



MEMORANDUM

TO: Julaine Eberhard, Stephen Lewis Foundation  
FROM: Frederique Dupuy, LL.M. Student, International Human Rights Clinic,  
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DATE: October 26, 2012  
RE: **The Right to Property and Inheritance Rights 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.

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## **I. INTRODUCTION**

This memorandum is provided in the context of an upcoming People’s Tribunal on the violation of older women’s human rights in the context of the HIV/AIDS pandemic in sub-Saharan Africa (“Grandmothers’ Tribunal”). One of the objectives of the Grandmothers’ Tribunal is to raise awareness about the human rights violation grandmothers’ face while tending to their dying children and raising grandchildren orphaned by HIV/AIDS. These older women have faced and continue to face several human rights violation based on gender discrimination about which they will come to testify about during the Grandmothers’ Tribunal.

The purpose of this memorandum is to explore international legal instruments relating to women’s right to property and right to inheritance. These findings will be useful to establish the violation of older women’s human rights in the sub-Saharan Africa and therefore to provide the foundation for recommendations for actions to be taken by States to change and improve the situation of these older women.

Women’s right to property and the right to inheritance are often considered key elements to the exercise of other rights.<sup>1</sup> Their violation may prevent the realization of related rights. As we will see below, women face many obstacles in the enjoyment of their right to property and inheritance. The existing imbalance between men and women is clearly illustrated by statistics relating to women and land: in 2010, rural women produced 60 to 80 per cent of the food in developing countries, yet they represent less than 20 per cent of the landowners.<sup>2</sup>

The memorandum will first address the relevant issues face by women in the sub-Saharan region. It will then discuss women’s right to property and right to inheritance through an analysis of the international and regional instruments applicable to the African grandmothers. This analysis will identify States’ obligations towards women’s right to property and inheritance and target the evidence that must be established through the testimony for the Grandmothers’ Tribunal to ground a finding of rights violations.

## **II. SHORTCONCLUSION**

International and regional human rights instruments can definitely be relied upon to establish violations of grandmother’s right to property and inheritance. Many provisions included in these instruments imposed obligations on states with regard to women’s rights to property and inheritance, more specifically regarding women’s right to equality and non-discrimination in relation with these rights. Considering the issues face by women in these areas and identified so far, our conclusions are the following:

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<sup>1</sup> See for example *Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Miloon Kothari, UN. Doc. E/CN.4/2005/43 (2005) at para 61; Elizabeth Wickeri and Anil Kalhan, “Land Rights Issues in International Human Rights Law” (2010) 4:10 Malaysian Journal on Human Rights at 1 and 9.

<sup>2</sup> High Commissioner on Human Rights, “Women and the Right to Adequate Housing”, OHCHR, HR/PUB/11/02, (2012) at 35.

- There could be a strong argument for establishing a violation of women's equal right to property of articles 15 (2) and 16(1) h) of the *Convention on the Elimination of All Forms of Discrimination against women*<sup>3</sup> ("CEDAW"). These articles are directly applicable to the issue identified so far and are not subject to progressive implementation. Moreover, other international treaty monitoring bodies have imposed obligations on States in that regard.
- There could be a strong argument for establishing a violation of women's equal right to inheritance of article 21 of the *African Union Protocol on the Rights of Women in Africa*<sup>4</sup> ("African Protocol"). This article is directly applicable to the issue identified so far. However, this argument will depend on whether or not the country has ratified the African Protocol. Further, the CEDAW Committee and the Committee on Economic, Social and Cultural rights ("ESCR Committee") have clearly stated that States hold obligations towards women to guarantee equal treatment regarding the right to inheritance.
- There could be a strong argument for establishing a violation of article 26 of the *International Covenant on Civil and Political Rights*<sup>5</sup> ("ICCPR") and 5 of CEDAW, the right to non-discrimination for women in statutory or customary laws, customs or practices. The right to equality and non-discrimination is recognized in almost all international and regional human rights instruments and is subject to immediate implementation. However, these two articles are directly applicable to the issues identified since they state that all discrimination against women in the statutory or customary laws or from the customs should be abolished by States.
- There might be a possibility to establish a violation of art. 14 of the *African Charter on Human and Peoples' rights*<sup>6</sup> ("African Charter"). However, the evidence of a violation of this article will be based on a case-by-case basis and will require a lot of facts from each victim. Therefore, the Grandmothers' Tribunal might not be the right forum to prove a violation under this article.

In summary, according to the issues known so far, grandmothers will have a strong case to establish violation of their rights to property and inheritance under international and regional instruments. However, all the above conclusions will need to be supported by facts provided by grandmothers. Once these facts will be known, we will then be in a better position to confirm the potential violations of older women's human rights in the sub-Saharan Africa. Moreover, these findings will provide the foundation for further

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<sup>3</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, 1 March 1980, 1249 UNTS 13 (Entered into force 3 September 1981) [CEDAW].

<sup>4</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000) (reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force Nov. 25, 2005) [African Protocol].

<sup>5</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (Entered into force 23 March 1976) [ICCPR].

<sup>6</sup> *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982) (Entered into force 21 October 1986) [African Charter].

recommendations for States regarding the action to be taken to change and improve the situation of these older women.

### **III. ISSUES ON THE GROUND RELATED TO PROPERTY AND INHERITANCE RIGHTS**

In sub-Saharan Africa, discrimination is the main factor preventing women from fully enjoying the rights guaranteed under international human rights law. The issues below are the key obstacles to the realization of women's rights to property and inheritance.

#### **A. Customary Law and traditional practices**

Customary laws are based on culture, customs and tradition, and applied in parallel to the statutory legislative system in legally pluralistic societies.<sup>7</sup> Customary laws are present in many parts of Africa.<sup>8</sup> For instance, they are recognized by the courts and have a binding force on citizens in various countries of sub-Saharan Africa.<sup>9</sup> They are usually non-codified and therefore subject to constant change.<sup>10</sup> Areas such as property and inheritance are often regulated under customary law.<sup>11</sup> In 2008, almost 75% of the land was held under forms of customary tenure in the sub-Saharan Africa.<sup>12</sup>

In patriarchal societies such as those in sub-Saharan Africa, laws rooted in customs and traditions are often discriminatory towards women.<sup>13</sup> Such laws relegate women to a subordinate position, which in turn affects their access to resources such as land and other property.<sup>14</sup> Under customary laws with regard to property, the two major issues facing women are related to the right to ownership of the marital property, and the right to inheritance.

Women who have attempted to challenge these discriminatory laws "have been subjected to threats and violence from their families and communities."<sup>15</sup>

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<sup>7</sup> High Commissioner on Human Rights, "Women and the Right to Adequate Housing", OHCHR, HR/PUB/11/02, (2012) at 44-45.

<sup>8</sup> S.F. Joireman, "The Mystery of Capital Formation in sub-Saharan Africa: Women, Property Rights and Customary Law" (2008) 36, No. 7 World Development 1233 at 1235.

<sup>9</sup> S.F. Joireman, "The Mystery of Capital Formation in sub-Saharan Africa: Women, Property Rights and Customary Law" (2008) 36, No. 7 World Development 1233 at 1235.

<sup>10</sup> High Commissioner on Human Rights, "Women and the Right to Adequate Housing", OHCHR, HR/PUB/11/02, (2012) at 44.

<sup>11</sup> *Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Miloon Kothari, UN. Doc. E/CN.4/2005/43 (2005) at para 55; Brigitte M. Bodenheimer, "Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa", 40 U.C. Davis L. Rev. 385 at 388-90; Elizabeth Dailey and Birgit Englert, "Securing land rights for women" (2010) 4, No. 1 Journal of Eastern Africa Studies 91 at 93-94; Elishiba N. Kimani and Lucy W. Maina, "Older Women's Rights to Property and Inheritance in Kenya: Culture, Policy and Disenfranchisement" (2010) 19 Journal of Ethnic and Cultural Diversity in Social Work 256 at 259.

<sup>12</sup> S.F. Joireman, "The Mystery of Capital Formation in sub-Saharan Africa: Women, Property Rights and Customary Law" (2008) 36, No. 7 World Development 1233 at 1235.

<sup>13</sup> Elizabeth Dailey and Birgit Englert, "Securing land rights for women" (2010) 4, No. 1 Journal of Eastern Africa Studies 91 at 98.

<sup>14</sup> Brigitte M. Bodenheimer, "Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa", 40 U.C. Davis L. Rev. 385 at 390.

<sup>15</sup> High Commissioner on Human Rights, "Women and the Right to Adequate Housing", OHCHR, HR/PUB/11/02, (2012) at 47.

This discrimination has been recognized by international treaty monitoring bodies. The CEDAW Committee released a general recommendation where it succinctly outlined the issues with customary law and women's right to marital property as follows:

- There are countries that do not acknowledge that right of women to own an equal share of the property with the husband during a marriage or de facto relationship and when that marriage or relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.<sup>16</sup>
- Even when these legal rights are vested in women, and the courts enforce them; property owned by a woman during marriage or on divorce may be managed by a man. In many State's, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it.<sup>17</sup>
- In many countries, property accumulated during a de facto relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner.<sup>18</sup>

In most African countries there is no co-ownership of marital property and married women often “do not have autonomous rights to lineage or family land once married, and do not have the ability to protect and retain their homes and movable possessions upon the death of the divorce of a husband.”<sup>19</sup> Some scholars have said that women's dependency on men for access to property is exacerbated when it comes to older women: “Older widows are especially vulnerable and, in some cases, older women have to tolerate abusive relationships from in-laws for fear of losing access to land.”<sup>20</sup>

Lastly, because most of the decisions with regard to land and property occur locally, officials, such as traditional leaders and local authorities, are more likely to apply customary laws.<sup>21</sup> This process “jeopardize[s] the statutory right of women and puts them at

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<sup>16</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 30.

<sup>17</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 31.

<sup>18</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 33.

<sup>19</sup> S.F. Joireman, “The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law” (2008) 36, No. 7 *World Development* 1233 at 1238.

<sup>20</sup> Elishiba N. Kimani and Lucy W. Maina, “Older Women's Rights to Property and Inheritance in Kenya: Culture, Policy and Disenfranchisement” (2010) 19 *Journal of Ethnic and Cultural Diversity in Social Work* 256 at 259.

<sup>21</sup> High Commissioner on Human Rights, “Women and the Right to Adequate Housing”, OHCHR, HR/PUB/11/02, (2012) at 47.

disadvantage of men.”<sup>22</sup>

### **B. Other major issues related to cultural practices**

Two other major issues related to cultural practices that impact the right to property and inheritance are worth briefly mentioning. Both illustrate the vulnerability faced by women upon the death of their spouses.

One such practice is ‘property-grabbing’ from the widow’s husband’s relatives.<sup>23</sup> Such “claims” to the spouses’ property are made outside of any inheritance structure.<sup>24</sup> In such circumstances, women may be forced to leave their homes within days of their husband’s death.<sup>25</sup> This practice has devastating consequences on women who may lose everything, including household items, land or have their access to other resources blocked.<sup>26</sup> It is sometimes justified by customary law according to which “property and profits of labor belongs to the entire family, and women, as property, cannot own property.”<sup>27</sup>

The second practice, which is related to women being considered property, is ‘wife inheritance’. In this customary practice, the widow is inherited along with her deceased husband’s other property to a male relative of her late husband.<sup>28</sup> In these circumstances, she is not entitled to any property herself nor to any claim she might have made to the marital property.<sup>29</sup>

### **C. Statutory Laws and enforcement**

In many countries, constitutions and national legislation now protect women’s equality rights and the principal of non-discrimination.<sup>30</sup> However, even where such protections exist, there remains enforcement issues.

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<sup>22</sup> Brigitte M. Bodenheimer, “Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa”, 40 U.C. Davis L. Rev. 385 at 404.

<sup>23</sup> S.F. Joireman, “The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law” (2008) 36, No. 7 World Development 1233 at 1240.

<sup>24</sup> Sarah J. Conroy, “Women’s Inheritance and Conditionality in the Fight Against AIDS” (2011) 28 WILJ 705 at 714.

<sup>25</sup> Sarah J. Conroy, “Women’s Inheritance and Conditionality in the Fight Against AIDS” (2011) 28 WILJ 705 at 714.

<sup>26</sup> Nadia Steinzor, “Women’s Property and Inheritance Rights: Improving Lives in a Changing Times” (March 2003), A Women in Development Technical Assistance Project, Development Associates, Inc. at 5, online at: [http://pdf.usaid.gov/pdf\\_docs/PNADA958.pdf](http://pdf.usaid.gov/pdf_docs/PNADA958.pdf)

<sup>27</sup> Rachel C. LoftSpring, “Inheritance Right in Uganda : How Equal Inheritance Rights would Reduce Poverty and Decrease the Spread Of HIV/AIDS in Uganda” (2007-2008) 29 U. Pa. J. Int’l L. 243 at 257.

<sup>28</sup> Sarah J. Conroy, “Women’s Inheritance and Conditionality in the Fight Against AIDS” (2011) 28 WILJ 705 at 714.

<sup>29</sup> Rachel C. LoftSpring, “Inheritance Right in Uganda : How Equal Inheritance Rights would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda” (2007-2008) 29 U. Pa. J. Int’l L. 243 at 257.

<sup>30</sup> *Constitution of The Federal Democratic Republic of Ethiopia*, 1994, article 35; *Constitution of Kenya*, 2010, articles 27(3) and 60 (f); *Republic of Malawi (Constitution)*, 1994, No. 20 of 1994, article 20; *Constitution of the Republic of South Africa*, 1996, No. 108 of 1996, s 9 ; *Constitution of The Kingdom of Swaziland Act*, 2005, articles 20 and 28 ; *Constitution of the Republic of Uganda*, 1995, article 21 and 33 (note that article 33(6) has been repealed by *The Constitution (Amendment) Act*, 2005, article 12; *Constitution of Zambia (As amended by Act No. 18 of 1996)*, 1996, preamble (The Government of Zambia is presently working on new

First, a number of the constitutions also include provisions that create exceptions for customary laws and practices.<sup>31</sup> Alternatively, customary law is often used to interpret non-discrimination provisions to the disadvantage of women.<sup>32</sup>

Second, effective enforcement of non-discrimination laws requires an efficient justice system as well as a strong administrative structure, which is often lacking in certain underdeveloped countries and developing countries.<sup>33</sup>

Finally, non-discrimination laws will be useless if women are not *aware* of these rights. This may be the case in areas where customary law is routinely applied, such as rural areas. Therefore, access to information about their rights is fundamental to the full realization of them.

#### **D. HIV/AIDS impact**

According to UNAIDS, women represent nearly 60% of infected adults in sub-Saharan Africa. In that regard, the UN High Commissioner for Human Rights states: “Gender inequality constitutes an underlying factor of women’s vulnerability to HIV/AIDS. Women who lack control over economic assets—including housing, land and property—and are economically dependent on male partners are less likely to direct their sexual life, making them more vulnerable to HIV/AIDS.”<sup>34</sup> According to the High Commissioner: “Customary laws and practices or statutory laws that prevent women from inheriting on an equal basis with men can also put widows at greater risk of contracting HIV/AIDS, as it can force women to engage in unsafe sexual behaviour to ensure their economic security.”<sup>35</sup> The fact that practices such as ‘wife inheritance’ and ‘property grabbing’ have become more common since the HIV pandemic began may have also contributed to the spread of HIV/AIDS.<sup>36</sup>

In contrast, empowerment of women and increased economic security through the full enjoyment of their right to property and inheritance reduces their vulnerability to unsafe sex practices.<sup>37</sup>

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constitution); *Constitution of Zimbabwe of 1979 (as amended to the Constitution of Zimbabwe Amendment (no. 19 Act, 2009)* 2009, article 23.

<sup>31</sup>High Commissioner on Human Rights, “Women and the Right to Adequate Housing”, OHCHR, HR/PUB/11/02, (2012) at 46.

<sup>32</sup>High Commissioner on Human Rights, “Women and the Right to Adequate Housing”, OHCHR, HR/PUB/11/02, (2012) at 46.

<sup>33</sup>S.F. Joireman, “The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property Rights and Customary Law” (2008) 36, No. 7 World Development 1233 at 1241.

<sup>34</sup>High Commissioner on Human Rights, “Women and the Right to Adequate Housing”, OHCHR, HR/PUB/11/02, (2012) at 81.

<sup>35</sup>High Commissioner on Human Rights, “Women and the Right to Adequate Housing”, OHCHR, HR/PUB/11/02, (2012) at 82.

<sup>36</sup>Sarah J. Conroy, “Women’s Inheritance and Conditionality in the Fight Against AIDS” (2011) 28 WILJ 705 at 714.

<sup>37</sup>High Commissioner on Human Rights, “Women and the Right to Adequate Housing”, OHCHR, HR/PUB/11/02, (2012) at 81.

With the mortality effect of AIDS and decreasing life expectancies for men and women in sub-Saharan Africa, issues related to women's right to inheritance are more prevalent:

- A widow whose spouse has died of HIV/AIDS may find her property pilfered and diminished by her in-laws.<sup>38</sup>
- Widows are blamed for killing their husbands by infecting them with HIV/AIDS and in-laws use this as a justification to dispossess them.<sup>39</sup>
- Relatives delay the administration of the estate, waiting for the beneficiaries to die. As a result, many widows and their children do not receive antiretroviral therapy because they cannot access the property (including money) they are entitled to.<sup>40</sup>

#### **IV. FINDINGS**

##### **A. Right to Property**

###### **1. Right to property in International and Regional Instruments**

The right to property or right to protection of property does not imply that everyone has a right to own property but rather that people have a right to the protection of their private property.

The right to property is the subject of much controversy. This controversy finds its origin in the division between, on one the hand, democratic and capitalist States' views regarding private property, and non-democratic socialist States' views on the other.<sup>41</sup> This debate led to a divided recognition of this right within the international instruments.

The right to property is recognized in the non-binding Universal Declaration of Human Rights ("UDHR") as follows in article 17:

- (1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.

Though not binding, the UDHR is widely recognized as is the foundation of international human rights system. The Vienna Declaration and Programme of Action reiterates that States must commit to uphold the provision of UDHR as well as other instruments that protect and promote human rights.<sup>42</sup>

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<sup>38</sup>High Commissioner on Human Rights, "Women and the Right to Adequate Housing", OHCHR, HR/PUB/11/02, (2012) at 82.

<sup>39</sup>High Commissioner on Human Rights, "Women and the Right to Adequate Housing", OHCHR, HR/PUB/11/02, (2012) at 82.

<sup>40</sup>High Commissioner on Human Rights, "Women and the Right to Adequate Housing", OHCHR, HR/PUB/11/02, (2012) at 82.

<sup>41</sup>Gudmundur Alfredsson and Eide Asbjørn, *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers, (1999) at 359-61.

<sup>42</sup> *Vienna Declaration and Programme of Action*, UNGAOR, 1993, A/CONF.157/23 (1993), preamble.



Due to the impossibility of reaching consensus on the protection of the right to property, the legally-binding ICCPR and the *International Covenant on Economic, Social and Cultural rights*<sup>43</sup> (“ICESCR”) do not include explicit protections of this right. The UN Human Rights Committee (the treaty monitoring body of the ICCPR) has confirmed several times in its jurisprudence that the right to property was not guaranteed under ICCPR.<sup>44</sup> Nevertheless, according to certain academics, the fact that the right to property is not included in the ICCPR should not mean however, that this right is not a universal human right.<sup>45</sup> They base their conclusion in that regard on what happened during the drafting and vote processes:

While it was possible to agree on a formulation of the right for the UDHR, which as a legally non-binding declaration did not require such precise formulation, it was not possible to reach a consensus on the permissible restrictions in the context of a universal convention. The Attitudes of States is well illustrated in the voting on the article on the right during the tenth session of the Commission on Human Rights. The final voting in the Commission was on the following proposal:

The States Parties to this Covenant undertake to respect the right of everyone alone as well as in association with others. This right shall be subject to such limitations and restrictions as are imposed by law in the public interest and in the interest of social progress in the country concerned.

No one shall be deprived of his property without due process of law. Expropriation may only take place only for consideration of public necessity or utility as defined by law and subject to such compensation as may be prescribed.

The Commission was unanimously in the favour of the text when voting only on the first sentence of the proposal, i.e. the general formation of the right to property. Only during the vote on the remaining parts of the article – the limitations – did the Commission face considerable disagreements and varying opinions. As the commission failed to agree on the formulation, it finally decided not to include the right to property in the Covenants and to adjourn the question *sine die*.<sup>46</sup>

Despite this absence in both the ICCPR and ICESCR, a number of other international conventions refer to the right to property. However, none of these international instruments

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<sup>43</sup> *International Covenant on Economic Social and Cultural Rights*, 16 December 1966, 933 UNTS 3 (Entered into force 3 January 1976) [ICESCR].

<sup>44</sup> *Jakes and Mazurkiewiczova v Czech Republic*, Communication N° 724/1996, CCPR/C/66/D/724/1996 (26 July 1999) at para 6.2.

<sup>45</sup> Gudmundur Alfredsson and Eide Asbjørn, *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers, (1999) at 365.

<sup>46</sup> Gudmundur Alfredsson and Eide Asbjørn *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers, (1999) at 365-66.

"[...] include a free-standing right to private property."<sup>47</sup> These will be explored in more detail below.

Finally, article 14 of the African Charter provides:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of applicable laws.

In its decisions regarding the right to property, the *African Commission on Human and People's rights* ("African Commission") has explained that the right to property is a fundamental right in democratic and liberal societies.<sup>48</sup> The African Commission further explained the principles encompassed in this right:

The right to property encompasses two main principles. The first one is of a general nature. It provides for the principle of ownership and peaceful enjoyment of property. The second principle provides for the possibility, and conditions of deprivation of the right to property. Article 14 of the Charter recognizes that States are in certain circumstances entitled, among other things, to control the use of property in accordance with the public or general interest, by enforcing such laws, as they deem necessary for the purpose.<sup>49</sup>

Under its article 21, the African Charter has also recognized the right to everyone to freely dispose of their wealth and natural resources. This right includes that "In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."<sup>50</sup>

## **2. The scope and content of the right to property**

Since the right to property is not protected by the ICCPR or ICESCR, treaty monitoring bodies have rarely had the opportunity to delve deeply into this issue. However, almost all the regional treaty bodies have considered the ambit of the right to property under the auspices of Indigenous peoples' right to property.

The interpretation given by the African Commission is the most relevant for the Grandmothers' Tribunal. According to the Commission in the case *Centre for Minority Rights*

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<sup>47</sup> Jacob Mchangama, "The Right to Property in Global Human Right Law" (2011) Cato Policy Report, online: [http://www.cato.org/pubs/policy\\_report/v33n3/cprv33n3-1.html](http://www.cato.org/pubs/policy_report/v33n3/cprv33n3-1.html).

<sup>48</sup> See for example: *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan*, 279/03-296/05, 45<sup>th</sup> ordinary session (27 May 2009) at para 192; *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme / Mauritania*, 373/09, 8<sup>th</sup> extraordinary session (3 March 2010) at para 45.

<sup>49</sup> *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan*, 279/03-296/05, 45<sup>th</sup> ordinary session (27 May 2009) at para 193; *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme / Mauritania*, 373/09, 8<sup>th</sup> extraordinary session (3 March 2010) at para 46.

<sup>50</sup> African Charter, article 21.

*Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya* rendered in 2009, the following elements define the Indigenous right to property:

(1) traditional possession of land by indigenous people has the equivalent effect as that of a State-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, although they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights.<sup>51</sup>

In this same decision, the Commission also recalled its own case law and reiterates that property “includes not only the right to have access to one’s property and not to have one’s property invaded or encroached upon, but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit [footnotes omitted].”<sup>52</sup>

In the case of the grandmothers, it might be possible to use by analogy the principles established to prove property rights of indigenous peoples in order to prove women’s right to property when women have possession of land but have no title to prove it.

In respect to the right to property, States parties to the African Charter have both positive and negative obligations. Their negative obligation is to respect the right to property by not arbitrarily interfering with one’s enjoyment of this right. Their positive obligation is to protect and fulfill the right to property. Protection requires taking all available steps, such as legislative, administrative and judicial, to prevent third parties from encroaching other’s right to property.<sup>53</sup> As for the fulfilling part of the State’s obligation it consists in undertaking actions that would help to constitute an enabling environment.<sup>54</sup>

These obligations have been endorsed a number of time by the African Commission in its decisions.<sup>55</sup> The Commission particularly detailed the role of the State in the case *Social and*

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<sup>51</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 273/2003, 46<sup>th</sup> ordinary session (25 November 2009) at para 209.

<sup>52</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 273/2003, 46<sup>th</sup> session (25 November 2009) at para 186.

<sup>53</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 273/2003, 46<sup>th</sup> session (25 November 2009) at para 211-12.

<sup>54</sup> Christopher Golay and Ioana Cismas, *Legal opinion: The Right to Property from a Human Right Perspective*, Académie de droit international humanitaire et des droits humains à Genève (2010) at 21.

<sup>55</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 273/2003, 46<sup>th</sup> ordinary session (25 November 2009) at para 191; *Sudan Human Rights*

*Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria*. The Commission applied its conclusions regarding State's obligations towards the right to shelter to the right to property of article 14 of the African Charter:

61. At a very minimum, the right to shelter obliges the Nigerian Government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-State actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be let alone and to live in peace, whether under a roof or not.

62. The protection of the rights guaranteed in Articles 14, 16 and 18(1) leads to the same conclusion [footnotes omitted and emphasis added].<sup>56</sup>

### **3. Women's equal right to property**

There are two articles within CEDAW that directly relate to equality between men and women in relation to property:

15(2) States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. Particularly, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

...

16 (1). States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

[...]

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

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*Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan*, 279/03-296/05, 45<sup>th</sup> ordinary session (27 May 2009) at para192.

<sup>56</sup> *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria*, 155/96, 30<sup>th</sup> ordinary session (27 October 2001) at para 61 et 62.

The CEDAW Committee explains that: “The right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence, and in many countries will be critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and for her family.”<sup>57</sup>

Similarly, though the ICCPR does not explicitly protect the right to property, the Human Rights Committee has found that the right to equality under article 16 of the ICCPR “implies” that women should have the capacity to own property.<sup>58</sup>

Women’s right to own, use and have access to land and property is also included under the right to an adequate standard of living, which is guaranteed by article 11 of the ICESCR.<sup>59</sup> In its general comments, the ESCR Committee expressly mentioned that:

Article 11 of the Covenant requires States parties to recognize the right of everyone to an adequate standard of living for him/herself and his/her family, including adequate housing (para. 1) and adequate food (para. 2). Implementing article 3, in relation to article 11, paragraph 1, requires that women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so [emphasis added].<sup>60</sup>

In the African Protocol, women’s right to property is not expressly granted. However, the African Protocol imposed obligations on States parties regarding women’s right to equal property in order to ensure the realization of other rights such as, the right to sustainable development,<sup>61</sup> equality during marriage<sup>62</sup> and equality in case of separation, divorce or annulment of the marriage.<sup>63</sup>

When it comes to the equality between men and women with regards to right to property, the obligations of States are clear and positive.

According to CEDAW Committee, the rights provided in articles 15(2) and 16 (1)(h) of Convention are overlapping and complement each other in order to place an obligation “on

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<sup>57</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 26.

<sup>58</sup> Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)*, (Sixty-eighth session, 2000), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 179 (2003) at para 19.

<sup>59</sup> Committee on Economic, Social and Cultural Rights, *General comment No. 16, Article 3: Equal right of men and women to the enjoyment of all economic, social and cultural rights*, 34<sup>th</sup> session, U.N. Doc. E/C.12/2005/3 (2005) at 28.

<sup>60</sup> Committee on Economic, Social and Cultural Rights, *General comment No. 16, Article 3: Equal right of men and women to the enjoyment of all economic, social and cultural rights*, 34<sup>th</sup> session, U.N. Doc. E/C.12/2005/3 (2005) at 28.

<sup>61</sup> African Protocol, art. 19.

<sup>62</sup> African Protocol, art. 6.

<sup>63</sup> African Protocol, art. 7.

States to give women equal rights to enter into and conclude contracts and to administer a property.”<sup>64</sup>

The CEDAW Committee also imposes obligations on States parties regarding equal sharing of marital property. As explained above, legal precedent and customary law often limit this right. CEDAW explicitly States that any property laws and customs that lead women to receive a significantly lower share than their partners at the end of a relationship should be revoked and discouraged.<sup>65</sup>

The CEDAW Committee also requires specific actions to be taken to ensure older women’s right related to property:

- States parties should enable older women to seek redress for and resolve infringements of their rights, including the right to administer property and ensure that older women are not deprived of their legal capacity on arbitrary or discriminatory grounds.<sup>66</sup>
- States parties have an obligation to repeal all legislation that discriminates against older women in marriage and upon its dissolution, including in the areas of property and inheritance.<sup>67</sup>
- States parties must repeal all legislation that discriminates against older widows in respect of property and inheritance and protect them from land grabbing. They must adopt laws of intestate succession that comply with their obligations under the Convention. Furthermore, they should take measures to end practices that force older women to marry against their will and should ensure that succession is not conditioned on forced marriage to a deceased husband's sibling or any other person.<sup>68</sup>

The former Human Rights Commission (now the UN Human Rights Council) affirms in its Resolution 2002/49 that discrimination in law against women when it comes to accessing, acquiring or securing land, property and housing, constitutes a violation of women’s human rights,<sup>69</sup> and urged States to “design and revise laws to ensure that women are accorded full

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<sup>64</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 25.

<sup>65</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 33.

<sup>66</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 27 on Older Women and Protection of their Human Rights*, 47<sup>th</sup> Sess., UN Doc. CEDAW/C/GC/27 (2010) at para 34.

<sup>67</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 27 on Older Women and Protection of their Human Rights*, 47<sup>th</sup> Sess., UN Doc. CEDAW/C/GC/27 (2010) (2010) at para 51.

<sup>68</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 27 on Older Women and Protection of their Human Rights*, 47<sup>th</sup> Sess., UN Doc. CEDAW/C/GC/27 (2010) at para 52.

<sup>69</sup> Human Rights Commission, *Resolutions 2002/49 on Women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing*, E/2002-23-E/CN.4/2002/200, chap. X., 51<sup>st</sup> meeting (23 April 2002) at para 3.

and equal rights to own land and other property.”<sup>70</sup> Moreover, it encourages UN member States to assist in the modification of customs and traditions that discriminate against women regarding those rights.<sup>71</sup> The Commission also encourages all participants, such as governments, specialized agencies, funds, programmes and other organizations of the UN system, to provide judicial actors with information and education on women’s right to equal ownership and access to property and control over land.<sup>72</sup>

For its part, the UN Human Rights Committee requires States parties to the ICCPR “to ensure that the matrimonial regime contains equal rights and obligations for both spouses, for instance with regard to the ownership or administration of property.”<sup>73</sup> It encourages States to review their legislation in that regard.<sup>74</sup>

### **B. Right to Inheritance**

As outlined above, there are multiple issues related to women’s right to inheritance. According to the UN High Commissioner for Human Rights, the discrimination faced by women in relation to inheritance of housing, law and property lies at the root of the low level of security of tenure that women experience.<sup>75</sup> Statutory or customary laws and practices often do not provide women with the equal right of men in inheritance.<sup>76</sup> Women regularly receive a lesser share of the inheritance than their male relatives, or their right to inheritance is simply nonexistent.<sup>77</sup>

There is no general right to inheritance expressly protected in the text of any international human rights instruments. Moreover, as opposed to the right to property, the right to non-discrimination in relation to inheritance is almost never addressed in the text of these instruments.

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<sup>70</sup> Human Rights Commission, *Resolutions 2002/49 on Women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing*, E/2002-23-E/CN.4/2002/200, chap. X., 51<sup>st</sup> meeting (23 April 2002) at para 4.

<sup>71</sup> Human Rights Commission, *Resolutions 2002/49 on Women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing*, E/2002-23-E/CN.4/2002/200, chap. X., 51<sup>st</sup> meeting (23 April 2002) at para 5.

<sup>72</sup> Human Rights Commission, *Resolutions 2002/49 on Women’s equal ownership of, access to and control over land and the equal rights to own property and to adequate housing*, E/2002-23-E/CN.4/2002/200, chap. X., 51<sup>st</sup> meeting (23 April 2002) at para 8.

<sup>73</sup> Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)*, (Sixty-eighth session, 2000), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 179 (2003) at para 25.

<sup>74</sup> Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)*, (Sixty-eighth session, 2000), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 179 (2003) at para 25.

<sup>75</sup> High Commissioner on Human Rights, “Women and the Right to Adequate Housing”, OHCHR, HR/PUB/11/02, (2012) at 55.

<sup>76</sup> High Commissioner on Human Rights, “Women and the Right to Adequate Housing”, OHCHR, HR/PUB/11/02, (2012) at 55.

<sup>77</sup> High Commissioner on Human Rights, “Women and the Right to Adequate Housing”, OHCHR, HR/PUB/11/02, (2012) at 55.

The only instrument that directly ensures the protection of right to inheritance to women is the African Protocol. In that regard, its article 21 States:

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.
2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.<sup>78</sup>

Although women's right to non-discrimination in relation to inheritance is not addressed expressly by international instruments, because of its close relation with women's equal right to property, international bodies have expressed some specific recommendations regarding women's right to inheritance.

The CEDAW Committee recognizes that there are many countries where the law and practice regarding property and inheritance lead to the unequal treatment of women.<sup>79</sup> It recalls many consequences that arise from this uneven treatment:

- Women may receive a smaller share of the husband or father's property at his death than would widowers and sons.<sup>80</sup>
- In some instances, women are granted limited and controlled rights and receive income only from the deceased's property.<sup>81</sup>
- Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage.<sup>82</sup>

According to the CEDAW Committee, the absence of women's ability to inherit and administer the property upon the death of their spouses under customary law, even when there is legal justification, is de facto discrimination against older women who are more vulnerable.<sup>83</sup>

Also, it is clear that States parties hold obligations towards women to guarantee equal treatment regarding the right to inheritance.<sup>84</sup>

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<sup>78</sup> African Protocol, art. 21.

<sup>79</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 35.

<sup>80</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 35.

<sup>81</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 35.

<sup>82</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 35.

<sup>83</sup> Committee on Elimination of Discrimination against Women, *General Recommendation No. 27 on Older Women and Protection of their Human Rights*, 47<sup>th</sup> Sess., UN Doc. CEDAW/C/GC/27 (2010) at para 26.

<sup>84</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 35.



The Committee declares that all law or practices with regard to inheritance and property that leads to discrimination against women contravenes CEDAW and should thus be abolished.<sup>85</sup> Further, the Committee reiterates the UN Economic and Social Council's recommendations as provided in the Resolution 884D (XXXIV): "States ensure that men and women in the same degree of relationship to a deceased are entitled to equal shares in the State and to equal rank in the order of succession."<sup>86</sup>

The CEDAW Committee has also paid particular attention to State's obligations in relation to elderly women's right to inheritance, calling on States parties to repeal discriminatory legislation against older widows in respect of inheritance, and more particularly to protect them from land grabbing.<sup>87</sup> The Committee further emphasizes the obligation of States parties to adopt laws of intestate succession that comply with their obligations under the CEDAW.<sup>88</sup>

In the framework of its recommendation with regard to equality between men and women, the Human Rights Committee also comments on women's right to inheritance. It considers that States should ensure that women have "equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses."<sup>89</sup>

The ESCR Committee has also elaborated on States' obligations in relation to the right to inheritance with regard to some of the rights protected by the ICESCR. In general recommendation 12 on the right to adequate food, while emphasizing the importance of "prevent[ing] discrimination in access to food or resources for food", the Committee notes that States parties must guarantee women "full and equal access to economic resources, including the right to inheritance [...]"<sup>90</sup> In 2005, in the context of a recommendation relating to rights to family, marriage and protection against discrimination, the ESCR Committee stated: "Implementing article 3, in relation to article 10, requires States parties, [...] to ensure that women have equal rights to marital property and inheritance upon their husband's death."<sup>91</sup>

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<sup>85</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 35.

<sup>86</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, 13<sup>th</sup> Sess., U.N. Doc. A/49/38 at 1 (1994) at para 34.

<sup>87</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 27 on Older Women and Protection of their Human Rights*, 47<sup>th</sup> Sess., UN Doc. CEDAW/C/GC/27 (2010) at para 52.

<sup>88</sup> Committee on Elimination of Discrimination Against Women, *General Recommendation No. 27 on Older Women and Protection of their Human Rights*, 47<sup>th</sup> Sess., UN Doc. CEDAW/C/GC/27 (2010) at para 52.

<sup>89</sup> Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)*, (Sixty-eighth session, 2000), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 179 (2003) at para 26.

<sup>90</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 12, The right to adequate food (article 11)*, 20<sup>th</sup> Sess., 1999, U.N. Doc. E/C.12/1999/5 (1999) at para 26.

<sup>91</sup> Committee on Economic, Social and Cultural Rights, *General comment No. 16, Article 3: Equal right of men and women to the enjoyment of all economic, social and cultural rights*, 34<sup>th</sup> Sess., U.N. Doc. E/C.12/2005/3 (2005) at para 27.

### C. Right to non-discrimination as applied to property and inheritance

The right to equality and non-discrimination is recognized in almost all international and regional human rights instruments. According to the non-discrimination provisions contained in these instruments “everyone is entitled to the rights and freedoms set out in human rights instruments 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.”<sup>92</sup>

As described in the above section on the issues on the ground, the main obstacles to the right to property and the right to inheritance are the existence of statutory laws, customary laws and traditional practices that are discriminatory to women. Consequently, any provision or interpretation that ensures equality and non-discrimination before the law and equal protection by the law can be beneficial to contest transgression by the law of rights to property or inheritance.

The right to be free from discrimination under the law and to ensure equal protection of the law is enshrined in the UDHR.<sup>93</sup>

According to article 3 of the ICCPR, States parties must provide “equal right of men and women to the full enjoyment of the rights set forth in the Covenant.”<sup>94</sup> Article 26 states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” Therefore, although the ICCPR does not protect the right to property or inheritance per se, it does protect women against all discriminatory laws, statutory or customary, with regard to property or inheritance. Indeed, the Human Rights Committee has been clear regarding the fact that this article finds application for all rights protected under a law even if the right is not specifically protected under ICCPR.<sup>95</sup>

Furthermore, in its general comment 28 adopted in March 2000, the Human Rights Committee expressly recognized that: “Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes.”<sup>96</sup> In order to abolish this inequality, it specifically obliges States parties to “ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.”<sup>97</sup> It also requires States parties to “furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which

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<sup>92</sup> UDHR art 2; CESCR art 2(2); CCPR art 26.

<sup>93</sup> UDHR art. 7; ICCPR art. 26.

<sup>94</sup> ICCPR, art. 3.

<sup>95</sup> *Järvinen v Finland*, Communication No. 295/1988, U.N. Doc. CCPR/C/39/D/295/1988 (1990) at 6.2.

<sup>96</sup> Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)*, (Sixty-eighth session, 2000), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 179 (2003) at para 5.

<sup>97</sup> Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)*, (Sixty-eighth session, 2000), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 179 (2003) at para 5.

jeopardize, or may jeopardize, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors.”<sup>98</sup>

The Human Rights Committee reiterated such comments regarding the discriminatory effect of long-standing tradition in *Müller and Engelhard v. Namibia*, where a distinction included in a statutory law was based on the long-standing tradition in Namibia by which women assume their husbands' surname: “In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant.”<sup>99</sup>

The “raison d’être” of CEDAW is to guarantee equality of rights for women and non-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.”<sup>100</sup> Therefore, CEDAW also addresses directly the issues of customary laws and traditional practices that may prevent women from enjoying their rights, including their right to property and inheritance in its article 5:

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

According to CEDAW general recommendation 25, this article can also be read in conjunction with article 4 of the CEDAW, which provides for temporary special measures:

States parties are reminded that temporary special measures should be adopted to accelerate the modification and elimination of cultural practices and stereotypical attitudes and behaviour that discriminate against or are disadvantageous for women. Temporary special measures should also be implemented in the areas of credit and loans, sports, culture and recreation, and legal awareness. Where necessary, such measures should be directed at women

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<sup>98</sup> Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Article 3)*, (Sixty-eighth session, 2000), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 179 (2003) at para 5.

<sup>99</sup> *Müller and Engelhard v Namibia*, Communication No. 919/2000, U.N. Doc. CCPR/C/74/D/919/2000 (2002) at 6.8.

<sup>100</sup> CEDAW, preamble.

subjected to multiple discriminations, including rural women.<sup>101</sup>

Furthermore, the CEDAW Committee emphasized that under articles 5, 2(e) and 2(f) of CEDAW discrimination under CEDAW is not restricted to action by or on behalf of States parties. According to these articles, States have an obligation to prevent discrimination by third parties.<sup>102</sup> Such obligation is fundamental in the context of property and inheritance rights where most of the violations arise from the application of discriminatory customary laws within communities, and traditional and cultural practices exercised by non-State actors, such as relatives or neighbours.

The principles and recommendations established by the CEDAW Committee in its jurisprudence with regard to violence towards women can be applied by analogy to the violation of women's right to property and inheritance.<sup>103</sup> In these cases, the CEDAW Committee has found States responsible for discriminatory acts towards women perpetrated by non-State parties. CEDAW has recommended the following in relation to violence against women:

(a) Strengthen implementation and monitoring of the Federal Act for the Protection against Violence within the Family and related criminal law, by acting with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so;

(b) Vigilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilized in cases where the perpetrator in a domestic violence situation poses a dangerous threat to the victim and also ensure that in all action taken to protect women from violence, due consideration is given to the safety of women, emphasizing that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity;

(c) Ensure enhanced coordination among law enforcement and judicial officers, and also ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with non-governmental organizations that work to protect and support women victims of gender-based violence;

(d) Strengthen training programmes and education on domestic violence for judges, lawyers and law enforcement officials, including on the Convention on the Elimination of All Forms of Discrimination against Women, general

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<sup>101</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation 25: Article 4, Paragraph 1: Temporary Special Measures*, 30th Sess., UN Doc A/59/38 at 78 (2004) at para 38.

<sup>102</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation 19: Violence against Women* 11th Sess., UN Doc. A/47/38 at 1 (1993) at para 9.

<sup>103</sup> *A.T. v Hungary* (Communication No. 2/2003), 32<sup>nd</sup> sess., (26 January 2005) at 9.2; *Yildirim v Austria*, UN Doc CEDAW/C/39/D/6/2005 (6 August 2007) at 12.1.1; *Goekce v Austria*, UN Doc CEDAW/c/39/D/5/2005 (6 August 2007) at 12.1.1.

recommendation 19 of the Committee, and the Optional Protocol thereto.<sup>104</sup>

These recommendations can be applied by analogy to the situation of violation of women's right to property and inheritance to provide States with concrete steps to move forward.

Article 2 of the African Protocol also imposes obligations on States to combat all forms of discrimination. Notably, to eradicate all harmful cultural and traditional practices towards women:

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

- a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
- b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
- c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
- d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
- e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.<sup>105</sup>

#### **D. Obligation of Sub-Saharan African States to implement International Instruments**

The Grandmothers' Tribunal has targeted the eight following countries: Ethiopia, Kenya, Malawi, South Africa, Swaziland, Uganda, Zambia and Zimbabwe. Most of these countries have signed and ratified the principal international instruments, as well as the African's

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<sup>104</sup> *Yildirim v Austria*, UN Doc CEDAW/C/39/D/6/2005 (6 August 2007) at 12.3; *Goekce v Austria*, UN Doc CEDAW/c/39/D/5/2005 (6 August 2007) at 12.3.

<sup>105</sup> African Protocol, art. 2.

regional instruments. However, as shown in the following table, some of them did not sign the Optional Protocols that followed the entry in force of some of these instruments.

	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.

All these instruments contain at least one general provision imposing obligations on States to implement the rights they protect.<sup>106</sup> In particular, as the right to non-discrimination is guaranteed under the ICCPR, States are under an immediate obligation to implement it.

As the Grandmothers' Tribunal focuses on discrimination against women, particular attention should be given to the implementation of the CEDAW and the African Protocol which address discrimination against women directly.

Article 2 of CEDAW provides means by which States parties can implement CEDAW and identifies the general legal obligations of States parties as follows:

States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.<sup>107</sup>

This article is crucial to the full implementation of CEDAW.<sup>108</sup> In its general recommendation with regard to the implementation of the convention, the CEDAW Committee emphasizes the obligation of States parties to pursue a policy of eliminating discrimination against women:

This requirement is an essential and critical component of a State party's general legal obligation to implement the Convention. This means that the State party must immediately assess the de jure and de facto situation of women and take concrete steps to formulate and implement a policy that is targeted as clearly as possible towards the goal of fully eliminating all forms of discrimination against women and achieving women's substantive equality with men.<sup>109</sup>

The CEDAW Committee also explains that under article 2, “all aspect of States’ legal obligation have to be address in order to respect, protect and fulfill women's right to non-discrimination and to the enjoyment of equality.”<sup>110</sup>

Additionally, Article 1 of the African Protocol imposes similar obligations on States parties regarding the measures that should be taken to eradicate discrimination against women:

States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

- a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
- b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

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<sup>107</sup> CEDAW, art. 2.

<sup>108</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th Sess., UN Doc. CEDAW/C/GC/28 (2010) at para 6.

<sup>109</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th Sess., UN Doc. CEDAW/C/GC/28 (2010) at para 24.

<sup>110</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th Sess., UN Doc. CEDAW/C/GC/28 (2010) at para 9.

- c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
- d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
- e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

**E. Evidence required to find Right to property and inheritance violations**

Where the right to property is expressly guaranteed, such as under the African Charter, the first step to establish a violation will be to prove that there is indeed traditional or official possession of a property (immovable or movable). Further, the claimant must demonstrate that the State fails, without justification, to respect, protect or fulfill the right to property. For instance, a State will fail to respect the right to property by arbitrarily interfering with the enjoyment of the right or by expropriating it without legal basis. It can also be prove that a State has violated one's right to property if it fails to protect it from third party encroachment. This could be the case if a State does not take all necessary means, including legislative, administrative and judicial to protect against any potential encroachment.

Women's right to property under other international and regional instruments is rather a right to equality in the fulfillment of the right than a right to property per se. Therefore, a violation will require the proof of a discrimination suffered by women. The same kind of evidence will be required to demonstrate a violation of women's right to inheritance.

This discrimination will be demonstrated by proof of differential treatment in the enjoyment of the right to property or the right to inheritance. This differential treatment could be reflected in constitution, statutory law, customary law, policies or any other documents. The differential treatment could also appear through customs, tradition or practices. Moreover, this discrimination is not restricted to action by or behalf of the State. States will be held accountable if there is evidence that a differential treatment exists regardless of the identity of the perpetrator. The violation will be established in those situations by showing that States fail to protect women by taking all necessary actions or measures against these situations to prevent women to be discriminated.

Practically speaking we would have to find women who can testify about different type of discrimination. Since all the countries targeted have constitutions protecting the right to equality and non-discrimination for women, it will be useful to have testimony that prove those rights are violated. The experiences or facts that should be brought before the Grandmothers' Tribunal have to illustrate the range of violation faced by women when it comes to non-discrimination and equality regarding right to property or right to inheritance.

For instance, the following situations could be good evidences of such violations:

- Any fact or experience showing discrimination in the access of their property, including land or movable property;



- Any fact or experience where women were in subordinate position with regard to access or control over property;
- Any fact or experience related to an unequal ownership, control or share of the marital property during the marriage or at the end of the relationship;
- Any experience or knowledge of situation related or not to discriminatory customs or tradition faced by women when it comes to ownership, acquisition, management, administration, enjoyment and disposition of property;
- Any experience or knowledge of situation related or not to discriminatory customs or traditions faced by women when it comes to inheritance, such as unequal sharing of relatives' properties, including parents.
- Any experience or knowledge of situation related or not to discriminatory customs or traditions faced by women upon the death of their spouse, such as property grabbing or wife inheritance.
- Any experience where a woman had to face discrimination under a national legislation itself or its enforcement.
- Any fact or experience showing that challenging discriminatory customary laws or practices could be harmful for women who tried to do it.
- Any fact or experience showing consequences caused by the existence of discrimination regarding women's right to property or inheritance. For instance, no control over income from property, no possibility to earn livelihood, no possibility to provide adequate housing and nutrition to herself and family.

## V. CONCLUSION

In conclusion, human rights international and regional instruments analyzed above will certainly provide a sound legal foundation for grandmothers to establish violation of their rights to property and inheritance, and right to freedom from non-discrimination.

In the light of the issues faced by women on the ground in sub-Saharan Africa, it appears that older women have a strong case for a clear violation of the right to property and inheritance in the context of discrimination. States parties have immediate positive obligations to guarantee that women will be able to enjoy their right in equality with men and free from any discrimination.

With respect to women's right to property and inheritance contained in human rights instruments, we have reached the following conclusions:

- Right to property: The African Charter is the only instrument that expressly guarantees the right to property and it is binding on all the States at issue. However, article 14 of the African Charter provides that the right to property may be encroached, in accordance with the provisions of applicable laws, in some circumstances such as, upon in the interest of public need or in the general interest of the community. Under article 14, States parties have positive and negative obligation to respect, protect and fulfill the right to property to everyone. I do not yet have sufficient understanding of the particular facts facing the grandmothers to determine whether they will have a strong claim that their right to property has been

violated.

- Women's right to property: women's right to property is related to other rights and is therefore implicitly recognized by the ICESCR and ICCPR. However, CEDAW is the only instrument that explicitly guaranteed an equal right of property for women. This protection implies that States should ensure women equal rights to enter into and conclude contracts and to administer a property but also in the equal share of marital property. CEDAW have provided specific State's obligation to guarantee the protection of older women's right to property. These obligations will be useful to establish evidence of violations in the context of the Grandmothers' Tribunal.
- Women's right to inheritance: The only instrument that directly ensures the protection of right to inheritance to women is the African Protocol. However, CEDAW, ICCPR and ICESCR have imposed obligations on States to guarantee an equal right to inheritance for women and men. Any law or practice with regard to inheritance that leads to discrimination against women should be abolished. Therefore, any evidence for the existence of such a law or practice could be used to prove a violation of women's right to inheritance.
- Right to non-discrimination in the context of property and inheritance: Almost all instruments analyzed in this paper provide for a general right to non-discrimination and equal treatment. They place positive obligations on States to provide mechanisms that should eradicate discrimination and the prejudice that it causes to women. State failure to comply with these provisions may allow older women of the Grandmothers' Tribunal to prove violations of their right to property and inheritance. More specifically, article 26 of the ICCPR can be invoked to prove violations against all discriminatory laws, statutory or customary with regards to property or inheritance.

Lastly, it is important to note that the right to property and the right to inheritance are issues often dealt with at a national level. Therefore, the legal research and analysis on each country aimed by the Grandmothers' Tribunal will certainly be useful to have a better understand of the implementation of these rights as well as the violations faced by older women in sub-Saharan Africa.