

KENYA

IN THE SHADOW OF DEATH: HIV/AIDS and Children's Rights in Kenya

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*I have constant pain, and there is no help for us—just for the rich people—but if I can find someone to look after my children, I can die in peace.*¹

Lillian M., thirty-eight, a person with AIDS
Nairobi

I. INTRODUCTION

Human immuno-deficiency virus/acquired immune deficiency syndrome (HIV/AIDS) is a national disaster for the people of Kenya, children and adults alike. Kenya is estimated to have the ninth-highest prevalence of HIV in the world with about 14 percent of the adult population infected. An estimated 1 million orphans in the country represent only a fraction of the population of children affected by AIDS, which includes children withdrawn from school to care for a sick relative, those in families caring for orphans, and those who have had to become breadwinners to replace the income of a sick parent.

As a global epidemic, HIV/AIDS takes its place with the bubonic plague of the Middle Ages for the millions of lives it has claimed. The fact that 22 million have died of AIDS so far but over 36 million are infected means that the worst is yet to come. In Africa, where its impact is most heavily felt, the unprecedented destruction of HIV/AIDS has meant deteriorating national and household income, the unraveling of the social safety net of the extended family, and the creation of millions of orphans. Although too little and too late from the point of view of many working to combat the disease, HIV/AIDS is now the subject of considerable global attention in the international press, in international policy fora, and in the aid community.

Depicted and analyzed as an economic, social and development catastrophe, HIV/AIDS is less well understood as a human rights crisis, though the rights of persons living with and at risk of AIDS have figured in AIDS policy development from the beginning. The late Jonathan Mann, who headed the first Global Programme on HIV/AIDS at the World Health Organization (WHO), recognized early in the epidemic the importance of linking HIV/AIDS and human rights, especially to ensure that those at risk would not be stigmatized in using services.² Early policy statements on AIDS from WHO underlined the importance of combating discrimination against HIV-infected persons.

As the epidemic grew, national policies in the industrialized world came increasingly to include explicit provisions against discrimination of HIV-positive persons and persons living with AIDS as well as protections of the voluntary nature of testing and confidentiality of test results. Some public health experts note that these policies on HIV/AIDS contrasted with those on other sexually transmitted diseases such as syphilis and gonorrhea, where testing was mandatory at certain times and identification and tracing of sex partners were required by law.³ As HIV/AIDS in Africa has become a crisis of historic proportions, some experts have suggested it may be time to reconsider emergency measures such as large-scale mandatory testing under certain conditions.⁴ Human rights law, including law on the rights of children, should inform these important public health policy discussions.

¹ Human Rights Watch interview, Kibera (Nairobi), March 15, 2001.

² Jonathan M. Mann, "Human rights and AIDS: The future of the pandemic," in Jonathan M. Mann, Sofia Gruskin, Michael A. Grodin, and George J. Annas, eds., *Health and human rights: A reader* (New York and London: Routledge, 1999), p. 217.

³ See, e.g., Kevin M. De Cock, "From Exceptionalism to Normalisation: a Reappraisal of Attitudes and Practice Around HIV Testing," *British Medical Journal* vol.316 (1998), pp. 7127-7133.

⁴ See, e.g., Kevin M. De Cock, "Keynote Lecture: Heterogeneity and Public Health in the Global HIV/AIDS Epidemic" (paper presented to the 8th Conference on Retroviruses and Opportunistic Infections, Chicago, February 4, 2001, and John Oywa, "Doctors Plea on AIDS Spread," *The Nation* (Nairobi), May 12, 2001. The latter recounts the efforts of Kenyan doctors to repeal guidelines that prohibit them from revealing the HIV status of their patients. The doctors state that confidentiality laws are standing in the way of combating the HIV/AIDS epidemic.

Work from U.N. bodies and others on AIDS and human rights has emphasized that the engine of the epidemic in many parts of the world is sexual violence and subordination of women and girls, recommending measures that protect the rights of women as part of AIDS policy and law.⁵ The U.N. Development Fund for Women (UNIFEM) echoes the work of many social scientists in asserting that the epidemic “would not have reached such vast proportions” if women in Africa and around the world were able to refuse unwanted and unprotected sex.⁶ Delegates from 45 countries recently endorsed a report made to the United Nations Commission on the Status of Women that concluded, “Women’s and girls’ relative lack of power over their bodies and their sexual lives, which is supported and reinforced by their social and economic inequality, makes them more vulnerable in contracting and living with HIV/AIDS.”⁷

On another human rights front, a vocal world-wide civil society movement is currently promoting the right of persons living with AIDS in developing countries to the same antiretroviral drugs that are widely used in the wealthy countries of the North. A United Nations Commission on Human Rights resolution in April 2001 declared access to treatment a right for all persons with AIDS and called upon states to facilitate access to “preventive, curative or palliative pharmaceuticals or medical technologies” used against the disease.⁸

These human rights analyses of HIV/AIDS, essential and ongoing, have not for the most part focused on children affected by AIDS and the ways in which the epidemic threatens children’s human rights. The plight of children orphaned by AIDS has been the subject of many journalistic accounts and program documents, but there have been few studies of legal and policy protections of children’s rights related to HIV/AIDS.

The traditional recourse that orphans and other vulnerable children have had to family-based and community-level support and protection is unraveling in AIDS-affected countries. This deterioration is in some cases a direct result of mortality and other consequences of the epidemic and in others due to the concurrent and combined effects of HIV/AIDS and intransigent poverty. The absence of traditional family and community support for children has direct implications for the state. The difficult circumstances faced by AIDS-affected children can be mitigated by legal and policy protections and state support for well-defined and well-targeted services. AIDS-affected children in Africa will number in the tens of millions for years to come. State responsibilities must be better understood and acted upon urgently in the face of this historically important threat to children’s rights.

After many years of a weak official response to HIV/AIDS, the government of Kenya has recently taken aggressive measures to emergize its fight against the disease, including the passage of legislation designed to facilitate the importation of cheaper, generic antiretroviral drugs and the first steps to removing tariffs on imported condoms. In this report, Human Rights Watch suggests that equally aggressive measures must be taken by the government to ensure protection of the rights of children affected by HIV/AIDS.

Because HIV/AIDS so often impoverishes and stigmatizes the children it affects, and claims the lives of so many in their extended family, these children are at high risk of having to eke out livelihoods on the street or in other potentially dangerous situations. AIDS-affected children face many obstacles to staying in school and thus to fulfilling their right to education. They are further disadvantaged in many cases by the unscrupulous and unlawful appropriation of property they are entitled to inherit from their parents, and in Kenya they are rarely able to take legal action to protect their inheritance rights. These factors together place at risk the realization by AIDS-

⁵ See, e.g., U.N. High Commissioner for Human Rights and U.N. Joint Programme on HIV/AIDS, *HIV/AIDS and Human Rights: International Guideline*, U.N. Doc. HR/PUB/98/1, 1998, especially guideline no. 8.

⁶ UNIFEM, “UNAIDS Partners with UNIFEM to Halt Spread of HIV/AIDS among Women and Girls” (press statement), May 24, 2001.

⁷ U.N. Commission on the Status of Women, “Agreed Conclusions on Women, the Girl Child and HIV/AIDS” (statement adopted at 45th session of the Commission, March 2001).

⁸ Economic and Social Council of the United Nations. Commission on Human Rights resolution 2001/33, “Access to medication in the context of pandemics such as HIV/AIDS,” U.N. Doc. E/CN.4/RES/2001/33, April 20, 2001. Passed unanimously with the United States abstaining.

affected children of their right to survival and development, which the government has an obligation to ensure “to the maximum extent possible” under the United Nations Convention on the Rights of the Child. These problems are compounded in Kenya by apparently poor access of children and young adults to appropriate and clear information about HIV/AIDS, which puts children at risk of being unable to protect themselves from HIV transmission. Children have the right to survival; physical, social and cultural development; health; and education. These rights are guaranteed under the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, especially article 24, and the African Charters on Human and Peoples’ Rights and on the Rights and Welfare of the Child, all of which Kenya has ratified.

Kenya is far from alone in needing to strengthen protections of the rights of AIDS-affected children. Governments around the world have neglected the consequences of AIDS on children and have failed to provide the necessary protections of their rights to survival and development. This failure is one of the most pervasive and lasting crises of the HIV/AIDS catastrophe, and it must be addressed with the greatest urgency.

II. RECOMMENDATIONS

To the Government of Kenya

- The national medium-term plan for HIV/AIDS and other strategic policy development and implementation on HIV/AIDS in Kenya should include a comprehensive plan for protection of children affected by AIDS with a well defined plan of action and budget.
- The government should as a matter of urgency ratify ILO Convention No. 182 on the elimination of the worst forms of child labor and establish mechanisms for monitoring and addressing child labor problems.
- The government should work with donors and nongovernmental organizations to develop and implement a system of providing legal assistance for children in property disputes or to modify property dispute resolution procedures so that reliance on legal assistance is less necessary. The Children Bill 2001 should reflect these changes.
- The Children’s Department should ensure that all children’s officers, including paid staff and volunteers, are trained on the situation of HIV/AIDS-affected children, including the range of abuses of which they are at highest risk and inheritance issues.
- The Ministry of Education should accelerate the training of teachers on the use of the HIV/AIDS curriculum to ensure its full implementation in all schools by January 2002 and ensure continued support for the use and evaluation of the curriculum.
- The National AIDS Control Council should identify the relevant ministries and non-governmental entities to spearhead an urgent effort to provide appropriate information on HIV/AIDS to school-aged children who are out of school. The Kenya Broadcasting Company and other government-run radio and television stations with significant reach in the country should be used optimally to provide appropriate and clear information on HIV transmission and AIDS treatment and care.
- President Moi and other leaders of the government of Kenya should contribute to breaking the silence and stigma of HIV/AIDS by speaking out frequently on public occasions to encourage nondiscrimination against persons affected by HIV/AIDS and their families as well as greater utilization of AIDS-related services.
- The National AIDS Control Council should make recommendations to the government for improved monitoring and inspection of orphanages and other group homes for children, particularly with regard to protecting AIDS-affected children from discrimination, mandatory testing, and abuse.

- The government should take measures to realize its stated commitment to ensure free primary education for all children in Kenya on a non-discriminatory basis.
- The president of Kenya should approve the final version of the recently passed Industrial Property Act, and the government should ensure follow-up action to increase access of persons with AIDS to treatment for both AIDS and opportunistic infections.

To International Donors Supporting the Government of Kenya

- Give high priority to supporting the government's efforts to ensure that AIDS-affected children are protected from abuse, neglect, disinheritance, hazardous labor, and premature withdrawal from school.
- Consider increased allocations earmarked to the Children's Department so that the number of paid children's officers (and not just volunteers) can be increased to reflect the increasing numbers of children in need of special protection.
- In international donor consultations, ensure that the needs of AIDS-affected children are given high priority in resource allocation and policy and program development.

To the United Nations

- Ensure that the policies and programs to protect AIDS-affected children receive high-priority support through the global fund for HIV/AIDS, malaria, and tuberculosis and other mechanisms. Ensure wider availability of program and policy guidelines and sharing of best practices with respect to AIDS-affected children.

III. METHODS

The challenge of protecting the rights of children affected by HIV/AIDS is far from unique to Kenya, and this research could have been conducted in any one of a number of African countries. Kenya was chosen partly because of the presence of a network of NGOs providing services to AIDS-affected children the staff members of which were generous enough to share their expertise with us, but also because the problem of children affected by AIDS has not figured as prominently in AIDS policy statements by the government as in many other countries.

Human Rights Watch conducted research for this report in Kenya in February and March 2001. For purposes of this work, we defined AIDS-affected children as those having a parent or guardian living with AIDS, those having lost a parent or guardian to AIDS, those living in households fostering children orphaned by AIDS, and those who were themselves living with AIDS.⁹ Because AIDS is rarely noted as a cause of death on death certificates and many of those living with the disease have not been tested for HIV or have not had test results communicated to them, it was necessary to work through intermediaries who knew the families well enough to know whether AIDS was a feature of their situation. The organizations that assisted us in this way were local NGOs that provide services to children in need of special protection or to families affected by AIDS.

Organizations identified families affected by AIDS, particularly those where children had been orphaned, and then further identified those where a child, parent, or guardian would be willing to talk about the impact of AIDS on the child. The population interviewed cannot be considered completely representative of the population of AIDS-affected families in Kenya because of its contact with service-providing organizations, but the bias is likely to be such that the general population of AIDS-affected children is in even worse circumstances than those of the families we encountered.

⁹ The Convention on the Rights of the Child defines children as "Every human being under the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." Convention on the Rights of the Child, art.1, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No.49) at 167, U.N. Doc. A/44/49 (1989). We also used this definition, though some young adults were interviewed about how they were affected by AIDS as children.

We interviewed twenty-six AIDS-affected children and young adults or their guardians. Among others interviewed as NGO, education or legal experts, four persons were also guardians of children orphaned by AIDS and made some remarks in that capacity. Either one or two Human Rights Watch researchers conducted the interviews, mostly in the homes of affected families. One youth group was interviewed as a group. All interviews covered a few topics determined in advance based on prior reports of the impact of AIDS on children. Organizations discouraged us from using translators unknown to the family. A social worker or other staff member of the organization accompanying us therefore provided the translations in most cases. This person was generally known to the family. Most of the interviews were conducted in Nyanza Province (Kisumu town, Siaya, and Rachuonyo), with six in Nairobi and two in Central Province. A few of the interviews were conducted in English but most were in Luo (in Nyanza Province) or Kikuyu. We also spoke with thirty-two experts from the legal and judicial communities, researchers, nongovernmental organization service providers, teachers, school administrators, and U.N. officials. These interviews were open-ended and generally wide-ranging in topic. We also reviewed journalistic accounts, NGO reports, and published and unpublished studies from many sources.

IV. BACKGROUND

Background on HIV/AIDS in Africa

HIV/AIDS is a crisis of unprecedented magnitude in sub-Saharan Africa. Almost 80 percent of the 22 million deaths from AIDS since the beginning of the epidemic have occurred in Africa.¹⁰ Most of those have been concentrated in eighteen countries that make up only 5 percent of the population of the world. In most of the highly affected countries of eastern and southern Africa, AIDS has caused life expectancy to decline by over twenty years from already low levels.¹¹ In the last ten years, AIDS has been a more potent killer by several orders of magnitude than all of the armed conflicts in Africa together.¹² The AIDS epidemic is distinctive among lethal epidemics in that most of the lives it takes are of adults from twenty to forty years old. In Africa the vast majority of persons in this age group are parents, so AIDS has been responsible for orphaning millions of African children. About 25 million people are estimated to be living with HIV/AIDS in sub-Saharan Africa, of whom 3.8 million were infected in 2000 alone.¹³ Millions of new infections each year among young adults guarantee that high rates of orphaning will continue for years to come.

Mostly because of the stigma of AIDS, it is impossible to count children orphaned by AIDS using sample surveys or censuses. Estimates of the numbers of children orphaned by AIDS are extrapolated from statistics on AIDS-related deaths and demographic assumptions, which differ somewhat between the two main sources of projections, the United Nations and the United States Bureau of the Census. The United Nations estimated that by end 2000 about 13 million children under age fifteen years in sub-Saharan Africa would have lost their mother or both parents to AIDS.¹⁴ The Census Bureau estimates that there are currently about 15 million children under

¹⁰ U.N. Joint Programme on HIV/AIDS (UNAIDS), *Report on the Global HIV/AIDS Epidemic: June 2000*, (Geneva: United Nations, 2000).

¹¹ UNAIDS, *AIDS Epidemic Update, December 2000: Graphics* (Geneva: United Nations, 2000). The countries with the ten highest reported rates of HIV infection in the world as of June 2000 were Botswana (adult prevalence of 36 percent), Swaziland (25.2 percent), Zimbabwe (25.1 percent), Lesotho (23.6 percent), Zambia (20 percent), South Africa (20 percent), Namibia (19.5 percent), Malawi (16 percent), Kenya (14 percent), and Central African Republic (13.8 percent). See tables in UNAIDS, *Report on the Global HIV/AIDS Epidemic: June 2000*, p. 124.

¹² UNICEF Eastern and Southern Africa Regional Office, "The Silent Emergency" (annotated presentation and fact sheets, Nairobi, 2000).

¹³ Joint United Nations Programme on HIV/AIDS (UNAIDS). *AIDS epidemic update, December 2000*. Geneva, 2000. For more information on methods of estimation of HIV/AIDS prevalence, see UNAIDS, *Report on the global HIV/AIDS epidemic: June 2000*, pp.115-116. Estimates of prevalence of AIDS in most African countries come from surveys of women seeking pre-natal services in selected or "sentinel" survey sites. This method has proven to be quite reliable in estimating national prevalence. Countries in which the epidemic is not in the general population but rather confined to high-risk groups use different methods of estimation.

¹⁴ UNAIDS, *Report on the global HIV/AIDS epidemic: June 2000*, p. 27.

age fifteen who have lost at least one parent to AIDS in Africa and that by 2010 this number will be at least 28 million.¹⁵

By 2010, in five countries of eastern and southern Africa, over 30 percent of all children under age fifteen will be orphans, largely due to AIDS, according to the Census Bureau.¹⁶ By comparison, research suggests that in most developing countries about 2 percent of children under fifteen years were orphans before the era of AIDS.¹⁷ Experts in the U.N. and the Census Bureau agree that “the HIV/AIDS pandemic is producing orphans on a scale unrivaled in world history,”¹⁸ and that orphans as a percentage of the child population will continue to remain high in Africa for decades.

In heavily affected countries, for each child who has lost a parent to AIDS, there are one or two children of school age who are caring for an ill parent, acting as breadwinners for the household, or otherwise unable to attend school because of AIDS.¹⁹ Children who are not orphaned are also affected when orphans are brought into their homes or, obviously, when they themselves are infected. Thus, AIDS-affected children comprise a much larger population than just orphans.

The response of African governments to the AIDS epidemic has generally been grossly inadequate. Uganda, Kenya’s neighbor to the west, is often cited as virtually the only African state in which government leaders recognized as early as the mid-1980s the threat of HIV/AIDS and acted to stop it. In 1986, spurred by outspoken leadership from President Yoweri Museveni, Uganda became the first country in Africa to collaborate with the World Health Organization Global Programme on AIDS to create an intersectoral national AIDS control program.²⁰ In 1993, the first hard evidence of declining transmission rates in Uganda was published²¹—a time when heads of state in the rest of Africa were still silent about the problem or mentioned it only to blame others for bringing it into their countries. In spite of early action on the part of the Ugandan government, Uganda still has over 1 million children orphaned by AIDS, and the epidemic has claimed millions of lives, including 110,000 in 1999 alone.²² This level of destruction is due to many factors, probably including the foothold that the epidemic already had in the country by 1986, the failure of even the greatest experts in the world at that time to understand its killing power, and the poverty and disintegration of social structures and basic services in Uganda following years of war. The successes in reducing rates of transmission in Uganda are most often attributed to the government’s leadership and openness about the problem, the active role of civil society and religious leaders, and early donor support.²³

Violations of civil and political rights have fueled HIV/AIDS’ massive destruction in Africa. The subordinate status of women and their inability in many circumstances to negotiate safer sex or resist coerced sex is only one category of abuses. Women and girls may also face greater stigma than men in seeking services related to reproductive health and prevention and treatment of sexually transmitted infections. Gay men live a largely hidden life in many African countries, and this discrimination and marginalization contributes to their vulnerability to the disease and the inaccessibility of services for them. Prisoners in many countries are

¹⁵ Susan Hunter and John Williamson, *Children on the Brink 2000*, (Washington, DC: U.S. Agency for International Development, 2000).

¹⁶ Ibid., p. 20.

¹⁷ UNAIDS and UNICEF, *Children Orphaned by AIDS: Front-line Responses from Eastern and Southern Africa* (New York: United Nations, 1999), p. 3.

¹⁸ Hunter and Williamson, *Children on the Brink*, p. 1.

¹⁹ World Health Organization (WHO) and UNICEF, *Action for Children Affected by AIDS: Programme Profiles and Lessons Learned* (Geneva: United Nations, 1994), p. 5.

²⁰ Mary Grace Alwano-Edyegu and Elizabeth Marum, “Knowledge is Power: Voluntary HIV Counselling and Testing in Uganda,” UNAIDS Best Practice Series (Geneva: UNAIDS, 1999).

²¹ Ibid.

²² UNAIDS, “Epidemiological Fact Sheet on HIV/AIDS and Sexually Transmitted Infections: Uganda” (Geneva: United Nations, 2000).

²³ Alwano-Edyegu and Marum, “Knowledge is Power,” p.8.

reportedly denied services and information to enable them to protect themselves. Injecting drug users and commercial sex workers are frequently marginalized and unable to assert their rights to protection. Sexual violence has been used systematically as a weapon of war and is particularly lethal where HIV/AIDS is prevalent. Any government's response to HIV/AIDS is incomplete without addressing these civil and political rights violations.

Breakdown of Community and Family Support Mechanisms

In the countries now hardest hit by HIV/AIDS, the extended family has traditionally been the source of support and care for orphans and other children needing special protection. In country after country, it has become clear that the extended family is now overextended and unable to provide its traditional level of protection and care for children deprived of a family environment. "In the body, HIV gets into the defensive system and knocks it out. It does that sociologically too. It gets into the extended family support system and decimates it," according to Geoff Foster, a pioneer in research on children affected by AIDS in Zimbabwe.²⁴ As a researcher in Ethiopia has noted, the extended family, "a social safety net that accommodated orphaned children for centuries, is unraveling under the strain of AIDS."²⁵

The deterioration of family support begins with the immediate family of the person with AIDS. John Williamson, author of some of the first and most authoritative analyses of the situation of AIDS-affected children, traces a pattern of weakening of the African family in the face of AIDS that has been confirmed in many investigations.²⁶ When symptoms of AIDS appear, a breadwinner or parent becomes increasingly ill and unable to work. The combination of losing that person's income or daily household work and the financial burden of expensive medical treatments, even involving no antiretroviral drugs, leads to problems of food insecurity and other material need in the household. Children are withdrawn from school either to care for the sick person in the household, to care for young children, or to engage in income-generating activities (or some combination of the three). Increased poverty in the household also means reduced access to health services for all members, not just the person or persons living with AIDS. Williamson considers problems of inheritance for surviving widows and children, a common occurrence after death from AIDS occurs. He also notes that psychosocial distress following the death in the family is exacerbated by stigmatization on the part of the community and more distant relatives.

The situation of families affected by AIDS, as opposed to other conditions that result in orphans, was described succinctly by WHO and the United Nations Children's Fund (UNICEF) in 1994:

Other epidemics and disasters also cause death on a large scale and leave orphaned children, but the pattern of HIV/AIDS is unique. AIDS is a protracted problem, which does not allow the prospects of a return to normality. Those who should be caring and providing for children and the elderly are the ones who are dying. In the communities hardest hit, there are fewer and fewer able-bodied adults to produce crops or income or to care for children, who are often pushed into poverty. The survival of those already poor becomes even more precarious. The problems are further exacerbated by the fear and stigma of AIDS which make other members of the community unwilling to help.²⁷

Many of the countries and communities hardest hit by HIV/AIDS in sub-Saharan Africa have in the era of AIDS suffered from war, natural disasters, increasing poverty, and the effects of widespread corruption. By the early 1990s, when the impact of AIDS began to be felt by the general population in most parts of eastern and southern Africa, community-level safety nets were already stretched. It is not surprising that caring for children affected by AIDS poses a major challenge. As one group of AIDS experts noted at an international conference,

²⁴ Association François-Xavier Bagnoud, *Orphan Alert: International Perspective on Children Left Behind by HIV/AIDS* (Boston: Association François-Xavier Bagnoud, 1999), p. 3.

²⁵ Ibid, p.14.

²⁶ Carol Levine and Geoff Foster, *The White Oak Report: Building International Support for Children Affected by AIDS* (New York: The Orphan Project, 2000), pp.24 - 27.

²⁷ WHO and UNICEF, *Action for Children*, p.8.

The number of orphans in countries with severe HIV/AIDS epidemics is already straining the ability of extended families and communities to absorb and provide for these children's needs. It is unclear how much coping can be expected of families and communities. How much of the inevitable gap in support will be taken up by the state? And what can civil society, with the support of government and the international community, do to help? These are questions that must be faced in the next decade, and there are no easy answers.²⁸

Among the particular risks to children affected by AIDS in this difficult context, several have been noted consistently in a number of countries.

Risk of Contracting HIV/AIDS

Young people are a high-risk group for contracting HIV/AIDS, particularly if they do not have regular access to appropriate and clear information on HIV transmission and safe sex, as is the case in much of Africa. Their risk is augmented when they are out of school, impoverished, on the street, or otherwise in circumstances that have been associated with the presence of AIDS in the family.

Risk of Being Out of School

As noted above, withdrawing children from school appears to be a common coping mechanism for families affected by AIDS, and quantitative studies have borne out this general observation. A study in rural Zambia showed that 68 percent of orphans of school age were not enrolled in school compared to 48 percent of non-orphans.²⁹ In this case, the study did not distinguish AIDS orphans from others, but the communities involved had very few orphans before the AIDS crisis. The most recent annual report by the U.N. Joint Programme on HIV/AIDS (UNAIDS) on the state of the HIV/AIDS epidemic notes that several studies have confirmed AIDS in the family as a direct cause of school dropout. For example, in a study of heavily AIDS-affected communities in Zimbabwe, 48 percent of primary school-age orphans had dropped out of school, most often at the time of a parent's illness or death, and of the children of secondary school age interviewed, there were no orphans who were able to stay in school.³⁰ Another survey by the Farm Orphan Support Trust in 2000 estimated that one third of children orphaned by AIDS on commercial farms in Zimbabwe had dropped out because their families could no longer afford school fees or because the children had lost their birth certificates or other documents needed for school registration.³¹ These direct risks of being removed from school are compounded for children in AIDS-affected communities by the high death rate among teachers and school administrators that has been reported in many countries, dramatically weakening the capacity of schools to deliver educational services.³²

Property-Grabbing and Retaining Inheritance Rights

In many African countries, inheritance rights of AIDS widows and orphans have not been respected or protected.³³ Although widows and orphans from other causes may also experience this so-called property-grabbing, some observers have suggested that it is much worse when AIDS is in the picture. A study in Zambia noted that wife inheritance, a practice whereby a widow is "inherited" to be married to her husband's brother or another relative, may contribute to property-grabbing in AIDS-affected families. When a man is betrothed, his family pays a bride price to his fiancée's family after which the woman and any children of the marriage are seen to belong to his family. If the man dies and his widow has AIDS or is suspected of being HIV-positive, his family

²⁸ Monitoring the AIDS Pandemic (MAP) Network, *The Status and Trends of the HIV/AIDS Epidemics in the World* (Cambridge, Massachusetts: François-Xavier Bagnoud Center for Health and Human Rights, 1998), p.20.

²⁹ UNAIDS and UNICEF, *Children Orphaned by AIDS*, p.17.

³⁰ UNAIDS, *Report on the Global HIV/AIDS Epidemic: June 2000*, pp.28-29.

³¹ Griffin Shea, "Future Bleak for Zimbabwe's AIDS Orphans," *The Mail and Guardian* (Johannesburg), September 25, 2000.

³² World Bank, *Exploring the Implications of the HIV/AIDS Epidemic for Educational Planning in Selected African Countries: The Demographic Question* (Washington, DC: The World Bank, 2000).

³³ See, e.g., WHO and UNICEF, *Action for Children*, p.7; Association François-Xavier Bagnoud, pp.12-13.

members may consider it undesirable to inherit the widow and may rather consider themselves entitled to claim his property.³⁴

Risk of Becoming Street Children and Other Special Protection Needs

Related partly to being out of school and without property, the phenomenon of AIDS orphans swelling the numbers of homeless children in Africa has been noted in the popular press and expert reports alike. In Lusaka, the Zambian capital, the population of street children more than doubled from 1991 to 1999, an increase the U.N. agencies in the country attribute largely to AIDS.³⁵ A recent *Time* magazine cover story used the figure of 350,000 children made homeless because they have been orphaned by AIDS.³⁶ Even in the Sudan, a country not among the most heavily affected by AIDS, church workers estimated in 1999 that 10,000 AIDS orphans swelled the street children population of Khartoum.³⁷ Nongovernmental organizations have documented many risks to street children. A recent report by Save the Children - Sweden confirms AIDS as an important part of what drives children to the streets and concludes, based on extensive interviews with service providers in Kenya, Uganda, Tanzania, and Ethiopia that, for the most part, “an unprotected girl working on the streets will sooner or later end up working as a prostitute.”³⁸

Risk of Having to Engage in Hazardous Labor

Closely related to the risk of being on the street and out of school, children's having to engage in hazardous labor has been associated with HIV/AIDS in some studies. UNICEF supported government and NGO teams in six countries in eastern and southern Africa to conduct rapid assessments of the situation of child laborers. The report of this work concluded that children's being in AIDS-affected families is a consistent and strong determinant of their being forced into the workplace, often into hazardous jobs. “The AIDS pandemic has turned African children into orphans and labourers,” concludes the report. “It is safe to say that eastern and southern Africa will have a disproportionate number of...working children by 2015 unless immediate action is taken to reverse this trend.”³⁹ In view of the adversity faced by children orphaned by AIDS, it is not surprising that a number of studies have found them to be more malnourished and more likely to suffer from a range of diseases than other orphans or other vulnerable children.⁴⁰

Street children, orphans living with poverty and stigma, children who have been deprived of their inheritance rights, and children with little prospect for realizing their right to education are all in need of special protection and are at very high risk of being victims of neglect, abuse and violence. HIV/AIDS in Africa contributes to all of these conditions.

HIV/AIDS in Kenya

In Kenya, HIV/AIDS is a national emergency. An estimated 2.1 million adults and children live with HIV/AIDS, representing about 14 percent of the sexually active population.⁴¹ Kenya has the ninth highest HIV prevalence rate in the world.⁴² UNAIDS estimates that about 500 persons died of AIDS each day in the country in 1999.⁴³ Many experts in Kenya now use the figure of 600 deaths or more per day.⁴⁴ U.S. Census Bureau

³⁴ WHO and UNICEF, *Action for Children*, p.42.

³⁵ UNAIDS and UNICEF, *Children Orphaned by AIDS*, p.16.

³⁶ “Crimes Against Humanity”, *Time*, January 12, 2001, p.8.

³⁷ Nhial Bol, “AIDS Orphans Throng the Streets,” Inter Press Service, January 13, 1999.

³⁸ Stefan Savenstedt, Gerd Savenstedt, and Terttu Haggstrom, *East African Children of the Streets – a Question of Health* (Stockholm: Save the Children - Sweden, 2000).

³⁹ UNICEF Eastern and Southern Africa Regional Office, *Child Workers in the Shadow of AIDS: Listening to the Children* (Nairobi: UNICEF, forthcoming).

⁴⁰ UNAIDS and UNICEF, *Children Orphaned by AIDS*, p.5.

⁴¹ National AIDS and STDs Control Programme (NASCOP), *AIDS in Kenya: Background, Projections, Impact and Interventions*, 5th ed. (Nairobi: Ministry of Health, 1999).

⁴² UNAIDS, *Report on the Global HIV/AIDS Epidemic: June 2000*, p.124. See prevalence rates of most affected countries in footnote 11.

⁴³ UNAIDS. Epidemiological fact sheet on HIV/AIDS and sexually transmitted infections – Kenya (Geneva: UNAIDS, 2000).

projections indicate that by 2005, there will be about 820 deaths per day from AIDS in Kenya.⁴⁵ About 75 percent of the deaths from AIDS in Kenya so far have occurred in adults aged eighteen to forty-five.⁴⁶ HIV/AIDS remains shrouded in denial and silence in much of Kenya, which complicates discussions of policy and legal measures to address the problem as well as the delivery of services to those affected.

HIV/AIDS has ravaged Kenya during a period of dramatic increases in the rate of poverty. In 1972, it was estimated that about 3.7 million Kenyans lived in poverty (defined as an income level of less than U.S. \$1 per day). Today that number is about 15 million, or about 52 percent of the population.⁴⁷ Nyanza Province—which has the highest rate of HIV infection in the country, about 29 percent⁴⁸ – also records the highest poverty rate, 63 percent, whereas in the early 1990s it was among the least poor regions.⁴⁹

HIV/AIDS has contributed to the economic downturn in several ways. Agriculture employs about half the labor force in Kenya. In Nyanza Province alone, AIDS has reduced the workforce on agricultural estates by an estimated 30 percent.⁵⁰ The World Bank estimates that in 2000, an average corporation in Kenya paid the equivalent of 8 percent of its profits for AIDS-related costs such as worker absenteeism.⁵¹ The Policy Project of Futures Group International estimates that the average rural smallholder household loses between 58 and 78 percent of its income following the death from AIDS of an economically active adult.⁵² The loss suffered by urban households is in the same range. The death of a second adult results in the loss of an estimated 116 to 167 percent of household income—that is, households incur debt, forcing them to liquidate assets, withdraw children from school or send children away to live with relatives.⁵³

As in many countries, there is controversy in Kenya over the number of orphans. In 1999, the UN estimated that there were about 730,000 children under age fifteen in Kenya who had lost their mother or both parents to AIDS since the beginning of the epidemic, with about 550,000 of these children still living. A more recent estimate of about one million AIDS orphans currently living in the country has been widely accepted, including by many experts interviewed by Human Rights Watch.⁵⁴ The Kenya National AIDS and Sexually Transmitted Disease Control Programme (NASCOP) estimates that there will be 1.5 million orphans under fifteen years by 2005, largely due to AIDS.⁵⁵

Social services, including those on which children rely, are gravely affected by HIV/AIDS in Kenya. The Teachers Service Commission estimates a national shortage of about 14,000 teachers at the primary and secondary levels, attributable in large part to AIDS deaths among teachers.⁵⁶ According to a high-level Ministry

⁴⁴ See, e.g., a National AIDS Control Council official cited as saying that about 700 people die daily from the disease in Kenya, in Hannah Gakuo, “AIDS Awareness Project Launched,” *The Nation*, May 3, 2001.

⁴⁵ Jill Donahue, Susan Hunter, Linda Sussman, and John Williamson, “Children Affected by HIV/AIDS in Kenya -- An Overview of Issues and Action to Strengthen Community Care and Support: Report of a Combined USAID/UNICEF Assessment of Programming in Kenya for Children and Families Affected by HIV/AIDS” (Washington, DC: USAID, 1999), p.3.

⁴⁶ NASCOP, *AIDS in Kenya*, p.14.

⁴⁷ Government of the Republic of Kenya, “Interim Poverty Reduction Strategy Paper 2000–2003” (Nairobi: Government of the Republic of Kenya, July 13, 2000).

⁴⁸ NASCOP, *AIDS in Kenya*, p. 7.

⁴⁹ “Interim Poverty Reduction Strategy Paper 2000–2003,” paragraph 2.3.

⁵⁰ NASCOP, *AIDS in Kenya*, p. 32.

⁵¹ *Ibid.*, p. 31.

⁵² Lori Bollinger, John Stover, and David Nalo, “The Economic Impact of AIDS in Kenya,” (Washington, DC: Futures Group International, 1999), p.4.

⁵³ *Ibid.*

⁵⁴ “UNICEF Warns of Orphan Crisis in Kenya,” *International Planned Parenthood Federation News*, December 1999.

⁵⁵ NASCOP, *AIDS in Kenya*, p.24.

⁵⁶ Kariuki Waihenya, “Teacher Shortage Biting,” *The Nation*, April 16, 2001.

of Education official interviewed by Human Rights Watch, a school in Kenya might easily have seven of eighteen teaching positions vacant because of attrition due to AIDS.⁵⁷

The care and treatment needs of persons with AIDS have overwhelmed health services in some parts of the country, causing reduced access to services generally, including basic child health and survival services.⁵⁸ One study estimated that by 2000 expenditures made to care for AIDS patients in government health facilities would be about the equivalent of the entire 1993-94 Ministry of Health budget.⁵⁹ It is only recently that, under pressure from nongovernmental organizations, the government has begun to take measures to improve access to antiretroviral drugs for the vast majority of persons with AIDS in the country for whom these drugs are unaffordable. In June 2001, over stiff opposition by pharmaceutical companies, the Kenyan Parliament passed the Industrial Properties Bill, which will allow the country to import and manufacture generic antiretroviral drugs.⁶⁰ In addition, the Minister of Finance recently announced that tariffs on imported condoms would be removed to accelerate the fight against HIV/AIDS.⁶¹

Girls are especially affected by the AIDS epidemic in Kenya. The rate of HIV infection in girls and young women from fifteen to nineteen years old is about six times as high as that of their male counterparts in the most heavily affected regions,⁶² a pattern seen in many African countries. Although there are biological reasons why HIV transmission in this age group may be more efficient from male to female than in the opposite direction, biological reasons alone cannot account for a disparity this great. Several observers conclude that girls in this age group are catching the virus from older men, in many cases as a result of sex in which they engage to survive economically.⁶³ One Kenyan girl in five reports that her first sexual experience is coerced or forced.⁶⁴

Girls are more readily pulled out of school when someone in the household is ill with AIDS, as has been noted in other countries. Ministry of Education figures show that after four years of primary school in heavily AIDS-affected Nyanza Province, girls make up only 6 percent of those who are promoted to grade five.⁶⁵ In Eastern Province, which has the lowest rate of HIV prevalence of Kenyan provinces, 42 percent of those passing into grade five are girls. The permanent secretary of the Ministry of Education attributed these disparities to AIDS and also noted that girls and boys passed through to grade five in roughly equal numbers twenty years ago before the epidemic's impact was felt.⁶⁶ A recent detailed study carried out by the nongovernmental organization Population Communication Africa found that out of 72 children orphaned by AIDS on Rusinga Island in western Kenya, girls from AIDS-affected households were less likely to be in school than boys.⁶⁷

Wife inheritance is practiced among some groups in Kenya, particularly the Luo in the national AIDS epicenter of Nyanza Province. This practice, whereby a widow is taken in marriage by the brother or other relative of her deceased husband, traditionally provided protections to the widow and her children who might otherwise find themselves bereft of the social and economic support of a family. In the era of HIV/AIDS,

⁵⁷ Human Rights Watch interview with W.K.K. Kimalat, permanent secretary of the Ministry of Education, Nairobi, March 5, 2001.

⁵⁸ NASCOP, *AIDS in Kenya*, p. 26.

⁵⁹ Cited in *ibid.*, p. 27.

⁶⁰ "Kenya's Parliament Passes AIDS Drugs Bill," Reuters, June 12, 2001.

⁶¹ "War on AIDS Gets Sh 146 Million Funding," *The Nation* (Nairobi), June 15, 2001.

⁶² NASCOP, *AIDS in Kenya*, p. 11.

⁶³ See, e.g., Tony Johnston and Wairimu Muita, *Adolescent Love in the Time of AIDS: A Kenyan Study* (Nairobi: Population Communication Africa, 2001), pp. 48-52. This report notes that so-called sugar daddies are an important phenomenon and are not necessarily as old as middle age but are old enough to have some kind of income.

⁶⁴ Tony Johnston, *The Adolescent AIDS Epidemic in Kenya: A Briefing Book*, rev. ed. (Nairobi: Population Communication Africa, 2000).

⁶⁵ Human Rights Watch interview with W.K.K. Kimalat, permanent secretary of the Ministry of Education, Nairobi, March 5, 2001.

⁶⁶ *Ibid.*

⁶⁷ Tony Johnston, Alan Ferguson, and Caroline Akoth, *A Profile of Adolescent AIDS Orphans* (Nairobi: Population Communication Africa, 1999).

however, wife inheritance has been criticized by some government and community leaders as a means of spreading HIV.⁶⁸ A study of AIDS-affected families on Rusinga Island concluded that “wife inheritance...is losing its former popularity due, perchance, to the risk of AIDS infection” but found that 77 percent of women widowed by AIDS still remarried, of whom half were inherited by the brothers of their husbands.⁶⁹

The first case of HIV was diagnosed in Kenya in 1984,⁷⁰ but concrete response on the part of the government came only years later. The Department for International Development (DFID), the British government aid ministry, noted that “Kenya has been notoriously slow to admit to its HIV/AIDS problem, to see it without an ethnic focus and to demonstrate high-level political commitment.”⁷¹ The first national policy statement on AIDS came with the Kenyan parliament’s adoption of its Sessional Paper no. 4 in 1997 which made recommendations for program implementation. In November 1999, President Moi declared HIV/AIDS a “national disaster,” his first major public statement on the subject.⁷² By then, an estimated one in every nine sexually active persons in the country was already infected. At about the same time, the government established an interministerial National AIDS Control Council (NACC) to develop strategies for controlling the spread of the disease.⁷³

It is difficult to put a monetary figure on the Kenyan government’s expenditures on HIV/AIDS because government-funded programs in many sectors touch directly or indirectly on the disease and its consequences. The government’s most recent medium-term plan for dealing with HIV/AIDS proposes a budget of U.S. \$30.7 million in government funds over five years.⁷⁴ The government recently reported to the Kenyan parliament that it had allocated 140 million shillings, or about U.S. \$1.87 million, for HIV/AIDS programs in the current fiscal year and that Kenya had received pledges of 7.6 billion shillings, or about U.S. \$100 million, from various donors to continue AIDS work in the coming years; much of this aid is to be channeled through nongovernmental organizations rather than the government.⁷⁵ The World Bank recently announced a loan on concessionary terms for U.S. \$50 million over four years to combat AIDS.⁷⁶ British official assistance in the area of HIV/AIDS was recently increased to 550 million shillings (\$7.3 million) for the year with about \$37 million pledged over five years.⁷⁷ While external donors have recently been very responsive in the area of HIV/AIDS, in the last several years some donors and lenders, notably the International Monetary Fund and World Bank, have withdrawn their assistance to Kenya because of allegations of corruption and other concerns.⁷⁸

V. FINDINGS ON AIDS-AFFECTED CHILDREN IN KENYA

Working and Living on the Street and Other Hazardous Labor

The “Common Country Assessment” published in 2000 by the U.N. agencies in Kenya noted that the burgeoning population of children orphaned by AIDS has led to an increase in child-headed households and “inevitably” in child labor.⁷⁹ The U.N. agencies asserted that the phenomenon of a historically large population of

⁶⁸ Stephen Buckley, “Wife Inheritance Spurs AIDS Rise in Kenya,” *The Washington Post*, November 8, 1997; John Oywa, “Stop Widow Rituals, Says PC,” *The Nation* (Nairobi), March 24, 2001.

⁶⁹ Johnston, Ferguson, and Akoth, *Profile of Adolescent AIDS Orphans*, pp. 44-45.

⁷⁰ NASCOP, *AIDS in Kenya*, p. 2.

⁷¹ Government of the United Kingdom, Department for International Development, Health and Population Department, “HIV/AIDS in Kenya – How Political Commitment Can Make a Difference,” *Stories from the Field Series* (London: Government of the United Kingdom, April 2001).

⁷² Rosalind Russell, “Kenya Calls AIDS National Disaster, Bars Condoms News Alerts,” Reuters NewMedia, November 30, 1999.

⁷³ Government of United Kingdom, “HIV/AIDS in Kenya,” p.1.

⁷⁴ NASCOP, *AIDS in Kenya*, p. 54.

⁷⁵ Odhiambo Orlale, “Sh 7.6 Billion Pledged for Fight Against AIDS,” *The Nation*, April 18, 2001.

⁷⁶ Ibid.

⁷⁷ “UK Raises AIDS Funds to Kenya,” *The Nation*, April 19, 2001.

⁷⁸ “Kenya’s Moi Lashes Donors on Corruption,” *The Mail and Guardian* (Johannesburg), February 14, 2001.

⁷⁹ United Nations. *Common Country Assessment—Kenya* (Nairobi: United Nations, 2000).

AIDS orphans is also a significant contributor to increases in the number of street children in urban areas and in the number of child prostitutes. They further concluded that the widespread practice of children being pulled out of school when AIDS is in the family is a strong impediment to economic and human development in Kenya in both the medium and long term.

This conclusion on the part of U.N. agencies in the country is not new. A WHO/UNICEF report concluded in 1994 that in Kenya AIDS is a vicious circle, putting children at many kinds of risk, including the risk of HIV transmission:

...AIDS has become another factor pushing children onto the streets, as parents die and relatives are unable or unwilling to provide care. Some street children are involved in sniffing glue or solvents, and their level of sexual activity is high, bringing the risk of sexually transmitted diseases, including AIDS.⁸⁰

A recent study by UNICEF on HIV/AIDS and child labor in eastern and southern Africa concludes that AIDS plays an important role in pushing a significant percentage of Kenya's estimated 3.5 million working children into the labor market.⁸¹

The permanent secretary of the Ministry of Education, W.K.K. Kimalat, told Human Rights Watch that AIDS is a driving force behind both the increase in the school drop-out rate in recent years and the increased numbers of street children in the country.⁸² In its current five-year development plan, written in 1996, the government of Kenya acknowledged that 3 million school-age children were out of school.⁸³ The 1999 census, however, puts the figure at 4.2 million.⁸⁴ A forthcoming study by several university-based researchers and ICROSS, an NGO based in Kenya, compared over 5,200 children whose parents died of AIDS with the same number of age-matched children who were orphaned by other causes. In this study, children orphaned by AIDS had significantly lower rates of school enrolment and retention than did other orphans.⁸⁵ They also suffered higher rates of severe and moderate malnutrition and were more likely to be in child-headed households.

Other NGOs in Kenya have gathered numerous reports of children affected by AIDS being in desperate situations where they are forced to engage in hazardous labor or wind up living on the streets. Human Rights Watch's interviews corroborated these accounts. Children and those caring for them or providing services to them recounted many desperate situations driven by the presence of AIDS in the family. Susan B., age ten, who had lost her mother to AIDS only a few weeks before Human Rights Watch met her in the Korogocho neighborhood of Nairobi, said that things were so bad when her mother was dying that her mother would send her to the streets to steal.⁸⁶ (She was later assisted by Pendekezo Letu, an organization that works with girls living and working on the streets.) Stealing on the streets of Nairobi is potentially very dangerous labor, particularly in view of the abusive treatment of street children by the police and in the juvenile justice system.⁸⁷

Claire S., age twenty-two, became the head of the household at age seventeen in Kisumu when her mother died of AIDS, and she still cares for her three younger siblings.

⁸⁰ WHO and UNICEF, *Action for Children*, p. 52.

⁸¹ UNICEF-ESARO, *Child workers in the Shadow of HIV/AIDS*.

⁸² Human Rights Watch interview with W.K.K. Kimalat, permanent secretary of the Ministry of Education, Nairobi, March 5, 2001.

⁸³ Government of the Republic of Kenya, *National Development Plan, 1997-2001* (Nairobi: Government of the Republic of Kenya, 1996), p.134.

⁸⁴ Kariuki Waihenya, "Teacher Shortage Biting", *The Nation*, April 16, 2001.

⁸⁵ R. Conroy, A. Tomkins, R. Landsdown, and M. Elmore-Meegan "AIDS Orphans, an Emerging Problem: A Study of 5206 Orphaned Children" (summary presentation, January 2001).

⁸⁶ Human Rights Watch interview, Korogocho (Nairobi), March 15, 2001.

⁸⁷ Human Rights Watch, *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* (New York: Human Rights Watch, 1997).

I tried to do anything to keep us going—I made chapatis and sold them, I washed cars, and now I'm working for a woman with a small kiosk, but I don't think it's going to last. The government should lend money to people so they can start a business and be self-reliant. I may have to go into prostitution, and then I know I will get HIV and die. I would rather have a real business, but it is not easy.⁸⁸

When her mother died, Paulette O., twenty-one, became the breadwinner in her elderly grandmother's household when she was only ten. From the age of about fourteen years, she engaged in prostitution off and on and had a child of her own whom she cares for in addition to her two younger siblings who depend on her completely since the recent death of her grandmother. Paulette said she knows she is lucky she did not get HIV. "I thought I would die like my mother. But now I am living positively and I want to start my own business and stay away from parking [prostitution] if I can."⁸⁹

Elizabeth Owuor-Oyugi, director of ANPPCAN-Kenya, one of the leading organizations in Kenya for the protection of children against abuse and neglect, described the many reports her office receives of abuse of AIDS-affected children. One account from Nyanza Province reported many AIDS orphans engaged in prostitution:

There were high levels of prostitution, even among girls as young as nine years old. The father's brother will come in and take the land after the parents die. His wife sends the children out at night and tells them not to come back until they have 200 shillings. Of course they will fall into prostitution—what else can they do?⁹⁰

Prostitution is classified as among the worst forms of child labor in the International Labor Organization Convention No. 182, which has been ratified by sixty countries, but not by Kenya.⁹¹ The physical and psychological hazards of child prostitution, even without highly prevalent HIV/AIDS, are well known.

John Mburu, who runs the orphan program in the Kariobangi slum of Nairobi for Action-AID-Kenya, encounters similar cases frequently. "With some guardians, there is abuse—we find a lot of sexual abuse, alcoholism, and so on. Children are told to go to the dumps and streets and come back with money in the evening.... We find children as young as eight years old who are the bread-winners."⁹² Joab Othatcher, director of TEMAK, an NGO in Kisumu which has provided services to hundreds of AIDS-affected children and young adults, said "survival sex"—girls engaging in prostitution because they have no other means of survival—is very common among girls affected by AIDS. "Measures are not being put into place to protect these children" and give them other opportunities, he noted.⁹³

Sending girls out to be domestic workers is another common survival strategy for AIDS-affected families. Samuel K. is the guardian of the four children of his sister, who died of AIDS in 2000. The oldest is a fifteen-year-old girl who he said was sexually abused as a housemaid during the period when her mother was dying until he pulled her out of that employment. Unfortunately, by the time he tried to enrol her in school, the headmaster said she was too old to return.⁹⁴

⁸⁸ Human Rights Watch interview, Kisumu, February 28, 2001.

⁸⁹ Human Rights Watch interview, Kisumu, February 28, 2001. "Living positively" is a phrase often used in Kenya by HIV-positive persons struggling to continue their lives in spite of their illness. In this case, the expression was used by a person who was not infected to describe her effort to remain HIV-negative.

⁹⁰ Human Rights Watch interview with Elizabeth Owuor-Oyugi, director, ANPPCAN-Kenya, Nairobi, March 9, 2001.

⁹¹ International Labour Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention No. 182); Convention 182 ratification map on www.ilo.org.

⁹² Human Rights Watch interview with John Mburu, Kariobangi, March 19, 2001.

⁹³ Human Rights Watch interview with Joab Othatcher, director, TEMAK, Kisumu, February 27, 2001.

⁹⁴ Human Rights Watch interview with Samuel K, age fifty-three, Siaya, March 6, 2001.

Joab Othatcher of TEMAK was part of a team that conducted a study recently of potential dangers to girls working as housemaids in Nyanza Province.⁹⁵ In this study, of the twenty-five girls aged nine to sixteen years who were interviewed in depth, eighteen were HIV-positive. Of those eighteen, most had worked in several homes and reported being sexually abused in all or most of them. Fifteen of the girls said their first sexual experiences were coerced and were with their employer or someone in his family or circle of friends. All but one of the HIV-positive girls did not know about HIV/AIDS or how to protect themselves from it. UNICEF and the ILO's International Programme on the Elimination of Child Labour (IPEC) have documented the hazards of domestic labor, especially for girls, in many parts of the world.⁹⁶

UNICEF's 1999 child labor study in Kenya surveyed children working on commercial tea and coffee plantations in the districts of Kiambu and Nyeri in Central Province where HIV prevalence is estimated to be above 30 percent in the adult population.⁹⁷ In the sample of this survey, more than 10 percent of the 264 children had grandparents as their primary caregivers, and most of the rest lived in single-parent households. Though it was not possible in all cases to link deaths in the family to AIDS, the researchers conclude that AIDS deaths are a key determinant of children's need to work in these districts. In this sample, 11 percent of children said they had been sexually abused on the farms, of whom one fifth were under the age of eight years, and several children recounted severe work-related injuries as well as beatings.

Children should not have to steal, turn to prostitution, or engage in other forms of labor in order to meet their daily survival needs. These needs are generally the responsibility of parents, who "have the primary responsibility for the upbringing and development of the child."⁹⁸ But when children have been deprived of the protections of a family environment, whether because their parents have died or for other reasons, the state has the responsibility to protect them from harm and secure their basic needs.

The right of children to such protection and care is guaranteed by the International Covenant on Civil and Political Rights (ICCPR) and the U.N. Convention on the Rights of the Child, international human rights treaties which Kenya has ratified. Article 24 of the ICCPR guarantees the right of the child "to such measures of protection as are required by his status as a minor." Article 3(2) of the Convention on the Rights of the Child (CRC) provides that a child has the right to "such protection and care as is necessary for his or her well-being." Article 32 of the CRC guarantees the right of the child to be protected from "economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health, mental, spiritual, moral or social development." Further, under article 19 of the convention, children have the right to protection from "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."⁹⁹

The failure to provide such protections for children who are deprived of a family environment may also infringe upon their right to the highest attainable standard of health and their right to an education on equal terms with other children.¹⁰⁰ Accordingly, these measures of protection will necessarily include economic, social, and cultural measures. The Human Rights Committee, the treaty monitoring body established under the ICCPR, for example, notes that "every possible economic and social measure should be taken ...to prevent [children] from

⁹⁵ TEMAK. Violation of Basic Needs and Basic Rights of Domestic Workers in Kisumu: Report of a Rapid Study (Kisumu: TEMAK, November 2000).

⁹⁶ UNICEF, "Child Domestic Work," Innocenti Digest no. 5 (Florence: Innocenti Research Centre, 1999).

⁹⁷ UNICEF-ESARO, *Child workers in the shadow of HIV/AIDS*, pp. 30-38.

⁹⁸ Convention on the Rights of the Child, art. 18(1).

⁹⁹ Kenya has not ratified ILO Convention No. 182 on the worst forms of child labor, which would require it to take "immediate and effective measures to secure the prohibition and elimination" of "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children," among other categories of child labor. See ILO Convention No. 182, arts. 1, 3. As a state party to the ICCPR and the Convention on the Rights of the Child, however, Kenya has accepted international responsibility to provide children with the broader protective measures required by those treaties.

¹⁰⁰ See Convention on the Rights of the Child, arts. 24(1), 2, 28.

being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution, or by their use in the illicit trafficking of narcotic drugs, or by any other means.”¹⁰¹

Psychological Trauma

The situation of children affected by AIDS, especially orphans, is exacerbated by psychological trauma, whether they or not are on the street or in hazardous labor. This is a very neglected aspect of the care and protection of children orphaned and otherwise affected by AIDS. Many AIDS orphans, particularly older children, become the principal care-givers of a dying parent and see that parent through a long and painful illness. Most of the orphans interviewed by Human Rights Watch, even those who could not identify the illness, described the terrible and exasperating ordeal of watching their ill parents become more frail, endure severe pain, and suffer stigmatization and rejection at the hands of health workers. “I don’t know what she had,” said Philip W., age sixteen, of his mother who had died a few months before, “but she had a lot of pain all over her body.”¹⁰² Susan B., age ten, appeared deeply troubled by the fact that she and her sister had never been called to the countryside where they thought their mother’s body was returned for burial.¹⁰³ “I don’t even know if she ever got buried,” she said. John Mburu of ActionAID-Kenya noted: “Even before a child is an orphan a lot happens. They need counselling—no one ever thinks of it. They leave school and need help; no one bothers about their counselling needs.”¹⁰⁴ The Population Communication Africa study of orphans on Rusinga Island in western Kenya found that 77 percent of the AIDS orphans surveyed said they had no one outside their decimated families to “tell their troubles to.”¹⁰⁵

A factor that adds to the psychological burden of many orphans is separation from their siblings. If children have been together through the ordeal of seeing their parents die of AIDS, they are likely to depend heavily on one another for emotional support. Philip W., age sixteen, had to risk getting in trouble with his supervisor on the farm where he worked to visit his eleven-year-old sister, who lived with his grandmother.¹⁰⁶ Their grandmother, who had little income, told Human Rights Watch she felt she could not take both the children after the death of their parents.¹⁰⁷ Susan B., who was unsure about her mother’s burial, said she was sad to be separated from her older sister, who had gone away to work as a housemaid and was not able to leave her workplace for visits.¹⁰⁸

Disinheritance

Legal experts and AIDS-affected persons alike recounted to Human Rights Watch a wide range of instances of disinheritance of children orphaned by AIDS in Kenya. Legal experts were unanimous in linking the increasing number of disinheritance cases to the AIDS epidemic. The property involved in these cases is most frequently the house in which the parent or parents of the children lived and sometimes the land on which it sits or adjacent land, occasionally also including movable property in or around the house. Some experts noted that property-grabbing has been practiced against widows in Kenya since before the era of AIDS, but that HIV/AIDS has made disinheritance a particular problem of children since surviving spouses usually do not live very long in AIDS-affected households.¹⁰⁹ One high-profile case followed by the Kenyan national media involved Beatrice Wanyonyi, a woman living with AIDS, whose relatives locked her out of a family business in which she was a

¹⁰¹ Human Rights Committee, General Comment 17, Rights of the Child (Art. 24), para. 3, 1989.

¹⁰² Human Rights Watch interview, Central Province, March 16, 2001.

¹⁰³ Human Rights Watch interview, Korogocho, March 15, 2001.

¹⁰⁴ Human Rights Watch interview with John Mburu, ActionAID-Kenya, Kariobangi, March 19, 2001.

¹⁰⁵ Johnston, Ferguson, and Akoth, *Profile of Adolescent AIDS Orphans*, pp. 62-63.

¹⁰⁶ Human Rights Watch interview, Central Province, March 16, 2001.

¹⁰⁷ Human Rights Watch interview with Marian M., Central Province, March 16, 2001. Pendekezo Letu, a nongovernmental organization that recognizes the importance of keeping children together, was in the early stages of offering assistance to Marian M., including support for vocational training for Philip, that might enable both children to live with her.

¹⁰⁸ Human Rights Watch interview, Korogocho, March 15, 2001.

¹⁰⁹ Human Rights Watch interviews with Ambrose D.O. Rachier, Nairobi, February 26, 2001, and Millie Odhiambo, director, CRADLE, New York, April 23, 2001.

shareholder. Her case was delayed because she had to apply for a waiver of legal fees, and she died before she could finish filing a legal action to reclaim her property.¹¹⁰

When a person dies without leaving a will and is survived only by children under eighteen years old, any property to be inherited should be administered by an adult who receives a letter of administration to handle the property. If there is no one else to administer the property, the public trustee, who is a government official—usually the district commissioner—is meant to ensure that the property is put in trust until the eldest surviving child comes of age.¹¹¹ The law provides that no one except for the representative appointed by the court to administer the estate “shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”¹¹² Letters of administration are granted based on a complex procedure outlined in the Probate and Administration Rules under section 97 of the Succession Act.

In spite of these protections, there was consensus among the legal experts interviewed by Human Rights Watch that AIDS-affected children in Kenya are highly disadvantaged in safeguarding their inheritance rights when their parents are both dead. Eric Ogwang, a noted children’s law expert and former magistrate of the children’s court, said he believes that even more than the stigma associated with AIDS, the pattern of mortality associated with AIDS in the extended family impedes realization of children’s inheritance rights. That is, especially in the most affected communities, AIDS has tended to claim the lives not only of the parents of a child but of siblings and cousins in the parents’ generation within their extended family. As a result, children are left with few relatives to whom they can turn to help protect their property. “When talking of the legal system, the question is who will administer the estate of a child—and too often the answer is the same person who wants to do the grabbing [of their property],” he said.¹¹³ This observation was echoed by other lawyers who have worked on AIDS-related cases.¹¹⁴

Several of the children interviewed by Human Rights Watch had the experience of having no one to turn to but a relative who was apparently more interested in their property than in taking care of them. Ten-year-old Susan B., whose parents both died of AIDS, was living with a neighbor in a slum of Nairobi:

My father’s relatives said that the property didn’t go with me and my sister, and they said go back to Nairobi to what you’re used to. They didn’t help my mother when she was sick. We got no assistance. When we were there up-country with them, they made my mother sleep in the kitchen [a lean-to away from the house] and not in the main house. We had to come back to the house my mother had here [in Nairobi]. But then [after my mother’s death] my uncle took that house, and I have to live somewhere else.¹¹⁵

Jane A., age thirty-nine, is a widow living with AIDS in Nairobi who cares for her two children as well as the six children of her sister, who died of AIDS in 1995.

After my sister’s husband died, she turned to her in-laws for help, but they told her to move from the house. She sold vegetables to make money and stayed outside the property much of the time. They treated her this way because of the property, which they wanted. She became a useless person to them, the same as the children.¹¹⁶

¹¹⁰ “AIDS Patient Dies Before Filing Suit,” Panafican News Agency, April 4, 2001.

¹¹¹ Law of Succession Act of 1981, § 41. The court appoints the legal guardian or another individual to administer the estate under a procedure outlined in section 7 of the Fifth Schedule to the act.

¹¹² Law of Succession Act of 1981, § 45(1).

¹¹³ Human Rights Watch interview with Eric Ogwang, director, Children’s Legal Action Network (CLAN), Nairobi, March 8, 2001.

¹¹⁴ Human Rights Watch interviews with Ambrose D.O. Rachier, February 26, 2001, and Millie Odhiambo, April 23, 2001.

¹¹⁵ Human Rights Watch interview, March 15, 2001.

¹¹⁶ Human Rights Watch interview, Kibera (Nairobi), March 13, 2001.

“There are so many cases where the nearest relative wants to take up the property but not care for the children,” said Ambrose D.O. Rachier, a lawyer in private practice and founder and director of the Kenya Ethical and Legal Issues Network on HIV/AIDS (KELIN), who has followed many legal cases involving AIDS-affected families since the beginning of the epidemic in Kenya.¹¹⁷ This view was supported by several of the AIDS-affected families interviewed by Human Rights Watch. Yusuf M., thirty-five, who cares for three of his brother’s children in Rachuonyo in western Kenya, in addition to his own children, said that he wound up with the children because other members of his family were only willing to care for them if they received an allowance from their father’s former employer, the Kenyan Navy. “When they saw that the children would not receive the navy benefits, they sent them away,” he said.¹¹⁸

Human Rights Watch encountered a number of relatives and guardians of children orphaned by AIDS who wished to work on behalf of the children to safeguard the inheritance of their property but ran into difficulties. “I asked the local authorities to let the children inherit the land and benefit from its sale, but they just told me, ‘Take the children and let us deal with the land.’ I talked several times to the chief, but he said I should just leave the land to be taken care of by those in the locality and keep the children with me in Kisumu,” said Marian M., a grandmother caring for three children of two of her children, both of whom died of AIDS.¹¹⁹ One guardian in Nyanza Province who cares for two orphans in addition to her own children, noted:

I have not been able to get the legal papers to be the official guardian of these children and help them with their property. I went to the Children’s Department, and they sent me to the Probation Department, and Probation sent me to Social Services, and Social Services sent me to the chief, and finally I went to the district commissioner, but still I was not helped. I know that means I can’t bring a case to court on behalf of these children and the property they have a right to.¹²⁰

According to Millie Odhiambo, director of a children’s legal aid service called CRADLE, this is a common story, and it is more than just bureaucratic run-around:

Children actually face problems in the system that adults don’t face. The law makes it hard for children. They have no standing. They need someone to seek a letter of administration on their behalf. For a letter of administration, there have to be identification documents and birth certificates. What child will know how to obtain a birth certificate? Sometimes by the time we obtain a letter of administration, the movable property has already been taken away...The mechanism that is in place, the public trustee, doesn’t do its work. The bureaucracy takes forever—it takes years to settle a case with adults, and it’s worse with children.¹²¹

Kenyan law leaves plenty of scope for property ownership disputes, particularly those involving land. “Property and land law are also very confused....Someone can register in the court as an administrator of an estate, but still it may be possible for someone else to take termination benefits or other property away,” said Eric Ogwang.¹²² Even when there is a will, it is easy for challenges to property agreements to be brought by extended family members if they can obtain legal counsel, a provision in the law that some lawyers say was written to reflect the values of extended families that do not always exist anymore in Kenya.¹²³ Orphaned children are less likely than income-earning adults to be able to retain counsel to defend themselves from such challenges. Legal

¹¹⁷ Human Rights Watch interview with Ambrose D.O. Rachier, February 26, 2001.

¹¹⁸ Human Rights Watch interview, Rachuonyo, March 5, 2001.

¹¹⁹ Human Rights Watch interview, Obunga (Kisumu), March 3, 2001.

¹²⁰ Human Rights Watch interview, March 3, 2001.

¹²¹ Human Rights Watch interview with Millie Odhiambo, April 23, 2001. The Government of Kenya estimates that about 30 percent of births are registered annually, and these are mostly in urban areas. Children whose births are not registered are unlikely to be able to obtain birth certificates. See Government of the Republic of Kenya, *First Kenya Country Report on the Implementation of the U.N. Convention on the Rights of the Child*, p. vi.

¹²² Human Rights Watch interview with Eric Ogwang, March 8, 2001.

¹²³ Human Rights Watch interview with Jane Ndaisi Kwinga, attorney, CRADLE, Nairobi, March 8, 2001.

aid services for children are provided on a significant scale by only five organizations based in Nairobi and one based in Thika, and they conclude that they meet only a small fraction of the enormous demand for these services.

A number of guardians of orphans and legal experts interviewed by Human Rights Watch criticized the institution of the public trustee as an avenue of protection for the inheritance rights of children. “There is nothing like a public trustee for these children. The public trustees always want you to give them something to do anything,” said Harriet R., a guardian of two orphans.¹²⁴ One lawyer interviewed by Human Rights Watch has handled a number of cases where money was turned over to the public trustee only to “disappear.”¹²⁵ “The public trustee can be an effective mechanism [in children’s property cases], but the problem is that it is open to abuse. The principal weakness is like that of any public institution—people are not well paid,” said David Otieno, a Kisumu-based attorney and member of KELIN.¹²⁶ Ambrose Rachier, the KELIN founder, said, “Like all civil service offices, in the office of the public trustee no one attends to you, and this makes it useless for orphans.”¹²⁷

Another challenge is that people have difficulty understanding the mechanisms and legal procedures that are in place to represent children’s interests with respect to their inheritance. “Some guardians are able to run around and look for administration papers, but many don’t even know there is something they can do,” noted Jedida Nyongesa, executive director of the Child Welfare Society of Kenya.¹²⁸ “People are not aware that a legal system exists [to protect children’s property rights],” said Elizabeth Owuor-Oyugi of ANPPCAN-Kenya.¹²⁹ “Education of communities on legal rights is very important,” she added. “People also confuse the administration of someone’s estate with ownership—this is a matter to be dealt with through public education,” said Justice Effie Owuor of the Court of Appeals.¹³⁰

Several experts suggested that it would be useful for the government to amend the law to make it easier for nongovernmental organization workers and other non-relatives to be children’s legal representatives for the purposes of property disputes. ANPPCAN-Kenya notes:

[There is] a shortage of lawyers at district level. There is no government-supported legal aid programme even for the adult population. Given the high cost of legal representation and the poverty in which the majority of Kenyans live, most parents or guardians cannot afford lawyers’ fees even when their children’s rights have been violated.¹³¹

“One solution might be for the government to give NGOs standing to act as guardians [for the purpose of these legal processes] or to establish a larger pool of people to provide legal assistance,” said Millie Odhiambo.¹³² Justice Effie Owuor, one of the experts advising on the development of proposed children’s legislation before the parliament, said, rather, that this need for better representation of children’s interests is a responsibility of the state. “The Attorney General’s office—the state counsels—should take on more. We can’t just leave this to voluntary organizations.”¹³³

¹²⁴ Human Rights Watch interview, Kisumu, March 3, 2001.

¹²⁵ Human Rights Watch interview with an NGO-based attorney who requested anonymity.

¹²⁶ Human Rights Watch interview with David Otieno of David Otieno & Co. Advocates, a member of the Kenya Ethical and Legal Issues Network on HIV/AIDS, Kisumu, March 3, 2001.

¹²⁷ Human Rights Watch interview with Ambrose D.O. Rachier, February 26, 2001.

¹²⁸ Human Rights Watch interview with Jedida Nyongesa, executive director, Child Welfare Society of Kenya, Nairobi, March 8, 2001.

¹²⁹ Human Rights Watch interview with Elizabeth Owuor-Oyugi, director, African Network for Prevention and Protection from Child Abuse and Neglect (ANPPCAN) Kenya Office, Nairobi, March 9, 2001.

¹³⁰ Human Rights Watch interview with the Honorable Lady Justice Effie Owuor, Court of Appeals, Nairobi, March 14, 2001.

¹³¹ ANPPCAN Kenya, *Children in the Dock: A Situation Analysis of the Juvenile Justice System in Kenya* (Nairobi: ANPPCAN, 1998), p.4.

¹³² Human Rights Watch interview with Millie Odhiambo, April 23, 2001.

¹³³ Human Rights Watch interview with the Honorable Lady Justice Effie Owuor, March 14, 2001.

As of January 2001, the High Court of Nairobi established a Family Division to hear cases involving intrafamilial disputes, particularly cases of divorce and maintenance (child support and alimony). A number of the legal experts interviewed by Human Rights Watch thought that the new family court would be an important mechanism for civil disputes involving inheritance by orphans, though this view was not unanimous. As a civil court, the family court would not be able to handle cases of alleged criminal appropriation of property. The timetable for the expansion of the family court to high court locations in Kenya other than Nairobi is not clear.¹³⁴ “We need to deal with this as a much bigger issue [than expansion of the family court],” said Millie Odhiambo. “We need to take a substantive look at the Succession Act and simplify it to improve access for children to the legal system.”¹³⁵

The failure to safeguard the property rights of AIDS-affected children deprives them of the “protection and care...necessary for [their] well-being” to which they are entitled under article 3(2) of the Convention on the Rights of the Child. This general provision should be read together with article 12 of the convention, which guarantees the right of children to have the opportunity to be heard in all matters affecting them, particularly in any judicial or administrative proceedings affecting them.

In addition, as a class, AIDS-affected children are likely to be targeted for dispossession of their property to a degree that other children are not. As described above, the pattern of AIDS mortality frequently leaves children with few or no relatives to whom they can turn for assistance in protecting their property. If the state does not secure the property rights of AIDS-affected children on equal terms with other individuals who inherit property, it fails to protect these children from discrimination on the basis of having an AIDS-affected parent. The U.N. Committee on the Rights of the Child has noted that distinctions made on the basis of having an AIDS-affected parent constitute an inappropriate ground for discrimination.¹³⁶ Deprivation of property contributes to the impoverishment of children and increases the likelihood that they will be unable to enjoy the highest attainable standard of health and the right to education guaranteed them in the Convention on the Rights of the Child.¹³⁷

Access to Information

Making a dent against HIV/AIDS in any population depends on popular access to appropriate and clear information on HIV prevention and AIDS treatment and care. The right of children to such information is guaranteed by the free expression provisions in article 13 of the Convention on the Rights of the Child and article 19 of the International Covenant on Civil and Political Rights, both of which include the “freedom to seek, receive and impart information and ideas of all kinds.” Children’s access to information on HIV/AIDS, including on means of protection from HIV transmission, is literally a matter of life and death.

The best source of national-level information on what the population of Kenya knows about HIV/AIDS is the Demographic and Health Survey (DHS) of 1998.¹³⁸ According to the DHS, 99 percent of the population of Kenya had heard of AIDS and knew that the HIV virus is transmitted through sexual intercourse. The same survey showed, however, that only 40 percent of adults were able to identify at least two methods of protecting themselves from infection. More than one in four girls aged fifteen to nineteen years in Kenya did not know of any way to protect themselves from HIV transmission. About one quarter of girls in this age group reportedly believed that someone with HIV will always look sick or conversely that someone who looks healthy cannot infect others with HIV. The corresponding figure for boys was 15 percent. Moreover, about 80 percent of both

¹³⁴ None of the legal and judicial experts interviewed by Human Rights Watch knew the timetable of the court’s expansion, though most were confident that there would be an expansion. Attempts to get this information from the Ministry of Justice were not successful. A recent editorial in a prominent national newspaper indicated that sixteen magistrates have been identified for posting outside Nairobi to hear cases for the family court, but these branch courts have not yet opened for business. See “Family Courts a Judicial Milestone”(editorial), *The Nation* (Nairobi), May 9, 2001.

¹³⁵ Human Rights Watch interview with Millie Odhiambo, April 23, 2001.

¹³⁶ See Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (New York: UNICEF, 1998), p.28; Convention on the Rights of the Child, art. 2(2).

¹³⁷ See *ibid.*, arts. 24 and 28.

¹³⁸ Government of the Republic of Kenya Central Bureau of Statistics and Macro International, Inc., *Demographic and Health Survey 1998* (Calverton, Maryland: Macro International, 1999).

boys and girls aged fifteen to nineteen perceived themselves to be at no risk or small risk of “getting AIDS.” This result is striking in view of the estimate from the DHS that the mean age of first sexual intercourse among boys in Kenya was sixteen years and among girls was seventeen.¹³⁹

Population Communication Africa recently released the results of a more detailed survey on access by children and young persons in Kenya to information on HIV/AIDS and their knowledge of key topics related to HIV transmission. Unlike the DHS survey, which was limited to persons aged fifteen years and over, the PCA survey included children as young as thirteen. The PCA survey largely confirmed the results of the DHS and concluded that a high percentage of young people in Kenya are grossly misinformed about HIV transmission and related issues. For example, 28 percent of young persons surveyed believed that HIV could be transmitted by mosquitoes. Some 32 percent did not know that condom use was part of safer sex practice.¹⁴⁰

Aside from its other dangers, under information of the kind reported by surveys in Kenya may contribute to stigma and discrimination. A number of AIDS-affected persons interviewed by Human Rights Watch reported, for example, being stigmatized because of the belief that AIDS is a highly contagious disease transmissible through casual contact:

“people won’t use the same toilet as me...”¹⁴¹

“no one will drink from the same cup as me or use the same plate...”¹⁴²

“in my church, they isolated me; I had to sit in the back apart from others so I stopped going”¹⁴³

“children at school said ‘your mother has that disease; we don’t want to catch it’...”¹⁴⁴

Linda R., a forty-two-year-old woman in Nairobi who cares for one child orphaned by AIDS in addition to her own children, reported having been scorned in many ways “by ignorant people” after she spoke openly about her illness:

After I came out with my illness, I was selling charcoal and paraffin, and some people wouldn’t buy anything from me. They said they would be infected if they bought my things. The owner of the house I was living in chased me away. Other children wouldn’t play with mine.¹⁴⁵

It is common for people living with AIDS in Kenya, even in the early stages of the disease, to suffer from skin infections over large parts of the body. Several persons living with AIDS told Human Rights Watch that visible skin infections induce an adverse reaction from other people, partly because they do not understand that the infections are not contagious. “I can’t even go to the market with my skin like this,” said Elizabeth W., age nineteen, a young woman with AIDS. “If you have skin problems, people talk bad about you.”¹⁴⁶

Since children are such an important target group for HIV/AIDS information, school-based information and education programs have been part of government AIDS strategies in many countries. In 2000, after years of resistance to an HIV/AIDS curriculum in schools, especially on the part of church organizations, the Kenyan Ministry of Education supported by a parliamentary mandate finalized and distributed curricular materials for both primary and secondary schools on HIV/AIDS. These consist of a summary description of the syllabus and some materials on basic facts about HIV/AIDS prepared for primary classes 1-3, 4 and 5, 6-8, and secondary

¹³⁹ Ibid., p. 73.

¹⁴⁰ Johnston and Muita, *Adolescent Love in the Time of AIDS*.

¹⁴¹ Human Rights Watch interview with Jacqueline K., twenty-six, Kisumu, February 28, 2001.

¹⁴² Human Rights Watch interview with Claire S., Kisumu, February 28, 2001.

¹⁴³ Human Rights Watch interview with Jane A., thirty-nine, a person living with AIDS and the guardian of six orphans and two of her own children, Nairobi, March 13, 2001.

¹⁴⁴ Human Rights Watch interview with Linda R., Kibera (Nairobi), March 13, 2001.

¹⁴⁵ Ibid.

¹⁴⁶ Human Rights Watch interview, Kisumu, March 1, 2001.

school students. There is also a facilitators guide that lists objectives and main points of the various lessons covered in the class books and notes other resources that teachers can consult.¹⁴⁷

Several teachers and headmasters interviewed by Human Rights Watch noted, however, that teachers regarded the guidelines for using the curricular materials as incomplete. “Right now teachers don’t know where to begin in using the curriculum,” said Francis Kandege, headmaster of Nyanganga Secondary School in Siaya.¹⁴⁸ “Teacher training will be the most important thing,” he said, and government training on the new curriculum has not yet reached all provinces. One head teacher also noted that, as in many countries, HIV/AIDS is not part of the examinable curriculum in Kenya—that is, the national exams that drive primary and secondary school promotion do not include this material.¹⁴⁹ A number of schools visited by Human Rights Watch had informal clubs to combat AIDS that reach some students with information and guidance. The recently published PCA survey of young persons aged thirteen to nineteen in Kenya concluded that teachers were an important source of information on AIDS for students, but not through the government sex education program, which was judged to be virtually non-existent.¹⁵⁰

The HIV/AIDS curriculum should be particularly helpful for reducing incidents of abuse and stigmatization in the classroom and at school. Among children interviewed by Human Rights Watch, the few who were able to stay in school after a parent became ill with AIDS were sometimes subject to abuse there. “When our mother was sick and couldn’t care for us, all of us had to drop out of school. First we tried to stay in, but when we were irregular in attendance, we were caned [beaten by a teacher] for that,” said Rose B., age eighteen, whose mother died in 1999.¹⁵¹ “My children come home from school saying that the other children abuse them because of my illness,” said Linda R., an HIV-positive mother in Nairobi.¹⁵²

Even when all Kenyan schoolchildren are able to benefit from the new curriculum, there will remain the challenge of reaching over 4 million school-age children who are not in school. The PCA survey classified the young persons interviewed as “high-risk” or “low-risk” with respect to HIV transmission based on a number of criteria related to their knowledge and reported behavior. Of those ranked as low-risk, only 1 percent were out-of-school youth. Of those ranked to be at high risk of HIV transmission, 39 percent were school-aged children not in school.¹⁵³ Comprehensive information on programs for out-of-school youth in Kenya is not available, but this population is clearly both difficult and essential to reach.

There is a need for all available channels of information, including school-based curricula and programs for out-of-school youth, to be put to maximal use with appropriate and clear information on HIV/AIDS prevention, treatment and care. Children and adults alike have a right to “freedom to seek, receive and impart information and ideas of all kinds,” as noted in article 19 of the ICCPR, and information on HIV/AIDS is a matter of life and death.

Child Protection Services of the Government of Kenya

The Department of Children’s Services of the Ministry of Home Affairs is in charge of coordination of protection services for children in special need. Representatives of NGOs providing services for children in Kenya generally praised the Children’s Department for doing what it can but concluded that the AIDS crisis is

¹⁴⁷ Republic of Kenya, Ministry of Education, Science and Technology, “AIDS Education Syllabus for Schools and Colleges” Nairobi, December 1999.

¹⁴⁸ Human Rights Watch interview, Siaya, March 6, 2001.

¹⁴⁹ Human Rights Watch interview with Thomas Otieno Onguru, head teacher, Kosele Primary School, Rachuonyo, March 5, 2001.

¹⁵⁰ Johnston and Muita, *Adolescent Love in the Age of AIDS*, p.18.

¹⁵¹ Human Rights Watch interview, Kisumu, March 1, 2001.

¹⁵² Human Rights Watch interview, Kibera (Nairobi), March 13, 2001.

¹⁵³ Johnston and Muita, *Adolescent Love in the Age of AIDS*, p.42.

overwhelming existing services.¹⁵⁴ The main professional staff members of the Children's Department are the district-level children's officers whose duties are to identify and arrange services for children in difficult circumstances. They also have a wide range of time-consuming duties related to children in conflict with the law.

Samuel ole Kwallah, director of the Department of Children's Services, said the department's budget has increased substantially over the years, but recognized that resources are still too thin on the ground.¹⁵⁵ The Children's Department budget is well less than 1 percent of the national budget.¹⁵⁶ For a country in which there are an estimated 1 million orphans and these are only a fraction of the children in need of special protection, there are currently 150 children's officers.¹⁵⁷ "In Kenya, the shortage of field officers (i.e. children's officers) is a serious problem. Huge areas still remain without appropriate services," according to a Children's Department document.¹⁵⁸ A 1997 UNICEF-supported government survey of children in need of special protection found that 28 percent of these children did not even have an idea where to turn for help.¹⁵⁹

The Children's Department has put forward a proposal for a corps of volunteer children's officers to help bridge the gap. The volunteers would have the following duties: (1) supervision and provision of after-care services for children in need of special protection and their families in the community (such as case investigation, home visits, counselling, and providing information); (2) environment adjustment for children in approved schools; and (3) community sensitization and advocacy on the plight of children in need of special protection.¹⁶⁰ The proposed volunteer corps will thus be at least somewhat oriented to care and protection as opposed to exclusively serving an enforcement function for children in conflict with the law. In spite of the Children's Department's statement that a system of volunteer children's officers "is well known as the most promising community-based approach [for dealing with children in need of protection] in the world,"¹⁶¹ the sustainability and effectiveness of a system of unpaid volunteers in Kenya in improving care and protection of AIDS-affected children obviously remain in question.

The Children's Department also has a mandate for overseeing residential institutions for children, including orphanages. A study by UNICEF and USAID in 1999 estimated that about 35,000 children, not including those in conflict with the law, were in institutional care in Kenya. At the time, the Children's Department reported that Kenya had sixty-four registered and 164 unregistered residential institutions for children. In Kisumu town, Human Rights Watch encountered numerous informal unregistered orphanages established in the last two years in people's homes. UNICEF and USAID note that while 35,000 represents only 0.3 percent of the population of children under fifteen in Kenya, that proportion is ten times the percentage of

¹⁵⁴ See, e.g., Human Rights Watch interview with Dr. Angelo D'Agostino, S.J., director, Nyumbani Home for Children, Nairobi, March 12, 2001.

¹⁵⁵ Human Rights Watch interview with Samuel ole Kwallah, director, Children's Department, Ministry of Home Affairs, Nairobi, March 13, 2001.

¹⁵⁶ Government of the Republic of Kenya, "First Kenya Country Report on the Implementation of the U.N. Convention on the Rights of the Child," Nairobi, 2000, p.15.

¹⁵⁷ Ibid., p. 63. The government report to the Committee on the Rights of the Child also refers to a UNICEF-supported exercise to identify children in need of special protection in 1997 that found about 110,000 such children, but the exercise covered only thirteen of Kenya's sixty-seven districts. Ibid., p.62.

¹⁵⁸ Government of the Republic of Kenya, Ministry of Home Affairs, Heritage and Sports, Department of Children's Services, "Introduction of the Volunteer Children's Officer (VCO) System in Kenya" (unpublished paper), 2001.

¹⁵⁹ "First Kenya Country Report," p.63.

¹⁶⁰ Ibid. In a separate document, children in need of special protection are defined as those in "situations including physical, economic or sexual exploitation and abuse, violence, harmful traditional practices, deprivation of family environment, childhood disability, inappropriate laws and unlawful judiciary practices, as well as deprivation of appropriate care and development opportunities, including nutrition and access to health and education." See Government of the Republic of Kenya and UNICEF-Kenya, "The Kenya Socio-cultural and Economic Reintegration Model for Children in Need of Special Protection and Implementation Guidelines (unpublished paper), February 2001. Approved schools, also referred to in the proposed volunteer duties, are correctional institutions under the administration of the Children's Department to which children ten years old and above may be committed by the courts.

¹⁶¹ Ibid.

children in institutions in neighboring Uganda, for example. Uganda significantly reduced the number of children living in orphanages there from 1992 to 1997 through an aggressive program of enforcing policies on standards of care in orphanages and reuniting children with family members. “Unless Kenya begins a similar approach, the number of children in its institutions can be expected to grow substantially as HIV/AIDS increases the number of orphans,” the report concludes.¹⁶²

The director of the Children’s Department said the protection of all categories of children in need of special protection would be greatly assisted by the passage of the Children Bill that was recently sent by the attorney general to parliament. The bill would establish a National Council for Children’s Services that would formally involve government ministries and departments outside the Children’s Department in the provision of children’s services.¹⁶³ The council would be responsible for planning, policy-making and financing children’s “welfare services” as well as programs targeted to children in need of special protection.¹⁶⁴ In a related effort, the Children’s Department and UNICEF-Kenya have proposed a “multi-sectoral approach to...prevent and control escalating numbers of children in difficult circumstances” in which the council and existing district-level Children’s Advisory Committees would play important roles in the identification and addressing of care and protection needs of children.¹⁶⁵ When the Children’s Advisory Committees were counted as part of a rapid assessment in 1999, they were reportedly active in thirty-nine of Kenya’s sixty-seven districts.¹⁶⁶

As Samuel ole Kwallah notes, protection of children’s rights is a responsibility that goes far beyond the Children’s Department. The government’s legal and judicial services for children have been widely criticized for focusing almost exclusively on children in conflict with the law and treating children in need of protection as criminals even if they are not in conflict with the law. “The laws that deal with children in Kenya are not meant for the protection of children; they are aimed at dealing with delinquent children. The juvenile court doesn’t even pretend to protect children,” said Otiende Amollo of KELIN, an observation echoed by other lawyers.¹⁶⁷ An ANPPCAN-Kenya study of the legal and judicial systems for children in Kenya noted:

Under existing laws and practices, child law is enforced on the premise of protecting society from the errant child rather than protecting the child from errant members of adult society....it is common for children found roaming the streets to be arrested for no apparent reason....This practice has been justified on the principle that children need care and protection under the Children and Young Persons Act. However, close scrutiny shows that the objective is to “clean up” the streets and not to protect the children.¹⁶⁸

This study corroborated many of the conclusions of an earlier report by Human Rights Watch on the treatment of street children in the Kenyan justice system. HRW’s report concluded that children in need of special protection are too often classified with disciplinary cases and punished rather than having their protection needs addressed.¹⁶⁹

Some observers interviewed by Human Rights Watch said that part of the solution may be the new District Intersectoral AIDS Committees, subcommittees of District Development Committees, which were recently authorized and granted a small budget by parliament. Allan Ragi, director of the Kenya AIDS NGO Consortium, hailed the intersectoral committees as a major breakthrough for dealing at a decentralized level with

¹⁶² Donohue et al., “Children Affected by HIV/AIDS in Kenya.”

¹⁶³ Government of the Republic of Kenya, “Children Bill 2001,” *Kenya Gazette*, Supplement no. 18, March 16, 2001.

¹⁶⁴ *Ibid.*, section 29.

¹⁶⁵ Department of Children’s Services and UNICEF-Kenya, “The Kenya Socio-Cultural and Economic Reintegration Model.”

¹⁶⁶ Donohue et al., “Children Affected by HIV/AIDS in Kenya,” p. 6.

¹⁶⁷ Human Rights Watch interview with Otiende Amollo, February 26, 2001. Echoed in Human Rights Watch interviews with Eric Ogwang, March 8, 2001, and Millie Odhiambo, April 23, 2001.

¹⁶⁸ ANPPCAN Kenya, *Children in the Dock*, p.4.

¹⁶⁹ Human Rights Watch, *Juvenile Injustice*, p.3.

a wide range of AIDS problems, though he noted that children's issues have been neglected at all levels.¹⁷⁰ He reported that between 190 and 200 such committees have been launched at district and sub-district levels. David Otieno, an attorney affiliated with KELIN in Kisumu, noted that, at least in greater Kisumu, it was far too soon to judge whether the intersectoral committees would be an effective mechanism for accelerating attention and resource allocation to AIDS-related problems.¹⁷¹ Members of parliament recently complained that it was impossible to launch the committees in their constituencies because the government had failed to release the funds allocated for the committees' work.¹⁷²

Finding ways to keep AIDS-affected children in school is central to addressing their concerns. Virtually every AIDS-affected child, all the guardians, and many service providers interviewed by Human Rights Watch mentioned help with school fees as the first thing that should be done to assist children affected by AIDS. Assisting children orphaned by AIDS with school fees is the sole mission of many smaller organizations that have been formed in Kenya in recent years. While primary school is officially free of charge in Kenya, school administrators are allowed to charge various fees, which are sometimes called tuition fees, sometimes construction fees, chalk fees, and so on. Nongovernmental organization experts estimate that over 60 percent of the costs of running schools are actually borne by parents.¹⁷³ By the government's reckoning, although 30 percent of the national budget goes to education, 80 percent of that sum goes to teacher salaries and the remaining 20 percent is insufficient for other operational expenses of schools, which has led the government to a policy of "cost sharing" with parents.¹⁷⁴ ANPPCAN director Elizabeth Owuor-Oyugi said:

We continue to lobby the government for free and compulsory education. Officially there are no school fees, but in reality there are so many levies that turn out to be even more than school fees. In that sense, we almost wish there were school fees which might be more reasonable than the current levies....[Because of AIDS,] we are going to end up with the generation of people who never went to school. Any NGO dealing with AIDS-affected children has to take on this problem at the local and national levels.¹⁷⁵

There is no doubt that AIDS-affected children are far from being the only children to be orphaned, withdrawn from school, engaged in hazardous labor, and otherwise in need of special protection. Samuel ole Kwallah observed:

Even before the HIV/AIDS problem, we weren't able to cope. The number of children in need of special protection in the various categories was always too big. Even that number overstretched our capacity, and now there is the big increase of AIDS orphans who have no adult for support.¹⁷⁶

Though AIDS is not the only factor that pushes children into situations in which they are in need of special protection, several experts emphasized that in quantitative terms, AIDS-affected children now dominate all categories of children in need of special protection. UNICEF and the Children's Department estimate that 80 percent of all orphans are children orphaned by AIDS.¹⁷⁷ AIDS-affected children not yet orphaned probably are overrepresented in the population of school-age children out of school and non-orphaned children on the streets.¹⁷⁸ Even if there is no intent to discriminate against AIDS-affected children, their numerical

¹⁷⁰ Human Rights Watch interview with Allan Ragi, director, Kenya AIDS NGO Consortium, Nairobi, February 22, 2001.

¹⁷¹ Human Rights Watch interview with David Otieno of David Otieno & Co. Advocates, Kisumu, March 3, 2001.

¹⁷² Odhiambo Orlale, "Sh 7.6 Billion Pledged for Fight Against AIDS," *The Nation*, April 18, 2001.

¹⁷³ Human Rights Watch interview with Patricia Hari, Save the Children-UK, Nairobi, March 19, 2001.

¹⁷⁴ "First Kenya Country Report", p.15.

¹⁷⁵ Human Rights Watch interview with Elizabeth Owuor-Oyugi, ANPPCAN-Kenya, Nairobi, March 9, 2001.

¹⁷⁶ Human Rights Watch interview with Samuel ole Kwallah, March 13, 2001.

¹⁷⁷ Department of Children's Services and UNICEF, "The Kenya Socio-Cultural and Economic Reintegration Model," section 2.1, p. 17.

¹⁷⁸ Donohue et al., "Children Affected by HIV/AIDS in Kenya," p. 4.

predominance means that they are disparately affected by the inadequacy of services for children at high risk of rights violations.

VI. LEGAL BACKGROUND

Kenyan Law

HIV/AIDS is not mentioned in Kenyan law other than in the public health statutes, in which it is mandated to be a reportable illness—that is, health providers are meant to report to the public health authorities all cases of it that they encounter. (In most developing countries where HIV/AIDS is subject to mandatory reporting, gross underreporting is thought to exist, and Kenya is no exception.)¹⁷⁹

The Kenyan constitution contains broad protections against discrimination based on “race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex.”¹⁸⁰ Although HIV/AIDS-related discrimination is not explicitly mentioned, lawyers who have worked on legal protections for persons with AIDS in Kenya believe that the constitution protects against this discrimination. They note, however, that such discrimination cases are unlikely to be brought to the Kenyan courts because of the stigma still associated with the illness.¹⁸¹

Most of the laws having to do with protection of children’s rights in Kenya date from well before the development of the Convention on the Rights of the Child or the African Charter on the Rights and Welfare of the Child of 1990. The Children and Young Persons Act of 1964 establishes legal penalties for anyone who has the custody of a “child or juvenile”—that is, a child up to age sixteen years:

who...wilfully assaults, ill-treats, neglects, abandons or exposes him or causes or permits him to be assaulted, ill-treated, neglected, abandoned or exposed, in any manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, hearing, limb or organ of the body, and any mental derangement); or by any act or omission, knowingly or wilfully cause that child or juvenile to become, or conduces to his becoming, in need of protection and discipline (Section 23).

Aside from this provision, the Children and Young Persons Act focuses on the treatment of children in conflict with the law and not those in need of care and protection.

There are relatively few explicit provisions in Kenyan law for protection of orphans, possibly because the current law was written before the explosive increase in the number of orphans in the last decade. The Law of Succession Act of 1981 details procedures for the inheritance of property by surviving children with or without the presence of a surviving parent. It provides in section 26 for the right of dependent children or someone acting on their behalf to apply to the court for redress in cases where “reasonable provision” has not been made for those children. It also outlines the need to ensure trusteeship of property of a surviving child until he or she reaches the age of eighteen years where the trustee should be “appointed by a court of competent jurisdiction”.¹⁸²

The Children Bill of 2000, later issued in a second reading as the Children Bill of 2001, was meant to reflect the full range of protections in the Convention on the Rights of the Child, according to its introductory statement.¹⁸³ The bill was scheduled to be considered by the Kenyan parliament after hearings in June 2001. It retains a major focus on issues related to children in conflict with the law but suggests greatly expanded consideration of the “protection and care” of children more generally, including children in need of foster care. Its sections making explicit the right to health care, education, protection from child labor and armed conflict,

¹⁷⁹ UNAIDS, “Epidemiological Fact Sheet on HIV/AIDS and Sexually Transmitted Infections – Kenya”

¹⁸⁰ Constitution of Kenya, rev. ed. 1998, chapter V, section 82.

¹⁸¹ For example, Human Rights Watch interview with Ambrose D.O. Rachier, February 26, 2001.

¹⁸² Law of Succession Act, subsidiary rules section 32.

¹⁸³ Children Bill, *Kenya Gazette Supplement No. 18 (Bills No. 4)*, March 2001, p. 146 (commencement to the bill).

protection from harmful cultural rites, and protection from sexual abuse and exploitation are new elements in Kenyan law.¹⁸⁴

International Law

Kenya ratified the Convention on the Rights of the Child in 1990 and recently submitted its first implementation report after a seven-year delay.¹⁸⁵ It has also ratified, the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women.

Guidelines and Statements on HIV/AIDS from U.N. Human Rights Bodies

There is no international human rights law explicitly addressing HIV/AIDS. Articles 2 and 26 of the International Covenant on Civil and Political Rights and article 2 of the Convention on the Rights of the Child all provide protection from discrimination on the grounds of race, color, sex, and other explicit characteristics, “or other status”. In its reviews of national reports, the Committee on the Rights of the Child has recognized children affected by HIV/AIDS and children of parents with HIV/AIDS among the categories of children covered by the protections against discrimination under article 2 of the convention.¹⁸⁶ At its fifty-third meeting in 1995, the U.N. Commission on Human Rights concluded that “discrimination on the basis of AIDS or HIV status, actual or presumed, is prohibited by existing international human rights standards” in that the term “or other status” in international human rights instruments (including the ICCPR and the Convention on the Rights of the Child) “can be interpreted to cover health status, including HIV/AIDS.”¹⁸⁷

In 1998, the office of the U.N. High Commissioner for Human Rights and the Joint U.N. Programme on HIV/AIDS (UNAIDS) issued “HIV/AIDS and Human Rights: International Guidelines,” which do not have the force of international law but provide many concrete suggestions for governments wanting to incorporate in national law and policy human rights protections related to HIV/AIDS.¹⁸⁸ The International Guidelines have been accorded considerable weight by the Commission on Human Rights and other U.N. human rights institutions. The guidelines cover discrimination in detail and issues related to confidentiality in HIV testing and partner notification as well as criminal laws related to HIV/AIDS. Guideline 8, which outlines protections for women and children, emphasizes protection of children from mandatory testing, discrimination and abandonment, and the right of children to access to information on HIV/AIDS and to means of prevention of HIV transmission. The guidelines are explicit in their recognition of improved social status for women as a necessary condition for protection of women’s and children’s rights with respect to HIV/AIDS, echoing a statement from a 1995 Commission on Human Rights resolution calling upon states to “advance the legal, economic and social status of women, children and vulnerable groups...to render them less vulnerable to the risk of HIV infection.”¹⁸⁹

The link between HIV/AIDS and human rights of children has been noted in other statements by U.N. human rights bodies (with reference to all countries, not only Kenya). The general comment on the right to education by the Committee on the Rights of the Child notes that “children with HIV/AIDS are also heavily discriminated against in both types of settings [formal and non-formal education]” and judges this discrimination to be in violation of article 29 of the CRC.¹⁹⁰ The Committee also issued a series of recommendations based on its theme day discussion on HIV/AIDS and children at its 19th session in 1998. Among these are that “access to

¹⁸⁴ Ibid., part II.

¹⁸⁵ First Kenya country report on the implementation of the CRC.

¹⁸⁶ Hodgkin and Newell, *Implementation Handbook for the Convention on the Rights of the Child*, p.28.

¹⁸⁷ Commission on Human Rights, “The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)” (Resolution 1995/44, adopted without a vote, March 3, 1995).

¹⁸⁸ Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, “HIV/AIDS and Human Rights – International Guidelines” (from the second international consultation on HIV/AIDS and human rights, 23-25 September 1996, Geneva), U.N. Doc. HR/PUB/98/1, Geneva, 1998.

¹⁸⁹ Commission on Human Rights, Resolution 1995/44, p.2.

¹⁹⁰ United Nations High Commissioner for Human Rights, Committee on the Rights of the Child, general discussion on “Children living in a world with HIV/AIDS”, September 21 – October 9, 1998.

information as a fundamental right of the child should become the key element in HIV/AIDS prevention strategies,” and that urgent attention be paid to “the ways in which gender-based discrimination places girls at higher risk in relation to HIV/AIDS.”¹⁹¹

International Law on Relevant Child Protection Issues

Protection of children, especially orphans and vulnerable children, is explicit in a number of human rights instruments. Article 24 of the ICCPR ensures a child “the right to such measures of protection as are required by his status as a minor.” Article 20 of the Convention on the Rights of the Child ensures “special protection and assistance” for a child “temporarily or permanently deprived of his or her family environment,” including “alternative care for such a child.” “Placement in suitable institutions for the care of children” is a possibility allowed for in article 20. Protection of all children against “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse” is guaranteed in article 19.

African Human Rights Instruments

The formulation of the African Charter on Human and Peoples’ Rights predates the AIDS era, as it was drafted in the late 1970s. The African Charter on the Rights and Welfare of the Child, which entered into force in November 1999, does not mention AIDS explicitly. It contains many of the protections contained in the Convention on the Rights of the Child. Where the convention refers to “a child temporarily or permanently deprived of his or her family environment”, the charter refers to “a child who is parentless or who is... deprived of his or her family environment”, but the protections noted are otherwise similar.¹⁹² Article 16 of the charter refers to protection of children from “all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.” Both these African charters contain anti-discrimination provisions with wording similar to those in the international instruments.¹⁹³

Kenya ratified the African Charter on the Rights and Welfare of the Child in July 2000 and ratified the African Charter on Human and Peoples’ Rights in 1992.¹⁹⁴

VII. CONCLUSION

HIV prevalence in the population of Kenya increased steadily and consistently by about 1 percentage point a year from 1990 to 1999, with each percentage point representing the potential for thousands of orphans and children otherwise affected by AIDS. During this period, policy and law to protect those affected by AIDS and well-funded action to promote prevention could have saved hundreds of thousands of lives. The Government of Kenya did little during this period to mobilize its population against the AIDS onslaught, even though its neighbor, Uganda, was providing a good example of aggressive and effective state action against HIV/AIDS. Kenya was not alone in its inaction in Africa or globally. Uganda’s experience in the 1980s and 1990s was exceptional; Kenya’s inaction was typical of much of the rest of Africa.

Since 1999, there has been greater state action and donor support for AIDS prevention programs in Kenya. The government is to be commended on taking steps to bolster prevention and treatment programs by developing policies and laws that will facilitate access to drugs and condoms. Equally essential to the struggle

¹⁹¹ Ibid., p.9.

¹⁹² African Charter on the Rights and Welfare of the Child, arts. 25(2) and 16, OAU Doc. CAM/LEG/24.9/49, 1990. articles 25(2) and 16.

¹⁹³ Ibid., article 3, and African Charter on Human and Peoples’ Rights, art. 2, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M.58, 1982.

¹⁹⁴ See ratification information posted to University of Minnesota Human Rights Library Web site, <http://www1.umn.edu/humanrts/instree/ratz1afchr.htm>; facsimile message from Ben Kioko, legal counsel a.i. of the Organisation of African Unity, to the Children’s Rights Division, Human Rights Watch, September 22, 2000 (OAU ref. No. CAB/LEG/24.9/113/vol.III).

against HIV/AIDS is the care and protection of children affected in various ways by AIDS. Over a million children orphaned and otherwise affected by AIDS in Kenya, particularly those living in poverty, are at high risk of engaging in hazardous work, finding themselves on the street, losing property that might be the key to their future protection, and being out of school and cut off from information on AIDS prevention. Current laws do not establish mechanisms adequate to ensure the protection of these children. Even where there is no intent to discriminate, these risks fall with disparate impact on AIDS-affected children because their numbers dominate all categories of children in need of special protection.

The state cannot completely compensate for the loss of traditional family and community-based protections for children. Sadly, the capacity of the state to protect the rights of AIDS-affected children is impeded by the impact of AIDS itself, including the epidemic's weakening of the extended family and community-based structures. The health sector is overwhelmed by the needs of persons with HIV/AIDS; the education sector is weakened by the deaths of teachers and administrators. Nonetheless, some basic protections can be provided by the state, and their provision for children affected by AIDS cannot be put off. If these children are not protected, the risks of abuse, neglect and discrimination that they face will be amplified in succeeding generations as the epidemic rages on.

Children's rights in the HIV/AIDS crisis, as in other contexts, are not subordinate to other rights. The government of Kenya must make AIDS-affected children a priority for policy and legal protections. Donors supporting Kenya's work in combating HIV/AIDS should also understand the threat to children's rights and well-being that the epidemic represents and reflect this understanding urgently in their assistance.

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APPENDIX

Excerpts from “HIV/AIDS and human rights: International guidelines” (UNHCHR/UNAIDS, 1998)

Guideline 7: Legal support services

32. States should implement and support legal support services that will educate people affected by HIV/AIDS about their rights, provide free legal services to enforce those rights, develop expertise on HIV-related legal issues and utilize means of protection in addition to the courts, such as offices of Ministries of Justice, ombudspersons, health complaint units and human rights commissions.

Guideline 8: Women, children and other vulnerable groups

38. States should, in collaboration with and through the community, promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups.

(b) States should support the development of adequate, accessible and effective HIV-related prevention and care education, information and services by and for vulnerable communities and should actively involve such communities in the design and implementation of these programmes.

(c) States should support the establishment of national and local forums to examine the impact of the HIV/AIDS epidemic on women. They should be multisectoral to include government, professional, religious and community representation and leadership and examine issues such as:

- The role of women at home and in public life;
- The sexual and reproductive rights of women and men, including women's ability to negotiate safer sex and make reproductive choices;
- Strategies for increasing educational and economic opportunities for women;
- Sensitizing service deliverers and improving health care and social support services for women;
- The impact of religious and cultural traditions on women.

(f) States should ensure that all women and girls of child-bearing age have access to accurate and comprehensive information and counselling on the prevention of HIV transmission and the risk of vertical transmission of HIV, as well as access to the available resources to minimize that risk, or to proceed with childbirth, if they so choose.

(g) States should ensure the access of children and adolescents to adequate health information and education, including information related to HIV/AIDS prevention and care, inside and outside school, which is tailored appropriately to age level and capacity and enables them to deal positively and responsibly with their sexuality. Such information should take into account the rights of the child to access to information, privacy, confidentiality, respect and informed consent and means of prevention, as well as the responsibilities, rights and duties of parents. Efforts to educate children about their rights should include the rights of persons, including children, living with HIV/AIDS.

(h) States should ensure that children and adolescents have adequate access to confidential sexual and reproductive health services, including HIV/AIDS information, counselling, testing and prevention measures such as condoms, and to social support services if affected by HIV/AIDS. The provision of these services to children/adolescents should reflect the appropriate balance between the rights of the child/adolescent to be involved in decision-making according to his or her evolving capabilities and the rights of duties of parents/guardians for the health and well-being of the child.

(i) States should ensure that persons employed to child-care agencies, including adoption and foster-care homes, receive training in the area of HIV-related children's issues in order to deal effectively with the special needs of HIV-affected children, including protection from mandatory testing, discrimination and abandonment.

(j) States should support the implementation of specially designed and targeted HIV prevention and care programmes for those who have less access to mainstream programmes due to language, poverty, social or legal or physical marginalization, e.g. minorities, migrants, indigenous peoples, refugees and internally displaced persons, people with disabilities, prisoners, sex workers, men having sex with men and injecting drug users.

Guideline 9: Changing discriminatory attitudes through education, training and the media

40. States should promote the wide and ongoing distribution of creative education, training and media programmes explicitly designed to change attitudes of discrimination and stigmatization associated with HIV/AIDS to understanding and acceptance.

(a) States should support appropriate entities, such as media groups, NGOs and networks of PLHAs, to devise and distribute programming to promote respect for the rights and dignity of PLHAs and members of vulnerable groups, using a broad range of media (film, theatre, television, radio, print, dramatic presentations, personal testimonies, Internet, pictures, bus posters). Such programming should not compound stereotypes about these groups but instead dispel myths and assumptions about them by depicting them as friends, relatives, colleagues, neighbours and partners. Reassurance concerning the modes of transmission of the virus and the safety of everyday social contact should be reinforced.

(b) States should encourage educational institutions (primary and secondary schools, universities and other technical or tertiary colleges, adult and continuing education) as well as trades unions and workplaces to include HIV/AIDS and human rights/non-discrimination issues in relevant curricula, such as human relationships, citizenship-social studies, legal studies, health care, law enforcement, family life and/or sex education, and welfare/counselling.

Guideline 11: State monitoring and enforcement of human rights

44. States should ensure monitoring and enforcement mechanisms to guarantee HIV-related human rights, including those of people living with HIV/AIDS, their families and communities.

80. The key human rights principles which are essential to effective States responses to HIV/AIDS are to be found in existing international instruments, such as the Universal Declaration of Human Rights, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. Regional instruments, namely the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples' Rights also enshrine State obligations application to HIV/AIDS. In addition, a number of conventions and recommendations of the International Labour Organization are particularly relevant to the problem of HIV/AIDS such as ILO instruments concerning discrimination in employment and occupation, termination of employment, protection of workers' privacy and safety and health at work. Among the human rights principles relevant to HIV/AIDS are, inter alia:

- The right to non-discrimination, equal protection and equality before the law;
- The right to life;
- The right to the highest attainable standard of physical and mental health;
- The right to liberty and security of person;
- The right to freedom of movement;
- The right to seek and enjoy asylum;
- The right to privacy;

- The right to freedom of opinion and expression and the right to freely receive and impart information;
- The right to freedom of association;
- The right to work;
- The right to marry and to found a family;
- The right to equal access to education;
- The right to an adequate standard of living;
- The right to social security, assistance and welfare;
- The right to share in scientific advancement and its benefits;
- The right to participate in public and cultural life;
- The right to be free from torture and cruel, inhuman or degrading treatment or punishment.

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