best of their abilities, include all of the information necessary to allow the treaty body to determine both whether the complaint is admissible and whether there has been a violation.[179] To show that the complaint is admissible, one must show that all domestic remedies have been exhausted, or that legal remedies are ineffective, unavailable or unreasonably prolonged.[180] To determine whether there has been a violation, the treaty body should have an account of the claim that is as complete as possible.[181] A complainant should set out all facts and provide all the documents of relevance to the claim and arguments, including domestic judicial decisions, if possible.[182]

---

[176] *Committee on Civil and Political Rights,* General Comment No. 18, Non-Discrimination (19889) at para 13.
[177] *Committee on Economic, Social and Cultural Rights*, General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 (2000) at para 35.
[178] Office of the High Commissioner for Human Rights, Procedure for complaints by individuals under the human rights treaties, available at http://www2.ohchr.org/english/bodies/petitions/individual.htm.
[179] Office of the High Commissioner for Human Rights, Procedure for complaints by individuals under the human rights treaties, available at http://www2.ohchr.org/english/bodies/petitions/individual.htm.
[180] Office of the High Commissioner for Human Rights, Procedure for complaints by individuals under the human rights treaties, available at http://www2.ohchr.org/english/bodies/petitions/individual.htm.
[181] Office of the High Commissioner for Human Rights, Procedure for complaints by individuals under the human rights treaties, available at http://www2.ohchr.org/english/bodies/petitions/individual.htm.
[182] Office of the High Commissioner for Human Rights, Procedure for complaints by individuals under the human rights treaties, available at http://www2.ohchr.org/english/bodies/petitions/individual.htm.

In addition to the individual complaint procedure which often addresses a single complaint, the CEDAW Committee has the ability to investigate "grave or systematic violations."[183] In contrast to the individual complaint procedure, where it is sufficient to show that there are grounds to believe a violation of treaty rights has occurred, CEDAW will initiate an investigation into systematic violations under the optional protocol if there is "reliable information indicating grave or systemic violations."[184] Non-governmental organizations are typically the best suited to initiate an investigation procedure as they have been likely documenting the pattern of rights abuse.

5. Conclusions

In conclusion, the African grandmothers would likely be able to establish violations of the right to health and discrimination, which are protected by various international instruments.

The right to health

It appears that the grandmothers have a strong case for a clear violation of the right to health guaranteed by the various covenants. However, the right to health is subject to progressive realization, and States may be able to argue that they were unable to provide health information, facilities, goods, and services, including essential medicines, due to resource constraints. However, States are required to take deliberate, concrete and targeted steps to ensure these rights and failure to do so would amount to treaty violations.[185]

ICESCR:

- Article 12 – this right has been interpreted broadly to include access to health information, health services and essential medicines. States are have a positive obligation to ensure the availability, accessibility, acceptability and quality of health care and health facilities, goods and services.

CRC:

- Article 13, 17, 24 – these provisions have been interpreted broadly to include the right to sex education in order to prevent the spread of HIV.

CEDAW

- Article 10(h) and 12 – these rights have been interpreted by the CEDAW Committee in an individual complaint to go beyond the equitable provision of health information between men and women but to include a general right to health information. This could likely be extended to health facilities, care and services.

[183] CEDAW Optional Protocol art 8.
[184] CEDAW Optional Protocol art 8.
[185] *Committee on Economic, Social and Cultural Rights*, General Comment No. 3, The nature of States parties obligations (Art 2, par.1) (1990) at para 2.

The CEDAW, CRC and ICESCR Committees have all issued concluding observations on country reports where they have strongly urged States parties to ensure access to health services and care. While this may not have crystallized internationally into a justiciable right as of yet, these comments provide support for holding States accountable for failure to ensure the right to health.

The right to non-discrimination in the context of health

The right to non-discrimination is a stronger legal mechanism because under international Conventions, States parties have immediate obligations to guarantee that rights protected, including the right to health, are exercised without discrimination of any kind. Discrimination based on gender, age and HIV status prevents grandmothers and the orphaned children that they care for from realizing their right to health. Arguing discrimination is one of the strongest arguments grandmothers can make, as the right to non-discrimination is a fundamental human right protected by all international covenants, including Article 26 of the ICCPR, Article 2 of the CRC, Article 2 of the ICESCR and Article 12 of the CEDAW.

ICCPR:

- Article 26 – this provision requires States to ensure their legislation and policies are not discriminatory or do not have the effect of being discriminatory. Sex is an enumerated ground under the ICCPR and the UNHRC has interpreted "other status" to include age
- Article 24 – States are required to protect children under this provision, including ensuring that girls are treated equally as boys. This could be used to establish that States are failing to provide health information to girls. There is evidence to support the fact that adolescent females are generally less informed than adolescent males about HIV transmission.

CEDAW:

- Article 12 – this provision requires States parties to eliminate discrimination against women in the field of health care and ensure equal access for men and women to health care services. States parties also have a positive obligation to ensure that third parties do not discriminate in the context of health care.
- CEDAW has been interpreted to include age as a prohibited ground of discrimination, and the CEDAW Committee has issued recommendations which indicate that States should take elderly women into account when creating health legislation, policies and programmes. It is arguable that CEDAW would extend its prohibition on discrimination to include health status.

CRC:

- Article 2 – discrimination under this provision has been interpreted in the context of HIV/AIDS to increase the vulnerability of children to HIV/AIDS, and this is compounded for girls. The CRC Committee has placed a positive

obligation on States parties, under their Covenant obligations, to ensure that laws, policies, strategies and practices address all forms of discrimination that contribute to increasing the impact of HIV/AIDS.

ICESCR:

- Article 2 – this article has been extended to protect age and health status as a prohibited ground of discrimination. The ICESCR Committee has established that under their treaty obligations, States are required to eliminate formal discrimination as well as adopt necessary measures to prevent, diminish and eliminate conditions and attitudes which cause or perpetuate substantive discrimination.

Grandmothers have the right to non-discrimination in the provision of health care. If they have been discriminated against in the field of health by virtue of their age, sex, or health status either by State legislation, programmes, policies or by third parties, they have a strong argument for a violation of international law. These treaties have been interpreted by the treaty monitoring committees to place positive obligations on States to eliminate the conditions which perpetuate discrimination. State inaction in this regard would likely amount to a violation in that regard.

Appendix A: Treaty ratification status of the countries of focus

	Ethiopia	Kenya	Malawi	South Africa	Swaziland	Uganda	Zambia	Zimbabwe
ICCPR	X	X	X	X	X	X	X	X
ICCPR O.P.			X	X		X	X	No
ICESCR	X	X	X	Signed only	X	X	X	X
ICESCR O.P.								
CEDAW	X	X	X	X	X	X	X	X
CEDAW O.P.			Signed only	X			Signed only	
African Charter	X	X	X	X	X	X	X	X
African Protocol	X	X	X	X	X	X	X	X

O.P. – Optional Protocol

X - State has signed and ratified or acceded the instrument.