

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 606 OF 2014**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
19,20,21,25,27,28,29,31,33,35,43,45 AND 46 OF THE CONSTITUTION OF
KENYA (2010)**

BETWEEN

**L.A.W.....1ST PETITIONER
KENYA LEGAL AND ETHICAL
ISSUES NETWORK ON HIV & AIDS (KELIN).....2ND PETITIONER
AFRICAN GENDER AND
MEDIA INITIATIVE TRUST (GEM).....3RD PETITIONER**

AND

**MARURA MATERNITY & NURSING HOME.....1ST RESPONDENT
COUNTY EXECUTIVE
COMMITTEE MEMBER IN CHARGE
OF HEALTH SERVICES – NAIROBI COUNTY.....2ND RESPONDENT
CABINET SECRETARY, MINISTRY OF
HEALTH.....3RD RESPONDENT
THE HON. ATTORNEY GENERAL.....4TH RESPONDENT**

AND

**THE SECRETARIAT OF THE JOINT UNITED
NATIONS PROGRAMME ON HIV/AIDS
(UNAIDS SECRETARIAT).....1ST AMICUS CURIAE
PROFESSOR ALICIA ELY YAMIN2ND AMICUS CURIAE
NATIONAL GENDER AND EQUALITY
COMMISSION (NGEC)3RD AMICUS CURIAE**

AND

**THE INTERNATIONAL COMMUNITY
OF WOMEN LIVING WITH HIV(ICW).....INTERESTED PARTY**

3RD AMICUS BRIEF

TABLE OF CONTENTS

<u>STATEMENT OF INTEREST</u>	3
<u>SUMMARY</u>	3
<u>I. KENYA HAS AN INTERNATIONAL HUMAN RIGHTS OBLIGATION TO ACT WITH DUE DILIGENCE TO PREVENT, PROTECT AGAINST, AND PROVIDE A REMEDY FOR FORCED STERILIZATION</u>	4
<u>A. The Due Diligence Principle Requires States to Take Measures to Prevent, Protect Against, and Remedy Human Rights Violations, Including When Committed by Non-State Actors.</u>	5
<u>B. Due Diligence Obligations Apply with Respect to Sexual and Gender-Based Violence.</u>	9
<u>1. The CEDAW Committee has identified the due diligence standard as part of CEDAW States parties' obligations to address sexual and gender-based violence.</u>	9
<u>2. Regional human rights bodies have also laid out States' due diligence obligations with respect to gender-based violence.</u>	11
<u>3. The obligation to act with due diligence to address sexual and gender-based violence may be customary international law.</u>	14
<u>C. Forced Sterilization Is an Act of Sexual and Gender-Based Violence under International Human Rights Law.</u>	15
<u>II. KENYA HAS SPECIFIC DUE DILIGENCE OBLIGATIONS IN THE CONTEXT OF FORCED STERILIZATION, BASED ON INTERNATIONAL HUMAN RIGHTS BODIES' INTERPRETATIONS.</u>	16
<u>A. The African Commission on Human and Peoples' Rights Has Addressed States' Obligations with Regard to Forced Sterilization in a Resolution and General Comment.</u>	16
<u>B. The CEDAW Committee Has Identified State Obligations to Address Forced Sterilization, under CEDAW.</u>	18
<u>C. The Inter-American and European Human Rights Bodies Have Also Identified Specific Due Diligence Obligations with Regard to Forced Sterilization.</u>	19
<u>CONCLUSION</u>	21

STATEMENT OF INTEREST

1. The National Gender and Equality Commission (NGEC) respectfully submits the following brief in its character as *amicus curiae*.¹

2. The NGEC is a constitutional commission established pursuant to Article 59 (4) and (5) of the Constitution and the National Gender and Equality Commission Act, No. 15 of 2011 with the overall mandate of promoting gender equality and freedom from discrimination in accordance with Article 27 of the Constitution. The overarching goal for the commission is to contribute to the reduction of gender inequalities and the discrimination against all; women, men, persons with disabilities, the youth, children, the elderly, minorities and marginalised communities. Owing to its mandate and immense public interest in this matter which raises issues falling within its areas of expertise sought and was joined in these proceedings as the 3rd *Amicus Curiae*.

SUMMARY

3. Pursuant to its international human rights treaty commitments² and, possibly, customary international law, Kenya is obligated to guarantee individuals' human rights, among them the right to be free from sexual or gender-based violence, a category that includes forced sterilization. International human rights law has, increasingly, mandated that States act with due diligence to prevent rights violations by non-State actors, to protect victims by appropriately responding to violations, and to provide victims with an adequate remedy. A State becomes internationally responsible for rights violations committed by private actors, including instances of forced sterilization, when it fails to meet the due diligence standard. The components of this standard, which are detailed below, have been developed and applied in a growing body of treaties and decisions and other interpretations by supranational human rights bodies. While not all of these interpretations are directly binding on Kenya, the State is a party to treaties that have been explicitly interpreted to require due diligence to address forced sterilization and, moreover, other human rights systems' interpretations are useful in understanding this norm and the extent to which it is customary international law.

4. In view of this doctrine, Kenya's international human rights obligations are increasingly clear with respect to forced sterilization. Specifically, State compliance with the due diligence standard has been interpreted to mean taking steps to: 1) prevent forced sterilization through: the enactment of legislation that prohibits this practice and sanctions

¹ NGEC acknowledges the assistance of the International Justice Resource Center (IJRC), a nonprofit human rights organization that provides informational materials, guidance, training, and support to facilitate the understanding and implementation of international human rights law. IJRC provided technical assistance in the research and drafting of this brief.

² Kenya is a State party to, *inter alia*, the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Elimination of All Forms of Discrimination against Women; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of the Child; Convention on the Rights of Persons with Disabilities; African Charter on Human and Peoples' Rights; African Charter on the Rights and Welfare of the Child; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

perpetrators; the licensing, monitoring, and regulation of healthcare providers and healthcare professionals; the establishment of quality standards in healthcare; the requirement or provision of training programs for healthcare personnel necessary to ensure they obtain informed consent to sterilization and otherwise respect patients' human rights; addressing root causes of discrimination against women; and ensuring the public's access to information on healthcare options and related rights; 2) protect victims of forced sterilization by responding to situations of known risk and to alleged violations, and by providing necessary services to victims; 3) investigate alleged instances of forced sterilization using methods that are prompt, effective, and designed to allow perpetrators to be identified and sanctioned; ensure the appropriate punishment of perpetrators; and, 4) make remedies available to victims, beyond the investigation and punishment of perpetrators, and including access to compensation.

I. KENYA HAS AN INTERNATIONAL HUMAN RIGHTS OBLIGATION TO ACT WITH DUE DILIGENCE TO PREVENT, PROTECT AGAINST, AND PROVIDE A REMEDY FOR FORCED STERILIZATION.

5. International law has long recognized a principle of due diligence which governs States' international responsibility for third parties' acts.³ In the realm of international human rights law, this principle imposes a circumstance-specific obligation on States to act with due diligence to prevent, investigate, punish, and remedy rights abuses by non-State actors.⁴ As detailed below, this obligation is particularly important with regard to acts of violence, including torture, inhuman treatment, and killings. Supranational human rights bodies have developed a detailed understanding of States' due diligence obligations in the context of sexual or gender-based violence,⁵ and these duties have been codified in regional human rights treaties that specifically deal with violence against women⁶. Forced sterilization is defined as an act of gender-based violence, in addition to constituting a violation of numerous human rights. As such, States are obligated to act with due diligence

³ See, e.g., *Alabama Claims Arbitration (United States v. Great Britain)* (1872) 29 RIAA 125, p. 129, available at http://legal.un.org/riaa/cases/vol_XXIX/125-134.pdf.

⁴ See, e.g., Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8, available at <http://undocs.org/CCPR/C/21/Rev.1/Add.13>.

⁵ See, e.g., Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 35: Gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35, 18 July 2017, para. 2, available at <http://undocs.org/CEDAW/C/GC/35>; IACHR, *Legal Standards Related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application* (2015), OEA/Ser.L/V/II. 143, 26 January 2015, para. 69, available at <http://www.oas.org/en/iachr/reports/pdfs/LegalStandards.pdf>.

⁶ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará" (adopted 9 June 1994, entered into force 5 February 1995), 33 I.L.M. 1534, art. 7(b) [hereinafter *Convention of Belém do Pará*], available at <http://www.oas.org/juridico/english/treaties/a-61.html>. Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 7 April 2011, entered into force 1 August 2014), CETS 210, art. 5 [hereinafter *Istanbul Convention*], available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>.

to prevent forced sterilization, protect individuals who may be or have been subjected to this practice, investigate and punish perpetrators, and provide access to remedies for victims.

A. The Due Diligence Principle Requires States to Take Measures to Prevent, Protect Against, and Remedy Human Rights Violations, Including When Committed by Non-State Actors.

6. The due diligence principle has roots in both the general obligation to “respect and ensure” or to “give effect” to human rights that is codified in human rights treaties,⁷ and in human rights jurisprudence detailing States’ positive obligations concerning violations by non-State actors.⁸ The standard has evolved most specifically in relation to acts of violence (or the rights related to physical integrity).⁹ In this regard, international human rights treaties explicitly mandate, or have been interpreted to mandate, State action to address potential and actual acts of violence against individuals, whether committed by State agents or private actors. Some bodies refer to States’ obligations to “respect, protect, promote, and fulfil” human rights¹⁰ while others have analyzed them as specific duties to “prevent, protect, punish, and remedy”¹¹ or to “prevent, investigate and punish”¹². No matter the terminology used, and though its components are interrelated and overlapping, the due diligence standard has been rather extensively elaborated.

7. Regional and universal human rights bodies have expressly identified a due diligence standard by which to measure States’ compliance with their international human rights obligations, in the context of violations not directly attributable to the State. With its first judgment, issued in 1988, the Inter-American Court of Human Rights held that

⁷ See, e.g., International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171, art. 2 [hereinafter *ICCPR*], available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3, art. 2 [hereinafter *ICESCR*], available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; African (Banjul) Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986), 21 ILM 58, art 1 [hereinafter *African Charter*], available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

⁸ See, e.g., I/A Court H.R., *Velásquez-Rodríguez v. Honduras*. Judgment of 29 July 1988. Series C No. 4, para. 172, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.

⁹ See, e.g., *id.*; *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *supra* note 4, para. 18 (noting, “These obligations [to investigate and bring to justice those responsible for human rights violations] arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment...”).

¹⁰ ACommHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/2002, Merits Decision, 39th Ordinary Session (2006), para. 151, available at http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf.

¹¹ See, e.g., *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk*, UN Doc. E/CN.4/2006/61, 20 January 2006, para. 38 *et seq.*, available at <http://undocs.org/E/CN.4/2006/61> (categorizing State obligations in terms of “prevention,” “protection,” “punishment,” and “reparation”).

¹² See, e.g., *Velásquez-Rodríguez v. Honduras*. Judgment of 29 July 1988. Para. 166. *But cf.* Committee Against Torture, *General Comment 2: Implementation of article 2 by States Parties*, UN Doc. CAT/C/GC/2, 24 January 2008, para. 18, available at <http://undocs.org/CAT/C/GC/2> (reiterating States’ obligation to “exercise due diligence to prevent, investigate, prosecute and punish” violations by non-State actors).

“the lack of due diligence to prevent [a] violation or to respond to it as required by” international law can make the State internationally responsible for a rights violation.¹³ The United Nations Human Rights Committee later made clear that the general obligation to respect and ensure the rights protected by the International Covenant on Civil and Political Rights (ICCPR) requires States parties to “exercise due diligence to prevent, punish, investigate or redress the harm caused by [acts committed by private persons or entities that would impair the enjoyment of Covenant rights].”¹⁴ In the words of the African Commission on Human and Peoples’ Rights (ACHPR), “an act by a private individual or [non-state actor] and therefore not directly imputable to a State, can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence on the part of the State to prevent the violation or for not taking the necessary steps to provide the victims with reparation.”¹⁵

8. The duty of prevention involves limiting or impeding interferences with individuals’ rights by non-State actors, including private service providers. States must “adopt legislative, judicial, administrative, educative and other appropriate measures” to deter rights violations.¹⁶ As described by the ACHPR, this “generally entails the creation and maintenance of an atmosphere or framework of an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.”¹⁷ With regard to non-State service providers, States have an ongoing “duty to exercise supervision and control” that is not satisfied merely by licensing providers.¹⁸ For example, in the realm of private healthcare, States are required to regulate and monitor facilities and healthcare providers to ensure they meet standards of quality, skill, and ethics and to adopt laws and enact regulations that allow breaches to be identified and sanctioned.¹⁹ The State

¹³ *Velásquez-Rodríguez v. Honduras*. Judgment of 29 July 1988. Para. 64.

¹⁴ *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, supra note 4, para. 8.

¹⁵ ACommHPR, *Sudan Human Rights Organisation, Centre on Housing Rights and Eviction v. Sudan*, Communication Nos. 279/03-296/05, Merits Decision, 45th Ordinary Session, 27 May 2009, para. 148, available at http://www.achpr.org/files/sessions/45th/comunications/279.03-296.05/achpr45_279.03_296.05_eng.pdf (citing *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 39th Ordinary Session, para. 142). See also ACommHPR, *SERAC v. Nigeria*, Communication No. 155/96, Merits Decision, 30th Ordinary Session, paras. 46, 57-58, available at http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf.

¹⁶ See *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, supra note 4, para. 7.

¹⁷ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 39th Ordinary Session, para.152.

¹⁸ ECtHR, *Storck v. Germany*, no. 61603/00, Judgment of 16 June 2005, para.103, available at <http://hudoc.echr.coe.int/eng?i=001-69374>.

¹⁹ See, e.g., I/A Court H.R., *Ximenes-Lopes v. Brazil*. Merits, Reparations and Costs. Judgment of 4 July 2006. Series C No. 149, para. 99, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf; ECtHR, *Z v. Poland*, no. 46132/08, ECHR 2012, Judgment of 13 November 2012, para. 76, available at <http://hudoc.echr.coe.int/eng?i=001-114521>; Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 11 August 2000, paras. 35, 51, available at <http://undocs.org/E/C.12/2000/4>.

may additionally need to mandate or provide training of healthcare providers in order to ensure that minimum standards are known and met.²⁰

9. More generally, international human rights bodies have emphasized the importance of human rights awareness as a tool for preventing abuses. The Human Rights Committee has encouraged States to increase governmental and societal understanding of the rights protected by the ICCPR, in connection with their obligation to give effect to those rights.²¹ In this regard, the ACHPR has determined that “[t]he State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.”²²

10. The duty of protection obligates States to act with due diligence to protect individuals from specific known risks of harm, including by investigating potential and alleged violations and providing services to victims. States must take measures designed to “avoid recurrence of the type of violation in question” and also “may [need to make] changes in the State Party’s laws or practices,” per the UN Human Rights Committee.²³ While international human rights law does not impose an absolute obligation on States to identify and punish every person responsible for an act that violates human rights, it does impose an obligation to conduct a “serious”²⁴ investigation and – when a perpetrator can be identified – to ensure a determination of that person’s accountability “without delay and within a reasonable time”²⁵ and to impose “appropriate punishment”²⁶. The Inter-American Court of Human Rights has indicated:

The State is obligated to investigate every situation involving a violation of the rights protected by the [American] Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.²⁷

²⁰ See, e.g., I/A Court H.R., *Albán Cornejo et al. v. Ecuador*. Merits, Reparations, and Costs. Judgment of 22 November 2007. Series C. No. 171, para. 176(7), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_171_ing.pdf.

²¹ *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, supra note 4, para. 7.

²² *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 39th Ordinary Session, para.152.

²³ *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, supra note 4, para. 17.

²⁴ I/A Court H.R., *Velásquez-Rodríguez v. Honduras*. Judgment of 29 July 1988. Series C No. 4, para. 174, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.

²⁵ I/A Court H.R., *Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 21 May 2013. Series C No. 261, para. 103, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_261_ing.pdf.

²⁶ *Velásquez-Rodríguez v. Honduras*. Judgment of 29 July 1988. Para. 174.

²⁷ See *id.* at para. 176.

11. Investigation and punishment are particularly integral with respect to non-derogable rights,²⁸ and “[t]hese obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as [torture or inhuman treatment, extrajudicial killings, and enforced disappearance].”²⁹ In this regard, human rights bodies view the obligation to investigate as particularly important whenever “the integrity of an individual is at stake.”³⁰ For example, in cases concerning medical negligence that results in physical harm, the Inter-American Court of Human Rights has reminded States that “[t]hey must, *inter alia*, [...] submit, investigate and decide complaints, and establish suitable disciplinary or judicial procedures for cases of inappropriate professional conduct or the violation of patients’ rights.”³¹ For its part, the European Court of Human Rights has noted that States incur international responsibility for inhuman treatment committed by private actors when “the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, failed to provide practical and effective protection of the rights guaranteed” by international law.³²

12. Finally, “the due diligence requirement encompasses the obligation both to provide and enforce sufficient remedies to survivors of private violence,” as the ACHPR has stated.³³ International human rights law, generally, recognizes that an effective remedy is one that includes compensation and reparation of the violated rights, to the extent possible.³⁴ With regard to non-compensatory remedies, the UN Human Rights Committee has noted that “reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”³⁵ Further, remedies must be responsive to the particular needs of vulnerable groups.³⁶

²⁸ See, e.g., ACommHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/2002, Merits Decision, 39th Ordinary Session (2006), para. 155, available at http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf.

²⁹ *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, supra note 4, para. 18.

³⁰ See, e.g., *Suárez Peralta v. Ecuador*. Judgment of 21 May 2013. Series C No. 261. Para. 103.

³¹ *Suárez Peralta v. Ecuador*. Judgment of 21 May 2013. Series C No. 261. Para. 134 (quoting I/A Court of H.R., *Ximenes-Lopes v. Brazil*. Merits, Reparations and Costs. Judgment of 4 July 2006. Series C No. 149, para. 99, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf).

³² ECtHR, *Valiulienė v. Lithuania*, no. 33234/07, ECHR 2013, Judgment of 26 March 2013, para. 75, available at <http://hudoc.echr.coe.int/eng/?i=001-117636>.

³³ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 39th Ordinary Session, para.159.

³⁴ See, e.g., Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 10 March 1992, para. 15, available at [http://undocs.org/HRI/GEN/1/Rev.9\(Vol.I\)](http://undocs.org/HRI/GEN/1/Rev.9(Vol.I)); *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 39th Ordinary Session, para. 203.

³⁵ *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, supra note 4, para. 16.

³⁶ *Id.* at para. 15.

B. Due Diligence Obligations Apply with Respect to Sexual and Gender-Based Violence.

13. International human rights law on States' due diligence obligations is particularly developed with respect to acts of sexual or gender-based violence, including those committed by non-State actors. Beginning in the 1990s, a number of universal and regional human rights bodies identified the due diligence standard as a key measure of States' efforts to address violence against women. In 1992, the United Nations Committee on Elimination of Discrimination Against Women (CEDAW Committee) published its General Recommendation No. 19, informing States that "[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."³⁷ With the Declaration on the Elimination of Violence against Women, the United Nations General Assembly explicitly called on States to "[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private actors."³⁸ In 1999, the United Nations Special Rapporteur on violence against women emphasized that international law was, by then, increasingly recognizing due diligence obligations on the part of States to address domestic violence.³⁹ Her report summarizes the UN and regional doctrine that initially fleshed out this standard.⁴⁰

1. The CEDAW Committee has identified the due diligence standard as part of CEDAW States parties' obligations to address sexual and gender-based violence.

14. Through its general recommendations, concluding observations, and views on individual complaints, the CEDAW Committee has further elaborated on States' due diligence obligations with regard to violence against women in the years since the adoption of its General Recommendation No. 19. The Committee has applied General

³⁷ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19: Violence against women*, UN Doc. A/47/38, 31 August 2000, para. 9, available at [http://undocs.org/A/47/38\(Supp\)](http://undocs.org/A/47/38(Supp)).

³⁸ UN General Assembly, Resolution 48/104, *Declaration on the Elimination of Violence against Women*, UN Doc. A/RES/48/104, 23 February 1994, art. 4(d), available at <http://undocs.org/A/RES/48/104>. See also UN Comm'n on Human Rights, Human Rights Resolution 1994/45, *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women*, UN Doc. E/CN.4/1994/132, 4 March 1994, para. 5, available at <http://undocs.org/E/CN.4/1994/132>.

³⁹ *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women, Report of the Special Rapporteur on violence against women, its cases and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85*, UN Doc. E/CN.4/1999/68, 10 March 1999, para. 6, available at <http://undocs.org/E/CN.4/1999/68>.

⁴⁰ See *id.* at paras. 19-27.

Recommendation No. 19 in requiring States to act with due diligence to prevent, investigate, punish, and remedy gender-based violence against women, as a form of discrimination prohibited by CEDAW.⁴¹ In a decision involving domestic violence, the Committee reiterated that the State's compliance with international standards requires more than formal policies, institutions, or programs, and depends on the active commitment of the State actors responsible for carrying out the due diligence obligations.⁴²

15. In General Recommendation No. 35, an update to General Recommendation No. 19, the Committee further describes the legislative, executive, and judicial actions required to fulfill the due diligence standard. CEDAW requires, *inter alia*, "the adoption and implementation of measures to eradicate prejudices, stereotypes and practices that are the root cause of gender-based violence against women."⁴³ With regard to gender-based violence by non-State actors, the newer General Recommendation indicates:

Under the obligation of due diligence, States parties have to adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors. They are required to have laws, institutions and a system in place to address such violence. Also, States parties are obliged to ensure that these function effectively in practice, and are supported and diligently enforced by all State agents and bodies. The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims/survivors of such acts, provides tacit permission or encouragement to acts of gender-based violence against women. These failures or omissions constitute human rights violations.⁴⁴

16. In the healthcare setting, the CEDAW Committee has determined that the actions or omissions of healthcare providers providing public services "shall be attributable to the State itself" under international human rights law.⁴⁵ Additionally, the CEDAW Committee has made clear that States must work to eliminate discrimination against women by non-State actors, generally, and "take steps directly aimed at eliminating customary and all

⁴¹ See, e.g., Committee on the Elimination of Discrimination against Women, *V.K. v. Bulgaria*, Communication No. 20/2008, UN Doc. CEDAW/C/49/D/20/2008, Views of 15 October 2008, para. 9.3, available at <http://undocs.org/CEDAW/C/49/D/20/2008>; Committee on the Elimination of Discrimination against Women, *Karen Tayag Vertido v. Philippines*, Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008, Views of 29 November 2007, available at <http://undocs.org/CEDAW/C/46/D/18/2008>; Committee on the Elimination of Discrimination against Women, *Fatma Yildirim v. Austria*, Communication No. 6/2005, UN Doc. CEDAW/C/39/D/6/2005, Views of 6 August 2005, para. 12, available at <http://undocs.org/CEDAW/C/39/D/6/2005>.

⁴² Committee on the Elimination of Discrimination against Women, *Fatma Yildirim v. Austria*, para. 12.1.2.

⁴³ *General Recommendation No. 35: Gender-based violence against women, updating general recommendation No. 19*, supra note 5, para. 26.

⁴⁴ *Id.* at para. 264(b).

⁴⁵ *Id.* at para. 264(b).

other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes,” including by regulating healthcare providers and other private actors.⁴⁶

17. The CEDAW Committee has expressed specific concerns related to Kenya, a State party to CEDAW since 1983, and its due diligence in addressing gender-based violence. For example, in 2017, the CEDAW Committee called on Kenya to, *inter alia*, “[i]ncrease the investigation, prosecution and conviction rates in cases of sexual and gender-based violence throughout the State party” and to “[p]rovide the judiciary, prosecutors, the police and other law enforcement officials with adequate training on women’s rights and on gender-sensitive investigation and interrogation procedures in cases of gender-based violence against women.”⁴⁷

2. Regional human rights bodies have also laid out States’ due diligence obligations with respect to gender-based violence.

18. Since the 1990s, regional human rights systems have adopted specialized standards related to States’ due diligence obligations concerning gender-based violence. This is due, in part, to the adoption of regional human rights treaties addressing violence against women. These include the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention);⁴⁸ the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará);⁴⁹ and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol).

19. The Maputo Protocol, which Kenya ratified in October 2010, directs States parties to, *inter alia*, “take appropriate and effective measures to...adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women,” including by addressing its “causes and consequences” and providing services to victims.⁵⁰ Additionally, the ACHPR’s 2017 *Guidelines on Combating Sexual Violence and Its Consequences in Africa* expressly adopt the due diligence principle and further instruct all States subject to its jurisdiction that they “must adopt the necessary legislative and regulatory measures to act with due diligence to prevent and investigate acts of sexual

⁴⁶ Committee on the Elimination of Discrimination against Women, *General Recommendations No. 28: Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/2010/47/GC.2, 19 October 2010, paras. 9, 13, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf>.

⁴⁷ Committee on the Elimination of Discrimination against Women, *Concluding Observations on the eighth periodic report of Kenya*, UN Doc. CEDAW/C/KEN/CO/8, 22 November 2017, paras. 23 (b), (e), available at <http://undocs.org/CEDAW/C/KEN/CO/8>.

⁴⁸ Istanbul Convention, art. 5.

⁴⁹ Convention of Belém do Pará, art. 7.

⁵⁰ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005), OAU Doc. CAB/LEG/66.6 (2000), art. 4(2) [hereinafter *Maputo Protocol*], available at http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf.

violence committed by State and non-State actors, prosecute and punish perpetrators, and provide a remedies to victims.”⁵¹

20. The ACHPR and other regional human rights bodies have emphasized States’ responsibilities for both generally deterring gender-based violence and addressing its root causes.⁵² The ACHPR has explained that States must seek to prevent violations of African Charter rights by private individuals or groups, and avoid impunity for such violations, including by specifically responding to known patterns or trends of violations in its law and practice.⁵³ While States enjoy a “margin of appreciation” in determining the best measures of prevention, a State will be held internationally responsible for a failure to prevent violence against women if it does not adopt general deterrence measures and take action to stop acts of violence against individual victims.⁵⁴ In this respect, the Inter-American bodies have determined that States must adopt strategies aimed at both preventing risk factors and at strengthening the institutions that can effectively respond to cases involving violence against women.⁵⁵ States’ prevention duties extend to “eliminating the root causes” of sexual violence, including discriminatory notions in society.⁵⁶

21. States’ obligations are heightened when authorities are aware of the risk that a specific individual or group faces.⁵⁷ A positive obligation arises when a State “knew or should have known” of the immediate risk of a violation and fails to take measures to avoid

⁵¹ ACommHPR, *Guidelines on Combating Sexual Violence and Its Consequences in Africa* (2017), para. 6, available at http://www.achpr.org/files/instruments/combating-sexual-violence/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf.

⁵² See, e.g., ACommHPR, *Equality Now and Ethiopian Women Lawyers Association (“EWLA”) v. Ethiopia*, Communication No. 341/2007, Merits Decision, 57th Ordinary Session (2015), available at https://www.escri-net.org/sites/default/files/caselaw/equality_now_ethiopian_w_omen_lawyers_association_decision_2007_0.pdf; IACHR, Merits Report No. 51/13, Case 12.551, *Paloma Angelica Escobar Ledezma et al.* (Mexico), 12 July 2013, available at <https://www.oas.org/en/iachr/decisions/2013/mxpu12551en.doc>; IACHR, Merits Report No. 80/11, Case 12.626, *Jessica Lenahan et al.* (United States), 21 July 2011, available at <http://www.oas.org/en/iachr/decisions/2011/uspu12626en.doc>; IACHR, Merits Report No. 54/01, Case 12.051, *Maria da Penha Maia Fernandes* (Brazil), 16 April 2001, available at <http://cidh.org/annualrep/2000eng/ChapterIII/Merits/Brazil12.051.htm>; ECtHR, *Opuz v. Turkey*, no. 33401/02, ECHR 2009, Judgment of 9 June 2009, paras. 148-149, available at <http://hudoc.echr.coe.int/eng?i=001-92945>; ECtHR, *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII, Judgment of 4 December 2003, para. 150, available at <http://hudoc.echr.coe.int/eng?i=001-61521>.

⁵³ *EWLA v. Ethiopia*, 57th Ordinary Session (2015), paras. 125, 131.

⁵⁴ *Id.* at paras. 128-32.

⁵⁵ I/A Court H.R., *González et al. (“Cotton Field”) v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 16 November 2009. Series C No. 205, paras. 258, 291, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf (citing I/A Court H.R., *Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of 31 January 2006. Series C No. 140, para. 78, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf). See also, *Paloma Angelica Escobar Ledezma et al.* (Mexico); *Jessica Lenahan et al.* (United States); *Maria da Penha Maia Fernandes* (Brazil).

⁵⁶ *Guidelines on Combating Sexual Violence and Its Consequences in Africa*, supra note 51, para. 7.

⁵⁷ *EWLA v. Ethiopia*, 57th Ordinary Session (2015), para. 125; see also *M.C. v. Bulgaria*, Judgment of 4 December 2003, para. 150.

the risk.⁵⁸ For example, in *EWLA v. Ethiopia*, the ACHPR concluded that the State's knowledge of a practice of marriage by abduction and rape required the State to take measures beyond the criminalization of those acts, which "could have included immediately launching sensitization campaigns...; providing direct security...; conducting random patrols of the areas where the practice was rampant; or indeed requiring [private dormitory operators] to adequately secure the premises."⁵⁹ Similarly, the IACtHR has explained that a State's obligation to prevent and protect against *specific* acts by private individuals is "conditional on the State's awareness of a situation of real and imminent danger for a specific individual or group of individuals and the reasonable possibility of preventing or avoiding that danger."⁶⁰ The State's policies and practices must be adequate to "guarantee that victims are protected from any new act of sexual violence" and have access to necessary assistance.⁶¹

22. Human rights bodies will examine the specific circumstances of a case to determine whether a State has met its due diligence obligation to investigate.⁶² However, it is not enough for the State to investigate to the best of its ability and following the laws in its jurisdiction if those do not meet international standards.⁶³ Among other requirements, the State must investigate promptly and effectively, keeping in mind a gender perspective, and in a manner capable of addressing obstacles that would result in impunity or in delay.⁶⁴ Moreover, State officials must be trained to have the capacity and sensitivity to appropriately respond to reports of violence against women.⁶⁵

23. With respect to the duty to provide access to a remedy, regional human rights bodies concur that, in the words of the ACHPR, redress for gender-based violence must include the diligent investigation, prosecution, and punishment of perpetrators and be designed to "remediate the violations... suffered."⁶⁶ The *Guidelines on Combating Sexual Violence and Its Consequences in Africa* indicate that investigation and prosecution must be "carried

⁵⁸ *Opuz v. Turkey*, Judgment of 9 June 2009, at para. 129; *Jessica Lenahan et al. (United States)*, 21 July 2011, para. 127; *Cotton Field v. Mexico*. Judgment of 16 November 2009, paras. 258, 279; *EWLA v. Ethiopia*, 57th Ordinary Session (2015), para. 125.

⁵⁹ *EWLA v. Ethiopia*, 57th Ordinary Session (2015), paras. 126, 131.

⁶⁰ *Cotton Field v. Mexico*, Judgment of 16 November 2009, para. 280; IACHR, Merits Report No. 54/01, *Maria da Penha (Brazil)*, Case 12.051, 16 April 2001, para. 56.

⁶¹ *Guidelines on Combating Sexual Violence and Its Consequences in Africa*, *supra* note 51, para. 8.

⁶² See *Cotton Field v. Mexico*. Judgment of 16 November 2009, paras. 294-295.

⁶³ See, e.g., I/A Court H.R. *Veliz Franco et al. v. Guatemala*. Judgment of 19 May 2014, Series C No. 277, para. 210, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_277_ing.pdf; also *M.C. v. Bulgaria*, Judgment of 4 December 2003, para. 182.

⁶⁴ IACHR, Merits Report No. 51/13, Case 12.551, *Paloma Angelica Escobar Ledezma et al. (Mexico)*, 12 July 2013, paras. 80-81, 87; available at <https://www.oas.org/en/iachr/decisions/2013/mxpu12551en.doc>; IACHR, Merits Report No. 80/11, Case 12.626, *Jessica Lenahan et al. (United States)*, 21 July 2011, para.106, available at <http://www.oas.org/en/iachr/decisions/2011/uspu12626en.doc>; see also ECtHR, *Opuz v. Turkey*, no. 33401/02, ECHR 2009, Judgment of 9 June 2009, paras. 150-151, available at <http://hudoc.echr.coe.int/eng?i=001-92945>.

⁶⁵ *Paloma Angelica Escobar Ledezma et al. (Mexico)*, 12 July 2013, para. 87.

⁶⁶ *EWLA v. Ethiopia*, Communication No. 341/2007, Merits Decision, 57th Ordinary Session (2015), para. 138, available at https://www.escri-net.org/sites/default/files/caselaw/equality_now_ethiopian_w_omen_lawyers_association_decision_2007_0.pdf.

out: without unjustified delays; independently, impartially and effectively; in a manner that will lead to the identification and sentencing of the perpetrators.”⁶⁷ The remedies available to victims of sexual violence must involve reparation, “be affordable and accessible without justified delays,” and “must include individual and collective measures, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.”⁶⁸ Where a State fails to ensure equal access to justice for victims of gender-based violence, it may also be responsible for discrimination on the basis of gender.⁶⁹

3. The obligation to act with due diligence to address sexual and gender-based violence may be customary international law.

24. In view of the treaties, decisions, and interpretations adopted over the past 25 years, the obligation to act with due diligence to prevent, investigate, punish, and remedy gender-based violence has arguably attained the status of customary international law. Already in 2006, the United Nations Special Rapporteur on violence against women wrote, “On the basis of the practice and opinio juris outlined [in her report], it can be concluded that there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence.”⁷⁰ She relied, in part, on the pre-2006 statements by UN and regional bodies identified in the preceding section of this brief.

25. Since the publication of the Special Rapporteur’s report, this body of law has only grown. For example, in its *Jessica Lenahan* decision of 2011, the IACHR concluded that “there is a broad international consensus over the use of the due diligence principle to interpret the content of State legal obligations towards the problem of violence against women.”⁷¹ In that decision, the IACHR helpfully summarized its view of the international consensus:

First, international bodies have consistently established that a State may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women; a duty which may apply to actions committed by private actors in certain circumstances. Second, they underscore the link between discrimination, violence against women and due diligence, highlighting that the States’ duty to address violence against women also involves measures to prevent and respond to the discrimination that perpetuates this problem. States must adopt the required measures to modify the social and cultural patterns of

⁶⁷ *Guidelines on Combating Sexual Violence and Its Consequences in Africa*, supra note 51, para. 9.1.

⁶⁸ *Id.* at para. 10.

⁶⁹ See *EWLA v. Ethiopia*, 57th Ordinary Session (2015), paras. 143-50.

⁷⁰ *Report of the Special Rapporteur on violence against women, its causes and consequences: The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, supra note 11, para. 29.

⁷¹ IACHR, Merits Report No. 80/11, Case 12.626, *Jessica Lenahan et al.* (United States), 21 July 2011, para.123, available at <http://www.oas.org/en/iachr/decisions/2011/uspu12626en.doc>.

conduct of men and women and to eliminate prejudices, customary practices and other practices based on the idea of the inferiority or superiority of either of the sexes, and on stereotyped roles for men and women. [...] Third, they emphasize the link between the duty to act with due diligence and the obligation of States to guarantee access to adequate and effective judicial remedies for victims and their family members when they suffer acts of violence. Fourth, the international and regional systems have identified certain groups of women as being at particular risk for acts of violence due to having been subjected to discrimination based on more than one factor, among these girl-children, and women pertaining to ethnic, racial, and minority groups; a factor which must be considered by States in the adoption of measures to prevent all forms of violence.⁷²

26. The IACHR's decision points to "a diversity of international instruments" to support this standard, including the UN Human Rights Council's 2010 resolution *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*.⁷³ In that resolution, the Human Rights Council "[s]tresses that States have the obligation to promote and protect all human rights and fundamental freedoms of women and girls, and must exercise due diligence to prevent, investigate, prosecute and punish the perpetrators of violence against women and girls and provide protection to the victims..."⁷⁴

27. There have been similar developments within the Council of Europe. For its part, the European Court of Human Rights has also recognized the Special Rapporteur's report identifying a customary international norm.⁷⁵ Additionally, the Istanbul Convention, which expressly includes the due diligence standard, was adopted five years after the Special Rapporteur's report.⁷⁶

C. Forced Sterilization Is an Act of Sexual and Gender-Based Violence under International Human Rights Law.

28. Under international human rights law, forced sterilization is recognized as a discriminatory act of sexual and gender-based violence.⁷⁷ In its 2017 General Comment No. 4 and *Guidelines on Combating Sexual Violence and Its Consequences in Africa*, the

⁷² *Id.* at paras. 126-27.

⁷³ *Id.* at para. 124 (citing UN Human Rights Council, Resolution 14/12, *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*, UN Doc. A/HRC/RES/14/12, 23 June 2010, available at <http://undocs.org/A/HRC/RES/14/12>).

⁷⁴ UN Human Rights Council, *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*, *supra* note 73, para. 1.

⁷⁵ See ECtHR, *Opuz v. Turkey*, no. 33401/02, ECHR 2009, Judgment of 9 June 2009, para. 79, available at <http://hudoc.echr.coe.int/eng?i=001-92945>.

⁷⁶ Istanbul Convention, art. 5.

⁷⁷ See e.g., *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1997/44*, UN Doc. E/CN.4/1999/68/Add.4, 21 January 1999, para. 51, available at <http://undocs.org/E/CN.4/1999/68/Add.4>.

ACHPR expressly defined forced sterilization as sexual violence that may also constitute cruel, inhuman or degrading treatment or torture.⁷⁸ The CEDAW Committee, most recently in General Recommendation No. 35, categorizes forced sterilization as a “[form] of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.”⁷⁹ Various other UN and regional bodies have similarly made this finding, since at least 1992.⁸⁰ As such, the due diligence obligations found to apply to gender-based violence apply equally to forced sterilization.

II. KENYA HAS SPECIFIC DUE DILIGENCE OBLIGATIONS IN THE CONTEXT OF FORCED STERILIZATION, BASED ON INTERNATIONAL HUMAN RIGHTS BODIES’ INTERPRETATIONS.

29. Although their decisions and statements specific to forced sterilization are limited in number, human rights bodies have identified particular due diligence obligations on this issue. These have included ensuring: access to information on reproductive health and rights, legislation punishing forced sterilization, support and oversight of healthcare providers, and training of medical personnel, in addition to the other due diligence duties described in the preceding sections. While the question has not been uniformly addressed, criminalization of forced sterilization has been recommended by a number of human rights bodies.

A. The African Commission on Human and Peoples’ Rights Has Addressed States’ Obligations with Regard to Forced Sterilization in a Resolution and General Comment.

30. The ACHPR specifically addressed States’ obligations relating to forced sterilization in a 2013 resolution and its second General Comment on the Maputo Protocol. In Resolution 260, acknowledging reports of involuntary sterilization of women with HIV

⁷⁸ ACommHPR, *General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)* (2017), paras. 57-58, available at http://www.achpr.org/files/instruments/general-comment-right-to-redress/achpr_general_comment_no_4_english.pdf; *Guidelines on Combating Sexual Violence and Its Consequences in Africa*, *supra* note 51, Definition 3.1 Sexual Violence, pp. 14-15.

⁷⁹ *General Recommendation No. 35: Gender-based violence against women, updating general recommendation No. 19*, *supra* note 5, para. 18. See also Committee on the Elimination of Discrimination against Women, *A.S. v. Hungary*, Communication No. 4/2004, Views of 14 August 2006, UN Doc. CEDAW/C/36/D/4/2004, 29 August 2006, para. 11.4, available at <http://undocs.org/CEDAW/C/36/D/4/2004>; *General Recommendation No. 19: Violence against women*, *supra* note 37, para. 22.

⁸⁰ Istanbul Convention, art. 39; I/A Court H.R., *I.V. v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 30 November 2016. Series C No. 329, paras. 252-55 (Spanish only), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_329_esp.pdf; IACHR, *Access to Maternal Health Services from a Human Rights Perspective*, OEA/Ser.L/V/II. Doc. 69, 7 June 2010, para. 75, available at <https://www.oas.org/en/iachr/women/docs/pdf/saludmaternaeng.pdf>; *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women, Report of the Special Rapporteur on violence against women, its cases and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85*, *supra* note 39, para. 6. See also Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), available at http://legal.un.org/icc/statute/99_corr/cstatute.htm.

taking place in States parties to the African Charter, the ACHPR reaffirmed that “all medical procedures, including sterilisation must be provided with the free and informed consent of the individual concerned in line with internationally accepted medical and ethical standards.”⁸¹ Recognizing forced sterilization as a violation of numerous human rights, Resolution 260 calls upon States parties to the African Charter to undertake specific actions to protect them.⁸² In 2014, the African Commission again addressed forced sterilization, in the context of the sexual and reproductive health of women, in its General Comment No. 2 discussing Article 14 of the Maputo Protocol.⁸³ Notably, both documents apply to violations committed by State and by non-State actors, in terms of the due diligence obligations set forth for States parties.⁸⁴

31. The ACHPR’s Resolution 260 and General Comment recommendations can all be viewed as due diligence obligations of prevention. The ACHPR recommends States adequately fund reproductive health services,⁸⁵ codify and enforce the requirement of free and informed consent to sterilization,⁸⁶ enact measures to deter or otherwise prevent coercive behavior by healthcare providers,⁸⁷ provide access to information on reproductive health services,⁸⁸ and require human rights training of medical personnel.⁸⁹

32. In line with the obligations to investigate, punish, and provide redress, Resolution 260 calls on States to “[i]nvestigate allegations of involuntary sterilization... and practices involving health practitioners, institutions and all persons involved in cases of involuntary sterilisations of women living with HIV.”⁹⁰ Relatedly, General Comment No. 2 calls on

⁸¹ ACommHPR, *Resolution 260: Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services*, 54th Ordinary Session (2013), available at <http://www.achpr.org/sessions/54th/resolutions/260/>.

⁸² *See id.*

⁸³ *See* ACommHPR, *General Comment No. 2 on Article 14.1 (a), (b), (c), and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, 55th Ordinary Session (2014), available at http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf.

⁸⁴ *See id.*

⁸⁵ *General Comment No. 2 on Article 14.1 (a), (b), (c), and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, *supra* note 83, arts. 45, 62; *Resolution 260: Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services*, *supra* note 81, art. 1.

⁸⁶ *See id.* at arts. 46, 47; *Resolution 260: Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services*, *supra* note 81, art. 2.

⁸⁷ *General Comment No. 2 on Article 14.1 (a), (b), (c), and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, *supra* note 83, arts. 47, 53; *Resolution 260: Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services*, *supra* note 81, art. 3.

⁸⁸ *General Comment No. 2 on Article 14.1 (a), (b), (c), and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, *supra* note 83, arts. 47, 51-52; *Resolution 260: Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services*, *supra* note 81, art. 4.

⁸⁹ *General Comment No. 2 on Article 14.1 (a), (b), (c), and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, *supra* note 83, art. 44; *Resolution 260: Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services*, *supra* note 81, art. 5.

⁹⁰ *Resolution 260: Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services*, *supra* note 81, art. 7.

States to make available “timely and efficient redress mechanisms for women whose sexual and reproductive rights have been violated.”⁹¹

B. The CEDAW Committee Has Identified State Obligations to Address Forced Sterilization, under CEDAW.

33. The CEDAW Committee addressed principles of due diligence in its views adopted with respect to communication No. 4/2004, concerning the matter of *A.S. v. Hungary*.⁹² The Committee concluded that A.S. had been subjected to forced sterilization, and identified measures Hungary could take to comply with its CEDAW obligations.⁹³ First, it called for Hungary to “provide appropriate compensation to Ms. A.S. commensurate with the gravity of the violations of her rights.”⁹⁴ The Committee also directed Hungary to “[t]ake further measures to ensure that the relevant provisions of [CEDAW and general recommendations 19, 21, and 24] are known and adhered to by all relevant personnel in public and private health centres.”⁹⁵ In keeping with the obligation of prevention, the CEDAW Committee recommended that Hungary ensure that its domestic law properly mandate informed consent to sterilization, and “[m]onitor public and private health centres...so as to ensure that fully informed consent is being given....”⁹⁶ Finally, it recommended that the State establish and enforce “appropriate sanctions” in cases of forced sterilization.⁹⁷

34. Other CEDAW Committee statements echo its recommendations in *A.S. v. Hungary*. General Recommendation No. 35, outlines States’ due diligence obligations with regard to acts of gender-based violence, including forced sterilization.⁹⁸ In addition to calling on States to take measures to generally deter forced sterilization,⁹⁹ the CEDAW Committee has reiterated, in multiple statements, its recommendations that States clearly codify the requirement of informed consent in domestic law,¹⁰⁰ ensure adequate training

⁹¹ *General Comment No. 2 on Article 14.1 (a), (b), (c), and (f) and Article 14.2 (a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, *supra* note 83, art. 50.

⁹² Committee on the Elimination of Discrimination against Women, *A.S. v. Hungary*, Communication No. 4/2004, Views of 14 August 2006, UN Doc. CEDAW/C/36/D/4/2004, 29 August 2006, para. 11.4, available at <http://undocs.org/CEDAW/C/36/D/4/2004>.

⁹³ *Id.*

⁹⁴ *Id.* at para. 11.5(I).

⁹⁵ *Id.* at para. 11.5(II).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *General Recommendation No. 35: Gender-based violence against women, updating general recommendation No. 19*, *supra* note 5, paras. 18, 24(b).

⁹⁹ *General Recommendation No. 19: Violence against women*, *supra* note 37, para. 24(m).

¹⁰⁰ Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Czech Republic*, CEDAW/C/CZE/CO/3, 25 August 2006, para. 24, available at <http://undocs.org/CEDAW/C/CZE/CO/3>; Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Hungary*, UN Doc. CEDAW/C/HUN/CO/6, 10 August 2007, para. 8, available at <http://undocs.org/CEDAW/C/HUN/CO/6>.

of healthcare providers to prevent coercive practices,¹⁰¹ monitor health centers,¹⁰² sanction perpetrators,¹⁰³ and provide redress and compensation to victims of forced sterilization¹⁰⁴.

35. Other UN human rights treaty bodies have made similar recommendations,¹⁰⁵ and have also recommended that domestic law criminalize forced sterilization and that perpetrators be criminally prosecuted.¹⁰⁶

C. The Inter-American and European Human Rights Bodies Have Also Identified Specific Due Diligence Obligations with Regard to Forced Sterilization.

36. Bodies in both the Inter-American and European human rights systems have emphasized the need for States parties to adopt legislation prohibiting forced sterilization, implement training concerning informed consent, ensure individuals' access to information necessary for informed decisions on their sexual and reproductive health, put in place monitoring mechanisms, investigate alleged violations, and punish perpetrators of forced sterilization. Some regional human rights bodies have explicitly recommended that forced sterilization be included in domestic criminal codes.

¹⁰¹ *Concluding comments of the Committee on the Elimination of Discrimination against Women: Czech Republic*, supra note 100, para. 24.

¹⁰² *Concluding comments of the Committee on the Elimination of Discrimination against Women: Hungary*, supra note 100, para. 8.

¹⁰³ Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Chile*, UN Doc. CEDAW/C/CHL/CO/5-6, 19 October 2012, para. 35(b), available at <http://undocs.org/CEDAW/C/CHL/CO/5-6>.

¹⁰⁴ *Concluding comments of the Committee on the Elimination of Discrimination against Women: Hungary*, supra note 100, para. 8; *Concluding observations of the Committee on the Elimination of Discrimination against Women: Chile*, supra note 103, para. 35(b).

¹⁰⁵ See, e.g., Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Czech Republic*, UN Doc. CAT/C/CR/32/2, 21 May 2004, para. 6(n), available at <http://undocs.org/CAT/C/CR/32/2>; Human Rights Committee, *Concluding observations of the Human Rights Committee: Slovakia*, UN Doc. CCPR/CO/78/SVK, para. 12, available at <http://undocs.org/CCPR/CO/78/SVK>; Human Rights Committee, *Concluding observations of the Human Rights Committee: Japan*, UN Doc. CCPR/C/79/Add.102, 6 November 1998, para. 31, available at <http://undocs.org/CCPR/C/79/Add.102>; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Slovak Republic*, UN Doc. CERD/C/SVK/CO/6-8, 3 March 2010, para. 18, available at <http://undocs.org/CERD/C/SVK/CO/6-8>; Committee on the Elimination of Racial Discrimination, *Concluding Observations on the combined tenth and eleventh periodic reports of the Czech Republic*, UN Doc. CERD/C/CZE/CO/10-11, 24 August 2015, paras. 21-22, available at <http://undocs.org/CERD/C/CZE/CO/10-11>.

¹⁰⁶ See, e.g., Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Slovakia*, UN Doc. CAT/C/SVK/CO/2, 20 December 2009, para. 10, available at <http://undocs.org/CAT/C/SVK/CO/2>; Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Czech Republic*, UN Doc. CAT/C/CZE/CO/4-5, para. 12, available at <http://undocs.org/CAT/C/CZE/CO/4-5>; Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/22, 2 May 2016, paras. 59, 64, available at <http://undocs.org/E/C.12/GC/22>; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Mexico*, UN Doc. CERD/C/MEX/CO/15, 7 March 2006, para. 17, available at <http://undocs.org/CERD/C/MEX/CO/15>.

37. In 2016, the Inter-American Court of Human Rights examined the issue of informed consent to medical treatment and forced sterilization in the case of *I.V. v. Bolivia*.¹⁰⁷ It concluded that I.V. had been forcibly sterilized, and held the State responsible for various human rights violations.¹⁰⁸ With regard to its obligation to guarantee the right to personal integrity, the Court reiterated its understanding that States must establish clear and appropriate normative frameworks to regulate the provision of healthcare services and to mandate informed consent, establish quality standards for both private and public institutions, monitor and oversee healthcare providers, and put in place administrative and judicial remedies that are competently implemented.¹⁰⁹ Moreover, it held that States have a positive obligation to ensure that individuals have access to the information necessary to make informed decisions about their bodies and treatment, especially in the realm of sexual and reproductive health.¹¹⁰

38. With regard to remedies for forced sterilization, the Court referred to its jurisprudence on the obligation to investigate instances of violence against women¹¹¹ before emphasizing that even though I.V.'s case was not connected to a broader State policy and did not occur in the context of armed conflict or an attack against the civilian population, "this does not mean that this act should be characterized merely as a mistake on the part of the doctor, but rather it is a human rights violation of significant gravity...."¹¹² While the Court declined to resolve the question of whether forced sterilization must be subject to criminal prosecution in every case,¹¹³ it noted that various human rights bodies' statements support a State obligation to make available avenues of redress that are appropriate and effective in establishing perpetrators' responsibility, in order to provide adequate reparation to the victim.¹¹⁴

39. Determining that clear and accessible information on the sexual and reproductive rights of women is key to preventing forced sterilization, the IACtHR ordered Bolivia: to create a publication about such rights and the obligations of medical personnel in providing sexual and reproductive healthcare, including informed consent;¹¹⁵ and to adopt permanent education and training programs for medical students and medical professionals about informed consent, discrimination based on gender and gender stereotypes, and gender violence.¹¹⁶ The Court emphasized these measures, as Bolivia already had in place legislation and public policy designed to counteract discrimination

¹⁰⁷ See I/A Court H.R., *I.V. v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 30 November 2016. Series C No. 329, paras. (Spanish only), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_329_esp.pdf.

¹⁰⁸ See *id.*

¹⁰⁹ *Id.* at paras. 154, 209-10.

¹¹⁰ *Id.* at paras. 155-64, 209.

¹¹¹ *Id.* at paras. 296-97.

¹¹² *Id.* at para. 297 [translation by IJRC].

¹¹³ *Id.* at paras. 300-12.

¹¹⁴ *Id.* at para. 312.

¹¹⁵ *Id.* at para. 341. Implementation of this directive would be monitored for three years through annual State reporting after its initiation. *Id.*

¹¹⁶ *Id.* at para. 342.

and a national strategic plan for reproductive health, as well as a legal system capable of preventing and addressing cases such as I.V.'s.¹¹⁷

40. Previously, the Inter-American Commission on Human Rights approved a friendly settlement between the parties in the matter of *María Mamérita Mestanza Chávez*, concerning a forced sterilization procedure that ultimately resulted in the death of Ms. Mestanza Chávez.¹¹⁸ As part of the settlement, the Peruvian State agreed to: “change laws and public policies on reproductive health and family planning, eliminating any discriminatory approach and respecting women’s autonomy”; to “[c]ontinuously conduct training courses” for healthcare personnel in reproductive rights, human rights, and gender equality; to closely monitor respect for the right of informed consent by healthcare providers; to investigate and review through judicial and administrative mechanisms violations of patient’s rights and penalize perpetrators.¹¹⁹

41. Also in the Americas, the Mechanism to Follow Up on the Implementation of the Convention on the Prevention, Punishment, and Eradication of Violence against Women (MESCEVI) has recommended that States parties to the Belém do Pará Convention criminalize forced sterilization in their national legislation, both as a common crime and as a crime against humanity or act of genocide.¹²⁰

42. The European human rights system has also contemplated specific State obligations with regard to forced sterilization. In three cases concerning the forced sterilization of Roma women in Slovakia, the European Court of Human Rights discussed the importance of effective and expeditious investigations that provide an opportunity for legal recourse, and of establishing legislation setting forth requirements concerning the provision of information to patients and the requirement of informed consent prior to sterilization.¹²¹ The Istanbul Convention, which entered into force after these three decisions, further mandates that States parties criminalize forced sterilization, using “necessary legislative or other measures.”¹²²

CONCLUSION

43. Over the course of the preceding decades, international human rights law has increasingly recognized a State obligation to act with due diligence to prevent, protect, investigate, punish, and remedy acts of gender-based violence, including forced

¹¹⁷ *Id.* at paras. 339-45.

¹¹⁸ IACHR, Friendly Settlement Report No. 71/03, Petition No. 12.191, *María Mamérita Mestanza Chávez* (Peru), 22 October 2003, available at <http://www.cidh.org/annualrep/2003eng/peru.12191.htm>.

¹¹⁹ See *id.* at section eleventh, para. a(2).


¹²⁰ Mechanism to Follow Up on the Implementation of the Convention on the Prevention, Punishment, and Eradication of Violence against Women, *Second Hemispheric Report on the Implementation of the Belem do Para Convention*, 98, para.12, available at <http://www.oas.org/en/mesecvi/docs/MESECVI-SegundoInformeHemisferico-EN.pdf>.

¹²¹ See ECtHR, *N.B. v. Slovakia*, no. 29518/10, ECHR 2012, Judgment of 12 June 2012, para. 84, available at <http://hudoc.echr.coe.int/eng?i=001-111427>; ECtHR, *I.G. and Others v. Slovakia*, no. 15966/04, ECHR 2012, Judgment of 13 November 2012, paras. 129, 132 available at <http://hudoc.echr.coe.int/eng?i=001-114514>; ECtHR, *V.C. v. Slovakia*, no. 18968/07, ECHR 2011 (excerpts), Judgment of 8 November 2011, available at <http://hudoc.echr.coe.int/eng?i=001-107364>.

¹²² Istanbul Convention, art. 39(b).

sterilization. Both the African Commission on Human and Peoples' Rights and the CEDAW Committee, bodies with jurisdiction over Kenya, have expressly adopted and applied this legal standard. Accordingly, Kenya is required to, *inter alia*, enact the laws and regulations necessary to deter and sanction forced sterilization, to monitor and supervise the provision of healthcare, to investigate and prosecute those responsible for forced sterilization, and to ensure that victims have access to judicial protection and are adequately compensated.

DATED at NAIROBI this 26th day of July 2021.


SYLVESTER MBITHI
ADVOCATE FOR THE 3RD AMICUS CURIAE

DRAWN & FILED BY:

SYLVESTER MBITHI, ADVOCATE
P.105/9563/12
CARE OF
NATIONAL GENDER AND EQUALITY COMMISSION,
SOLUTION TECH PLACE, 1ST FLOOR,
LONGONOT ROAD, UPPERHILL,
P.O. BOX 27512-00506,
NAIROBI.

Mobile: 0727-570430
Email: smbithi@ngeckkenya.org, info@ngeckkenya.org

TO BE SERVED UPON:

1. ALLAN ACHESA MALECHE (PRACTICE NO: LSK/2021/02706)
& NYOKABI NJOGU (PRACTICE NO: LSK/2021/02707)
C/O KELIN
KAREN C, KUWINDA LANE, OFF LANGATA ROAD.
P O BOX 112 - 00202 KNH
NAIROBI
Mobile No: +254 708 389 870
E-mail: amaleche@kelinkkenya.org
2. OJIENDA & CO. ADVOCATES
VIEW PARK TOWERS, 2ND FLOOR
UHURU HIGHWAY
P.O.BOX 17245-00100
NAIROBI

3. KITHI & CO ADVOCATES
MAENDELEO HSE, 4TH FLOOR
MONROVIA STREET/ UTALII LANE
NAIROBI

4. THE HON. ATTORNEY GENERAL
STATE LAW OFFICE
SHERIA HOUSE
HARAMBEE AVENUE
P.O. BOX 40112
NAIROBI

5. NUNGO, ODUOR & WAIGWA ADVOCATES
MAISONETTE NO. 1, COURT 30
MOMBASA ROAD, OFF BUNYALA ROAD
P.O BOX 70678-00400
NAIROBI.

6. RACHIER & AMOLLO ADVOCATES
MAYFAIR CENTRE, 5TH FLOOR
RALPH BUNCHE ROAD
P.O. BOX 55645-00200
NAIROBI

7. JACKSON AWELE ADVOCATES LLP
CHAKA PLACE, 2ND FLOOR,
ARGWINGS KODHEK RD, HURLINGHAM
P.O BOX 22701, 00100
NAIROBI