



# HOW TO USE TREATY BODIES' CONCLUDING OBSERVATIONS TO ADVANCE WOMEN'S LAND AND PROPERTY RIGHTS

## KENYA CASE STUDY

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# **How to use Treaty Bodies' Concluding Observations to advance Women's Land and Property Rights**

**Kenya Case Study**

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## Abbreviations

|               |                                                                            |
|---------------|----------------------------------------------------------------------------|
| <b>CEDAW</b>  | Convention on the Elimination of all Forms of Discrimination against Women |
| <b>CO</b>     | Concluding Observation                                                     |
| <b>CSO</b>    | Civil Society Organization                                                 |
| <b>HRC</b>    | Human Rights Committee                                                     |
| <b>ICCPR</b>  | International Covenant on Civil and Political Rights                       |
| <b>ICESCR</b> | International Covenant on Economic, Social, and Cultural Rights            |
| <b>IO</b>     | International Organization                                                 |
| <b>KELIN</b>  | Kenya Legal and Ethical Issues Network on HIV and AIDS                     |
| <b>KNCHR</b>  | Kenya National Commission on Human Rights                                  |
| <b>LOIPR</b>  | List of Issues Prior to Reporting                                          |
| <b>LSA</b>    | Law of Succession Act                                                      |
| <b>MOLPP</b>  | Ministry of Lands and Physical Planning                                    |
| <b>NLC</b>    | National Land Commission                                                   |
| <b>NGO</b>    | Non-governmental Organization                                              |
| <b>OHCHR</b>  | United Nations Office of the High Commissioner for Human Rights            |
| <b>TDR</b>    | Traditional Dispute Resolution Mechanisms                                  |
| <b>UN</b>     | United Nations                                                             |

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## Foreword

The importance of the full scope of land rights, in their own capacity and for the enjoyment of economic, social and cultural rights more broadly, is yet to be fully realised for many women across the world, and in Kenya in particular. This is despite the great strides made in the international, regional and national legal frameworks. For instance, the Convention on the Elimination of All Form of Discrimination Against Women (CEDAW) adopted in 1979 at the international level, the Maputo Protocol on the Rights of Women in Africa effective since 2005 and the Constitution of Kenya 2010, all have stringent protections for equality and non-discrimination and guarantee women's rights to land and property.

In an attempt to go beyond rhetoric, these frameworks have also embedded practical means of holding States and non-State actors to account to ensure the respect, protection and fulfilment of women's rights to land and property, including through the establishment of the CEDAW Committee and other treaty bodies which monitor and advise States on their progress towards the full realization of these rights.

Women's right advocates in Kenya, encouraged by the potential of these human rights institutions, have creatively leveraged these bodies for the advancement of their cause. In doing so, they have demonstrated the importance of embedding treaty body reporting and into a more extensive advocacy plan.

This report provides an instrumental overview of the CEDAW treaty reporting process, and shares practical examples of how women's land rights advocates in Kenya have utilized the reporting process as part of their advocacy, including how to use this process as part of a broader advocacy strategy, and as a way to bolster other efforts at both national and regional level. It highlights the importance of first having a broader strategy within which treaty reporting is one element which feeds into other national level approaches, and the importance of engaging proactively in the process from the beginning of the cycle, and following up on outcomes from the treaty reporting process.

Over the years I have worked on this issue, connecting the agitation on the ground with the international mechanisms and making the outputs of the international advocacy useful on the ground, the one thing that rings true is the resilience of the women rights Champions in these communities and the determination the advocates who see to support them to realise their rights to land and property.

I thank the Indiana University and Global Initiative for Economic, Social and Cultural Rights for their work on this report and toolkit, which will go a long way in making the international outcomes and pronouncements concrete and useful for the women who face these challenges every day.

**Faith Alubbe**  
**Chief Executive Officer**  
**Kenya Land Alliance**

## Summary

For men and women alike, access to land and property represents security, shelter, livelihood and an adequate standard of living. Land is a key economic resource directly linked to the use and control of other economic and productive resources. For example, land is essential for agricultural production or for building a house, and it can also generate income when rented or sold. The rights to land and property are thus 'gateway rights', which create the essential conditions for other human rights to be realised, such as the rights to housing, food, health and work. Numerous human rights bodies, international and regional standards, and judicial decisions, both long-established and recent, complement this recognition that land and property are central to fulfilling human rights.<sup>1</sup>

However, the obstacles that women face while trying to exercise their rights to land and property are complex and specific. Negative gender stereotypes and roles that still persist in most societies assume that men need to be in charge of households and property, and thus are the ones making decisions, managing land, and resources, and entitled to land tenure rights.<sup>2</sup> This reproduces the discriminatory prejudice that men necessarily need to be women's main source of financial security and economic stability. These practices severely undermine women's enjoyment of their rights, their agency and their ability to have an independent source of income. As a result, women's limited or lack of land tenure and property rights significantly increases their vulnerability to poverty and marginalisation.

The discriminatory practices in land and property rights reveal the structural patterns of gender inequality. Worldwide, it is women who overwhelmingly work for the land to produce food for themselves, their families, and their communities. For instance, 50 per cent of the food that is produced globally is cultivated by women and, in developing countries, this figure

<sup>1</sup> The 2018 United Nations Declaration on the Rights of Peasants and other people working in rural areas includes numerous specific references to land tenure, gender equality in access to land and resources, and the rights of indigenous peoples and customary communities. United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN Doc A/C.3/73/L.30 (30 Oct 2018), art. 7(3), art. 17(3), art. 4(1-2), art. 2(3); the CESCR Committee's work dovetails with the standard set by the Committee for the Elimination of Discrimination Against Women (CEDAW), explicitly declaring "Rural women's rights to land and natural resources to be fundamental human rights" (CEDAW General Recommendation No. 34, at para 56). Human rights bodies have also issued several reports on the right to land, including the Office of the High Commissioner for Human Rights (see HR/Pub/13/04 and HR/PUB/15/5/Add.1, and E/2014/86), and UN Women, on women's rights to land and natural resources (HR/Pub/13/04). These standards join longer-standing human rights law implicating land: the United Nations Declaration on the Rights of Indigenous Peoples, the International Labour Organization's Convention No. 169, and the Convention on the Elimination of all forms of Discrimination Against Women, which in addition to specific reference to women's equal rights to land (art 14) has issued a host of Concluding Observations relevant to women's land, housing, and property rights. These hard law developments in international law are complemented by a host of soft-law guidance on land at international and regional levels, including the Voluntary Guidelines on the Governance of Tenure (VGGT); the United Nations Guiding Principles on Business and Human Rights, the New Urban Agenda, and the African Union's Framework and Guidelines on Land Policy in Africa, and a host of decisions on land rights from regional human rights courts; see e.g., Minority Rights Group International 'Legal cases: Land Rights' <<https://minorityrights.org/our-work/law-legal-cases-introduction/land-rights/>> accessed 6 June 2020.

<sup>2</sup> UN Women, 'Realizing Women's Rights to Land and Other Productive Resources' (2013) <<https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2013/11/ohchr-unwomen-land-rights-handbook-web%20pdf.pdf?la=en&vs=1455>> accessed 6 June 2020.



*Many countries have reformed their laws and constitutions to ensure women's equal inheritance and property rights, including land tenure rights, marking a significant advancement in formal equality.*

increases to 60-80 per cent.<sup>3</sup> Still, in more than half of the world's countries, laws or customs continue to obstruct women's ownership, control, or access to land, property and productive resources.<sup>4</sup> In addition, there is an increasing global pressure on land to make way for development projects, industrial agriculture or extractive industries. This frequently fuels land grabbing and forced evictions, which, without secure land rights, makes women disproportionately vulnerable and prone to dispossession.<sup>5</sup>

In the last few decades, however, there has been some progress. Many countries have reformed their laws and constitutions to ensure women's equal inheritance and property rights, including land tenure rights, marking a significant advancement in formal equality.<sup>6</sup> Yet major challenges remain in terms of enforcement and implementation. Women continue to face many challenges to assert their rights to access to land and property as laws and policies that may seem non-discriminatory are often overridden by traditional customs or religious practices that can make substantive equality difficult to achieve.

For activists working to realise economic, social and cultural rights, securing women's rights to own, use, and make decisions about land and property has become extremely important for combatting poverty, as well as for raising their status in their communities, and enhancing their decision-making power, autonomy, and economic independence. Furthermore, evidence suggests that securing equal land tenure rights can be an effective measure to propel sustainable development and combat climate change.<sup>7</sup> Securing women's rights to access to land and property, for instance, encourages investment in adaptation measures,<sup>8</sup> and has a positive impact

<sup>3</sup> 'Preliminary study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas' (19 February 2011) UN Doc A/HRC/16/63, p 7.

<sup>4</sup> Landesa, 'The Law of the Land: Women's Right to Land: A Practical Guide' (2 February 2016 <<https://www.landesa.org/resources/property-not-poverty/>> accessed 6 June 2020.

<sup>5</sup> GI-ESCR, 'Using CEDAW to Secure Women's Land and Property Rights' (2014) <<http://globalinitiative-escr.org/wp-content/uploads/2014/03/CEDAW-Guide.pdf>> accessed 6 June 2020.

<sup>6</sup> World Bank; Food and Agriculture Organization; International Fund for Agricultural Development, 'Gender in Agriculture Sourcebook' (2009), module 4: Gender Issues in Land Policy and Administration.

<sup>7</sup> GI-ESCR, 'Submission to the United Nations Special Rapporteur on Extreme Poverty and Human Rights on gender equality as a central component of a just transition' (2020) <<https://www.gi-escr.org/latest-news/gender-equality-must-be-a-central-component-of-a-just-transition-submission-to-the-un-special-rapporteur-on-extreme-poverty-and-human-rights>> accessed 20 July 2020. Karina Kloos, 'Secure Land Rights for Climate Resilience' (Skoll Foundation 4 December 2018) <<https://skoll.org/2018/12/04/secure-land-rights-for-climate-resilience/>> accessed 6 June 2020.

<sup>8</sup> Landesa, 'Secure Land Rights: A Tool for Strengthening Food Security and Climate Resilience in the Global South' (29 November 2018) <<https://www.landesa.org/resources/food-security-climate-resilience/>> accessed 6 June 2020.

on families food security, education outcomes,<sup>9</sup> and reducing land degradation.<sup>10</sup>

International human rights law, and the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in particular, has an essential role to play in addressing these issues. The CEDAW Committee, the international expert body mandated to monitor the implementation of CEDAW, has recognised and further developed women's equal rights to land and property under the obligations established by the Convention. The Committee has consistently included the rights to land and property in its Concluding Observations (COs) to State Parties as part of its State reporting procedure. The COs contain the assessment of the CEDAW Committees on the compliance by State Parties with their obligations under the CEDAW. Thus, the COs of the CEDAW Committee can be an essential tool for activists, civil society, and non-governmental organisations (NGOs) looking to advance the human rights agenda and to review and enforce key laws and policies aimed at tackling gender inequalities and social injustice.

This report is a follow up to several other resources published to inform and support advocates for women's land rights. This report aims at providing information for women's human rights advocates, NGOs, and other civil society actors on the importance and uses of the COs. The COs are an important phase of the examination of State reports by United Nations (UN) treaty monitoring bodies. They contain the assessment by the Committees on the compliance by State Parties with their obligations under each treaty.

This report briefly explains what the treaty bodies are and how they work, the process of treaty reporting, as well as what COs are, why they are important, and how they can be used to enhance human rights.

This report focuses on the COs of the CEDAW Committee, through a case study on women's land and property rights in Kenya. The case study shows how the information in this report can be put into practice.

## Navigating this report

This report aims to provide advocacy information, advice, and tools to those wishing to use the UN human rights mechanisms to advance the realisation of women's rights at the national level. This guide is directed towards NGOs and advocates, providing a targeted resource containing substantive guidance on how to use international human rights treaty bodies, such as the CEDAW Committee, as part of their strategic advocacy activities to push for gender equality in their country.

<sup>9</sup> GI-ESCR (n 5).

<sup>10</sup> Atieno Mboya Samandari, 'Gender-Responsive Land Degradation Neutrality' (United Nations Convention to Combat Desertification 2017) Global Land Outlook Working Paper [https://knowledge.unccd.int/sites/default/files/2018-06/3.%20Gender-Responsive%20BLDN\\_\\_A\\_M\\_\\_Samandari.pdf](https://knowledge.unccd.int/sites/default/files/2018-06/3.%20Gender-Responsive%20BLDN__A_M__Samandari.pdf) accessed 6 June 2020.



*Many countries have reformed their laws and constitutions to ensure women's equal inheritance and property rights, including land tenure rights, marking a significant advancement in formal equality.*

The report uses the CEDAW reporting process and the case study on women's rights to access land and property in Kenya to illustrate how the COs can be used as leveraging tools at the national and international level to ensure States take the necessary measures to address key human rights concerns.

## **The report is divided into three main parts:**

### **Part I:**

Explains the nature of international human rights treaties, focusing on the CEDAW. It describes the main elements of the CEDAW and the CEDAW Committee. It provides a brief overview of how the State reporting process works, the important role of Cos, the CEDAW Committee's follow up procedure and the opportunities these processes offer for NGO engagement.

### **Part II:**

Presents the case study on women's access to land and property in Kenya. It provides a brief overview of the context, the legal and institutional framework protecting women's rights to land and property in Kenya, and the challenges and opportunities in realising those rights.

### **Part III:**

Discusses how NGOs and advocates can use COs and various implementation mechanisms to pressure States to comply with their international human rights obligations. It will explain how COs can be a powerful leveraging tool at the national and international level to effect change on the ground.

Additional resources on women's rights to land and property are listed at the end of this report.





## **Part I.**

# **TREATIES AND SUPERVISORY MECHANISMS: WHAT THEY ARE AND HOW THEY WORK**

## 1. Overview

According to the Vienna Convention on the Law of Treaties, a treaty is an international agreement concluded between States in written form and governed by international law. Treaties are thus formal written agreements between two States (bilateral treaties) or multiple States (multilateral treaties) that are binding under international law. For an international treaty to become enforceable, it must first be signed by States to indicate that the States agree with the treaty's content. Thereafter, each signing State must ratify the treaty (according to and using its own domestic legal procedures), to express its formal consent to be bound by the legal obligations outlined in the treaty.<sup>11</sup>

State ratification is vital to the international human rights treaty system. First, human rights treaties can only come into force once a certain number of States have ratified them.<sup>12</sup> Second, States are only subject to a treaty's legal provisions and monitoring mechanisms if they have ratified the treaty.<sup>13</sup> Third, State ratification of international human rights treaties inspires and provides a basis for civil society and individuals, both domestically and internationally, to advocate for human rights that are defined in the treaty and provides them with international legal language and mechanisms to demand those rights.<sup>14</sup>

There are nine core UN human rights treaties. Each of these treaties has a supervisory body, called a 'treaty body' or 'Committee'. Treaty bodies have mechanisms for monitoring compliance with the standards agreed upon in the treaty. The various supervisory procedures established in human rights treaties can be divided in four main groups:

- (a) State reporting procedures,
- (b) Inter-State complaints procedure,
- (c) Individual complaint procedure and
- (d) inquiry procedure.

Each treaty body consists of a number of experts of a high moral character and recognised competence in the relevant field of human rights. Whilst nominated and elected by States parties, the experts act in their personal capacity, which means that they must not act under instructions from any State.<sup>15</sup>

Treaty bodies monitor and report on whether State Parties of a specific treaty are complying with treaty obligations, although they cannot sanction a State Party for non-compliance.<sup>16</sup> They ensure treaty compliance by reviewing State reports. State Parties are obligated to submit initial and then regular periodic reports to the treaty bodies to outline the measures they have taken to comply with the relevant treaty.

Civil society and non-governmental organizations and institutions can also submit

<sup>11</sup> Vienna Convention on the Law of Treaties (concluded at Vienna on 23 May 1969) art 6-18.

<sup>12</sup> Rhona K.M. Smith, *International Human Rights Law* (8th edn, Oxford University Press 2018); Michael Goodhart, *Human Rights: Politics and Practice* (3rd, Oxford University Press 2016).

<sup>13</sup> *ibid.*

<sup>14</sup> Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009).

<sup>15</sup> OHCHR, 'Human Rights Treaty Bodies and Election of Treaty Body Members' (2013) <<https://www.ohchr.org/Documents/HRBodies/TB/ElectionsGuide.pdf>> accessed 9 June 2020.

<sup>16</sup> Smith (n 12); Goodheart (n 12).



*State Parties are obligated to submit initial and then regular periodic reports to treaty bodies to outline the measures they have taken to comply with the relevant treaty.*

reports to the treaty bodies to provide information about the State's compliance with the treaty. These reports are often called parallel or alternative reports.

The treaty body discusses these reports with the State party's delegation during a 6-hour meeting called a 'constructive dialogue'. Finally, the treaty body publishes its concerns and recommendations to the State Party in the form of Concluding Observations. State and parallel reports as well as Concluding Observations are available to the public on the UN websites of each treaty body.<sup>17</sup>

This report focuses on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), its supervisory body (the CEDAW Committee) and the State reporting mechanism.

## 2. The Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW), is an international human rights treaty that prohibits discrimination against women and calls for State Parties to uphold the dignity of every woman and girl. CEDAW was adopted by the UN General Assembly in 1979 and came into force in 1981. The instrument consists of 30 articles which describe different forms of discrimination that women face around the world.

CEDAW defines discrimination against women as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.<sup>18</sup> The Convention also emphasizes both formal or de jure and de facto discrimination. This means that women should be treated equally with men both in law and in practice. As part of the State reporting procedure described below, States' periodic reports

<sup>15</sup> OHCHR, Human Rights Treaty Bodies and Election of Treaty Body Members, January 2013. Available at: <https://www.ohchr.org/Documents/HRBodies/TB/ElectionsGuide.pdf> (last accessed 9 June 2020).

<sup>16</sup> Smith, Rhona K.M., Human Rights in International Law, in HUMAN RIGHTS IN POLITICS AND PRACTICE, Michael Goodheart, ed. (2009).

<sup>17</sup> Smith, Rhona K.M., Human Rights in International Law, in HUMAN RIGHTS IN POLITICS AND PRACTICE, Michael Goodheart, ed. (2009).

must report on the status of women in the country and the measures the national government has taken—through temporary special measures, legislation, and other methods—in order to realise equality between women and men.

**The text of the Convention can be accessed here:**

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

As of June 2020, CEDAW has 189 parties and 99 signatories. The United States, Palau, Tonga, Iran, Somalia, and Sudan have not joined the rest of the international community in signing CEDAW. However, several State parties to CEDAW have made reservations that have significantly undermined the effectiveness of the Convention.<sup>20</sup>

The rights in CEDAW are supplemented by another subsequent and related treaty called the Optional Protocol to CEDAW, adopted in 1999, which entered into force in December 2000. The OP-CEDAW contains two additional supervisory mechanisms (a) individual complaints mechanisms (Article 1 OP CEDAW) and (b) Inquiry procedure (Article 8 OP CEDAW). These procedures are intended to provide enforcement of CEDAW at the international level, so that individuals (in respect of the Complaint Procedure) and groups (where there are systematic and grave violations, using the Inquiry Procedure) whose rights under the Convention have been violated, can complain about their State's failure to implement CEDAW at the domestic level. These later supervisory mechanisms are outside the scope of this report. The Optional Protocol must be separately ratified by States before they will be subject to its jurisdiction.

**The text of the Convention can be accessed here:**

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx>

## CEDAW Committee – Constitution and Role

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) is the expert body which monitors compliance by State Parties to CEDAW and to CEDAW's Optional Protocol. The CEDAW Committee is comprised of 23 independent experts on women's rights issues around the world. Under the Convention, the elected experts must reflect an equitable geographic distribution of member states and represent a diversity of legal systems, societies and marginalized groups. They are recognised as experts 'of high moral standing and competence' in the Convention's focus areas. Each expert serves in their personal capacity and not as a representative of any State or institution for a term of four years and may be eligible for re-election.<sup>21</sup>

<sup>19</sup> United Nations, '8. Convention on the Elimination of All Forms of Discrimination against Women' (18 CEDAW Treaty Status, December 1979) Treaty Series, vol 1249, p 13 <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en)> accessed 6 June 2020.

<sup>20</sup> UN Women, 'Reservations to CEDAW' <<https://www.un.org/womenwatch/daw/cedaw/reservations.htm>> accessed 9 June 2020.

<sup>21</sup> For additional information on the CEDAW Committee Elections, and how NGOs may get involved, see IWRAW Asia Pacific, 'CEDAW Elections: An Introductory Guide' (current as of 17 March 2020) <<https://www.iwraw-ap.org/wp-content/uploads/2020/03/CEDAW-Committee-Elections-Guide-2020-1.pdf>> accessed 6 June 2020.

Through its 'General Recommendations', which are authoritative statements on the Convention's articles, the Committee further elaborates and establishes standards to guide State Parties in the implementation of the treaty.

The Committee meets three times a year in Geneva to review the performance of States under the Convention through the State reporting process, to consider complaints (communications and inquiries) submitted under the Optional Protocol and to elaborate General Recommendations on various important and topical issues. The Committee is supported by a Secretariat located within the UN Office of the High Commissioner for Human Rights (OHCHR).

**Contact details for the Secretariat are here:**

<http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Contact.aspx>

These important processes and how NGOs can participate in and utilize them are explained in more detail below.

### 3. The CEDAW Reporting Process

#### List of Issues

In 2018, the CEDAW Committee implemented a new, simplified reporting procedure. The Committee now forms a pre-session working group that prepares a 'list of issues' for approval by the Committee at its next session. The pre-session working group is usually made up of a sub-group of the Committee, which includes the 'Country Rapporteur' who is the Committee member responsible for coordinating the review of that State and preparing the list of issues and Concluding Observations.

This list of issues is known at this stage as 'List of Issues Prior to Reporting' (LOIPR) and is a list of specific women's human rights issues that the State Parties must respond to in their State reports to the CEDAW Committee. It is intended to serve as a guide to the State Party in the preparation of its report. The State Party's responses to the LOIPR constitute its periodic report due to the Committee pursuant to CEDAW.<sup>22</sup> Previously, the list of issues would be published after the State had submitted its periodic report.<sup>23</sup>

During the pre-session meeting, the Committee allocates time for NGOs to raise issues of concern that should be considered while drafting the LOIPR. NGOs are able to submit written information or the Committee during the pre-session meeting. This space provides NGOs and advocates the opportunity to raise issues of concern and influence the focus of the Committee in the review process.

<sup>22</sup> This information is drawn from the UN OHCHR website, CEDAW, 'Simplified reporting procedure' (OHCHR) <<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/ReportingProcedures.aspx>> accessed 6 June 2020.

<sup>23</sup> The List of Issues for each reporting State Party during a particular session can be found on the following website: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=18](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=18). See also CEDAW, 'List of issues and questions in relation to the eighth periodic report of Kenya' (2017) <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKEN%2fQ%2f8&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKEN%2fQ%2f8&Lang=en)> CEDAW/C/KEN/Q/8 accessed 6 June 2020.



*As part of this process, the CEDAW Committee reviews the State Party's report. While under the previous procedure, States were required to submit both a State report and a written reply to a list of issues, the simplified reporting procedure streamlines the reporting process so that State Parties invest fewer resources in report production*

## Drafting and submission of reports

### State Reports

About once every four years, State Parties that have signed and ratified international human rights treaties send a periodic national report on their efforts to implement national measures to fulfil its treaty obligations and their responses to the LOIPR to the relevant treaty body.<sup>24</sup> As part of this process, the CEDAW Committee reviews the State Party's report. While under the previous procedure, States were required to submit both a State report and a written reply to a list of issues, the simplified reporting procedure streamlines the reporting process so that State Parties invest fewer resources in report production. Additionally, LOIPRs help State Parties generate a more focused report that will be submitted in a timely manner.<sup>25</sup>

The Committee may also use responses to the List of Issues to monitor progress. For example, when a State submits subsequent periodic national reports, the Committee can measure the State's progress by ascertaining how well the State addressed previous COs and Lists of Issues. Thus, the Lists of Issues and responses enhance accountability and serve as a metric of States' progress and establish the standards to which they are held pursuant to their treaty obligations.

### Alternative / Parallel Reports

Before State Parties submit their reports to the CEDAW Committee, they are required to share the reports with NGOs and civil society organisations (CSOs) so that the CSOs can provide feedback on the reports. Based on the State's report, NGOs can submit their own report called 'parallel report' or 'alternative report', compiled by one or a group of NGOs, about women's issues in their State. These reports counter or highlight gaps in the State's report. Alternative or parallel reports draw attention to the struggles for women's rights and provides guidance to the State in the implementation of the Convention. These independent reports must be sent to the CEDAW Committee before the pre-session working group meets to decide which issues to address in the open dialogue between the State Party and CEDAW Committee.<sup>26</sup>

<sup>24</sup> For more information on the responsibilities of the State Parties in completing their national and periodic reports, see CEDAW, 'Guidance note for States parties for the preparation of reports under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women in the context of the Sustainable Development Goals' (2019) CEDAW/C/74/3.

<sup>25</sup> CEDAW (n 22)

<sup>26</sup> IWRAW Asia Pacific, 'Participation in the CEDAW Reporting Process: Process and Guidelines for Writing a Shadow/Alternative Report' (updated February 2010) <https://ilga.org/wp-content/uploads/2016/02/Participation-in-the-CEDAW-reporting-process.pdf>, accessed 6 June 2020.

NGOs can email alternative and parallel reports to the email account: [cedaw@ohchr.org](mailto:cedaw@ohchr.org). The International Women's Rights Action Watch Asia Pacific (IWRAP-AP), an NGO which supports the CEDAW Committee and the OHCHR by facilitating and supporting the participation of NGOs in the CEDAW review process, maintains a portal for NGOs and CSOs to provide information on the CEDAW review and reporting processes, available here: <https://cedaw.iwraw-ap.org>. IWRAP-AP also provides detailed guidance on the alternative and parallel reporting process on its website, which can be accessed here: <https://cedaw.iwraw-ap.org/for-ngos/>.

## 4. Concluding Observations

The review of the State Party includes a public dialogue with the government officials presenting the report. The discussion between government representatives and Committee members is called 'constructive dialogue'. NGOs can observe the review meeting but cannot make interventions during the meeting. Nevertheless, NGOs are given the opportunity to brief the Committee at the beginning of the session. NGO representatives are given 10 minutes to present the main points of their parallel report. Committee members also ask the representatives questions about the information presented to the Committee in written submissions during this time.

The dialogue is often open and frank, and State representatives recognise the failures of the States they represent and the difficulties encountered during the implementation of the Convention. During the dialogue with the reviewed State, the CEDAW Committee members comment on the State report and ask questions and request additional information on the State Party's activities reflected in the State report and raised by the parallel reports. This dialogue provides an important way for the CEDAW Committee to provide feedback and analysis of the State Parties' actions taken to fulfil their treaty obligations.

The final phase of the examination of State reports is the drafting and adoption of the Committee's Concluding Observations (COs).

## What are Concluding Observations?

The Committee uses COs as a way to deliver "an authoritative overview of the state of human rights in a country and for the delivery of forms of advice which can stimulate systemic improvements."<sup>27</sup> The State Parties are then required to implement the recommendations given by the Committee.

The purpose of CEDAW Committee COs is to create a dialogue more focused on gender equality and tailored to a country's most recent progress, while also referring to global themes.<sup>28</sup> The COs usually first identify the progress that the State has made in the implementation of the treaty, and then the areas where there are substantive challenges that the State needs to address.

<sup>27</sup>Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 Human Rights Law Review 27, 27.

<sup>28</sup>Meghan Campbell, 'Women, Poverty, Equality: The Role of CEDAW' (Hart Publishing 2018).

The Committee may call on State Parties to make specific changes to laws, processes, and conditions within the state that continue to inhibit women's rights. The Committee also sets the deadline by which the State must comply with the recommendations in the Concluding Observations and the date for the State's next report, making specific recommendations as to what issues it expects the State to address in the report, as well as procedural and substantive issues not addressed by the State.

When the time comes for the next periodic national report, the Committee assesses the State's progress by ascertaining how well the State addressed previous COs. For example, in 2016 after Kenya's Fourth Periodic Review by CEDAW, the CEDAW Committee issued COs urging the Kenyan government to, among other things, repeal discriminatory national legal provisions which inhibited women's equality to men in marriage, especially in respect of women's rights to land inheritance.<sup>29</sup> This serves as specific guidance that can be both implemented and measured for progress.

This report focuses on the CEDAW Committee COs, while drawing lessons from the use and implementation of COs from other treaty bodies including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

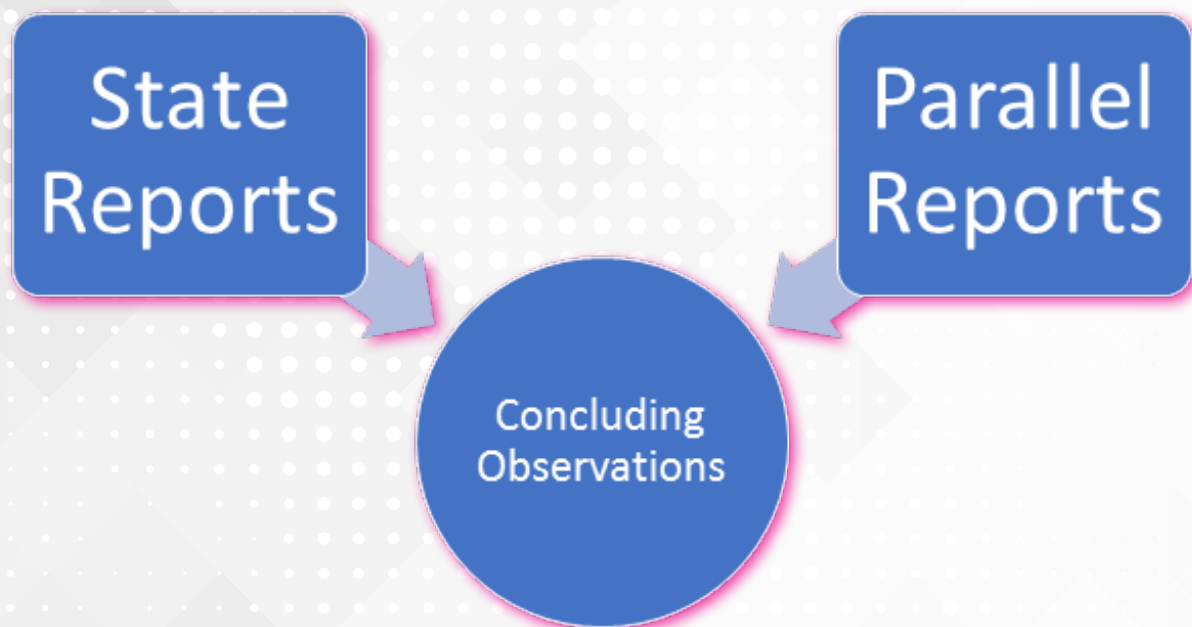
As discussed above, CEDAW's primary objective is to secure de jure and de facto equality for women.<sup>30</sup> CEDAW can only hold State Parties accountable to these objectives by maintaining active communication with States and other stakeholders, including NGOs concerning the status of treaty body implementation.<sup>31</sup> It is crucial for State Parties to implement the CEDAW Committee's recommendations to comply with its commitments derived from the treaty in order to ensure the advancement of women's rights.

<sup>29</sup> CEDAW Committee, 'Concluding observations on the eighth periodic report of Kenya' (22 November 2017) CEDAW/C/KEN/CO/8.

<sup>30</sup> CEDAW Committee, 'General recommendation No. 25, on art 4, para 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures' (on temporary special measures 2004) <<https://www.refworld.org/docid/453882a7e0.html>> accessed 29 March 2020, paras 6-7; Rikki Holtmaat and Paul Post, 'Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?' 33 Nordic Journal of Human Rights 319, 324.

<sup>31</sup> O'Flaherty (n 27).

Figure 1 Components of Concluding Observations



## Legal Status and Authority

COs are not formally legally binding. However, treaty bodies, NGO's and governments alike strive for implementation of COs because '[t]he treaty body obligations themselves are, naturally, binding' so 'a finding of a violation by a UN human rights treaty body may be understood as an indication of the State [P]arty being under an obligation to remedy the situation'.<sup>32</sup> In this way, COs do have some degree of legal weight in that they remind State Parties of their legal obligations envisaged in the treaty they signed and ratified.

Furthermore, '[e]ven if the findings of the monitoring bodies are formally non-binding, and have yet to reflect customary law or agreed treaty interpretations, it can still be argued that there is an international obligation of procedural nature to give serious consideration to the views of human rights treaty bodies'.<sup>33</sup> Thus, despite enforcement challenges, COs are a positive addition to the international human rights dialogue because they provide guidance and support for States to comply with their human rights obligations. They are a tool that describes what human rights should be and gives concrete proposals on how to achieve human rights goals so that States and civil society can plan accordingly.

The impact of COs also depends on a country's commitment to follow up on and implement the COs and the domestic weight given to compliance with international human rights standards. Soon after the COs are issued the State should publish and disseminate them to ensure the information is accessible to all decision-makers and right holders at the national level. However, States do not always make sufficient efforts

<sup>32</sup> O'Flaherty (n 27) 34.

<sup>33</sup> Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies Before Domestic Courts' (January 2018) 67 *International and Comparative Law Quarterly* 201.



*In 2016 after Kenya's Fourth Periodic Review by CEDAW, the CEDAW Committee issued COs urging the Kenyan government to, among other things, repeal discriminatory national legal provisions which inhibited women's equality to men in marriage, especially in respect of women's rights to land inheritance.*

to make the COs widely known. Thus, activists should ensure that COs are widely disseminated by, for example, issuing a press release, arranging forums, workshops, meetings and consultations with a range of stakeholders to inform and openly discuss the issues addressed in the COs. Despite the insufficient efforts of States to publicise the COs, COs still have great potential to influence State actions by highlighting human rights questions that the State needs to address and as a means for keeping the State accountable for improving the status of human rights over time.

## 5. Follow up Procedure

COs are addressed to States, and States are responsible for their domestic implementation. To monitor and supervise the State's compliance with the COs that the Committee considered urgent, the CEDAW Committee has a written follow-up procedure, whereby it requests the State to submit information on the progress of implementation of up to four of its Cos, as selected by the Committee, within one or two years. NGOs are encouraged to submit alternative or parallel information about implementation of those COs. The recommendations subject to the follow-up procedure are clearly identified at the end of the COs. The Committee analyses the information presented and decides whether the issues identified for the follow-up procedure have been adequately addressed and responded by the State.<sup>34</sup>

The CEDAW Committee appoints a Rapporteur on follow-up and a Deputy Rapporteur in charge of assessing the follow-up information presented by the State and NGOs. For example, following the CEDAW Committee's review of Kenya's eighth periodic report in 2017, the State was required to submit written updates on steps taken to implement selected recommendations, including the repeal of a gender-discriminatory section of the Matrimonial Property Act and the recognition of equal access to property in marriage, within two years, which is by November 2019.<sup>35</sup>

**The follow up processes to COs issued by the CEDAW Committee can be accessed here:** [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/FollowUp.aspx?Treaty=CEDAW&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/FollowUp.aspx?Treaty=CEDAW&Lang=en)

<sup>29</sup> OHCHR, 'Follow-up to Concluding Observations' <<https://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx#:~:text=Pursuant%20to%20follow%20Dup%20procedures,end%20of%20the%20concluding%20observations>> accessed 9 June 2020.

<sup>29</sup> CEDAW Committee (n 29).

Figure 2 FOLLOW-UP PROCEDURE

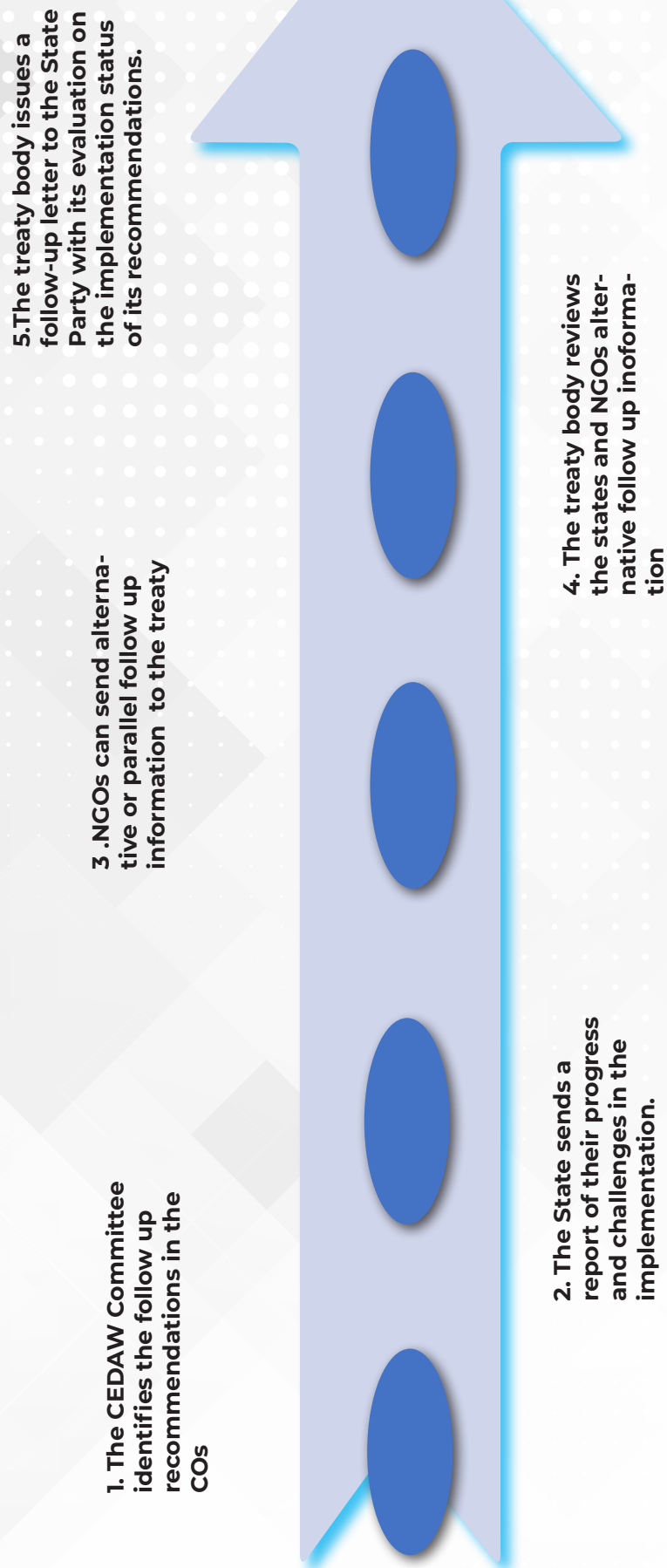
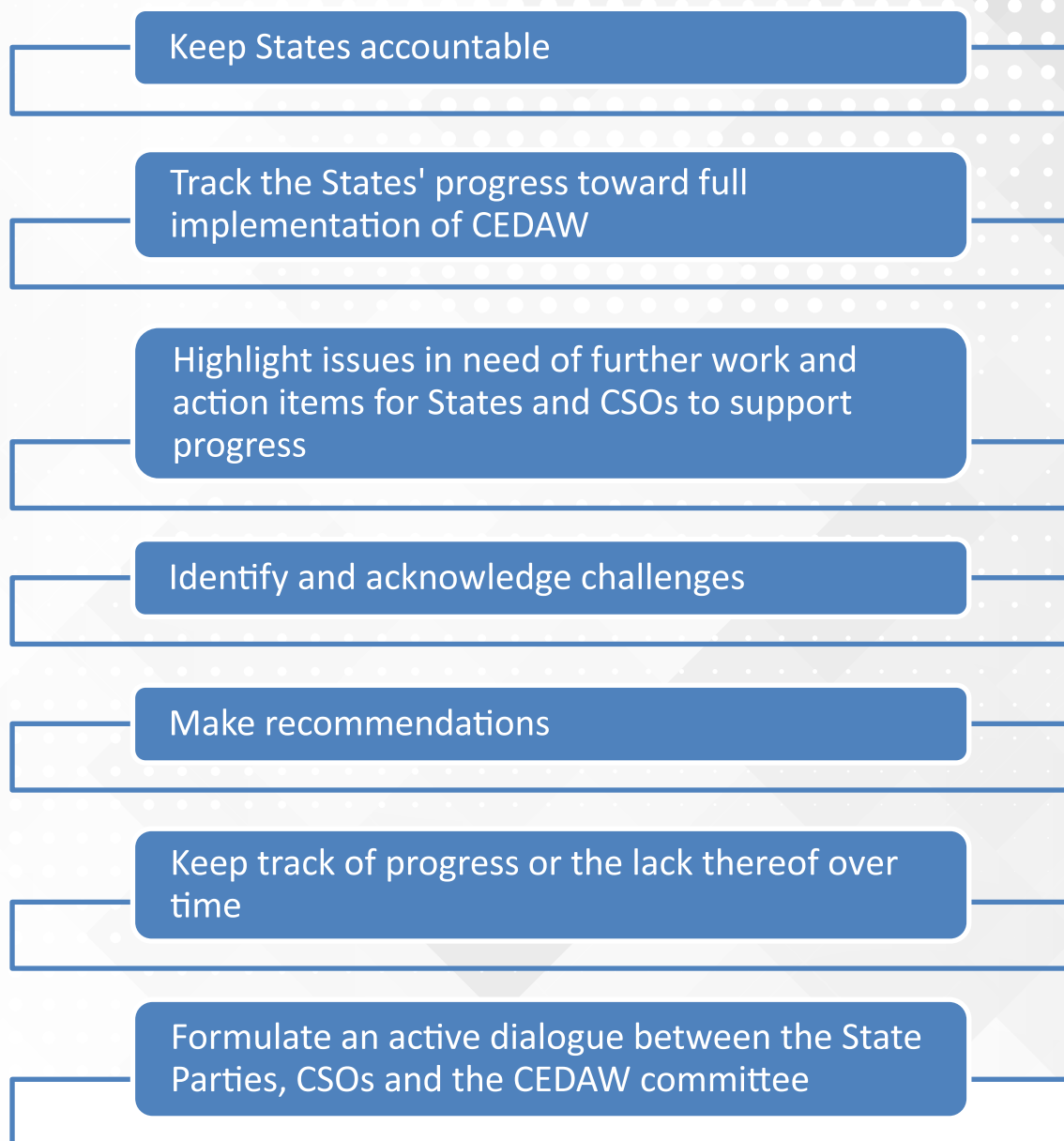


Figure 3

**Textbox 2: Importance of Concluding Observations**  
Concluding Observations are important because they:







## **Part II.**

# **WOMEN'S LAND AND PROPERTY RIGHTS IN KENYA**

## 1. Background

The recognition and implementation of women's land and property rights in Kenya continue to face persistent obstacles. Despite the guarantee of gender equality in the Kenyan Constitution, traditions, cultural and religious norms and practices continue to push against the implementation of newly codified land rights guaranteeing greater equality for women in land and inheritance. Data gathered by the Federation of Women Lawyers - Kenya (FIDA) shows that despite the fact that about 32 per cent of households in Kenya are headed by women, women hold only 1 per cent of land titles on their own and own 5 per cent of land titles jointly with men.<sup>36</sup>

One of the major obstacles to the realisation of women's right to land and property is the lack of knowledge about formal laws that benefit and protect women. This has been an issue even before the enactment of the new constitution in 2010 and the subsequent enactment of new land and marriage laws. Several organisations and institutions, including the CEDAW Committee, have advised the Kenyan government to conduct a large-scale public information campaign, including into rural areas, to increase the public's knowledge of these laws and to train local and regional authorities to better implement the laws. Such a campaign would greatly benefit in closing the gap between what the law is and what Kenyan women often experience in reality related to their land rights.

Even with the progressive formal legal changes, including the promulgation of a new constitution in 2010, and efforts to create awareness about the rights and negative impacts of denying women their rights to land and property, the gender disparity in land ownership and rights realisation clearly remains a problem. A more detailed analysis of these issues is presented in the following sections of the report. Below are some of the persistent challenges regarding gender disparity in land ownership.

### Drawback clauses

Kenya's progressive 2010 Constitution includes many constructive provisions that promote women's equality.<sup>37</sup> However, women's rights are severely curtailed by the subsequent implementations of, and failure to repeal, drawback clauses that reverse or hinder the progress towards the goals set by the Constitution and other laws. Drawback clauses are provisions which allow the suspensions of rights under certain circumstances. They are a way of undermining the constitutional and other legal provisions that guarantee women equal rights and equal opportunity by achieving a contradictory result through written policies. Drawback clauses have been introduced through both formal legislation and informal policies related to women's land and inheritance rights.

<sup>36</sup> Reem Gaafar, 'Women's Land and Property Rights in Kenya,' 2014.

Available at: <https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf> (latest accessed 6 June, 2020).

<sup>37</sup> For instance Article 27, of the 2010 Constitution on the prohibition of discrimination on any grounds including sex, and the introduction of affirmative action towards gender equality in elective and appointive bodies,.



*Shadow reports to treaty bodies are useful in highlighting drawback clauses as well as identifying the disconnect between de jure requirements and the situation on the ground.*

Specific laws which include drawback clauses include the Marriage Act 2014,<sup>38</sup> the Matrimonial Property Act 2015<sup>39</sup> and the Land Act 2012.<sup>40</sup> The Matrimonial Property Act, for example, provides that in the absence of an agreement between a husband and wife, they shall own the property between them based on their contribution instead of equally.<sup>41</sup> This provision runs counter to the constitutional provisions of equality of parties in a marriage. Furthermore, the law requires proof of contribution to acquired matrimonial property, but it is difficult for women to access matrimonial property upon divorce as it can be difficult to quantify care and domestic work, for instance.<sup>42</sup>

Another example of a drawback clause is the legal provision permitting polygamy despite the constitutional requirements of equality and non-discrimination.<sup>43</sup> The use of gender-neutral language in some legal provisions also renders gender discrimination invisible in legislation and makes it difficult for victims to raise legal complaints. Explicit use of women's land and inheritance rights in legislation would clarify laws and enhance the protection of these rights.<sup>44</sup>

The CEDAW State reporting procedure can be used to draw international attention to the discriminatory drawback clauses and to increase the pressure on the Kenyan government to repeal such clauses. For example, while the eighth periodic report of Kenya acknowledged de jure and de facto shortcomings in gender equality, citing delays in policy implementation of existing laws and lack of funding and resources to achieve this objective, information submitted by NGOs highlighted drawback clauses and other strategies of avoiding implementation of new legal requirements in many areas of land and inheritance rights.

<sup>38</sup> The Marriage Act, No. 4 of 2014, Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xml?actid=No.%204%20of%202014>> accessed 6 June 2020.

<sup>39</sup> The Matrimonial Property Act, No. 49 of 2013, Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/index.xml>> accessed 6 June 2020.

<sup>40</sup> The Land Act, No. 6 of 2012, Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xml?actid=No.%206%20of%202012>> accessed 6 June 2020.

<sup>41</sup> The Matrimonial Property Act (n 40) s 7.

<sup>42</sup> *ibid.*

<sup>43</sup> Constitution of Kenya 2010, Article 45(4); the Marriage Act, 2014, '8th periodic report of the Republic of Kenya on implementation of the Convention on Elimination of All Forms of Discrimination against Women' <<http://docstore.ohchr.org/SelfServices/FilesHandler>>.

<sup>44</sup> Food and Agriculture Organization of the United Nations, 'Realizing Women's Rights to Land in the Law: A Guide for Reporting on SDG Indicator 5.A.2', p 47 <<http://www.fao.org/3/I8785EN/i8785en.pdf>> accessed 6 June 2020.

## Customary Practices

Customary laws and practices are a main obstacle impeding the realisation of Kenya's legal guarantees of equal land and inheritance rights for women. In theory, women's land and property rights are protected by the Kenyan Constitution. However, in practice, women remain disadvantaged. Current customary laws and practices only grant women general secondary rights to land and prohibit women from owning or inheriting land and other forms of property. These customary laws and practices stereotype the practices and socialisation of women to believe that they are not meant to own or inherit any type of property. Under customary land tenure systems, women's access to land is dependent on their relationship with a male relative, for example, their husband, father or brother. Additionally, because customary practices are not formalized in writing, powerful community leaders, usually men, can manipulate customs and practices to disadvantage vulnerable groups such as women. Because women's secondary rights to land go unregistered, they are always at a risk of dispossession.<sup>45</sup>

Even a legal regime in which women are well-represented in the tribunals will be ineffective to protect women from being subject to certain customary practices surrounding land and inheritance rights if women are not made aware of the laws and legal remedies at their disposal and are able to access them to assert their rights.

Changing the customary law of a country is often one of the hardest things a government can strive to accomplish. However, given the progress that Kenya has made since the adoption of the 2010 Constitution, it is now in a prime position to influence customary laws to better suit the rights of women. The existence of the customary legal system in Kenya need not be eliminated in order to prevent harmful and discriminatory practices. Instead, scholars argue that the system could be harnessed by activists to ensure women's rights are represented and protected. For example, the Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN) has done extensive work on cultural structures and traditional dispute resolution which has seen the increasing inclusion of women in councils of elders responsible for making decisions and resolving disputes, including on matters of women's rights to land, including through inheritance rights.<sup>46</sup>

## Access to Justice and Education

Women's access to justice, such as legal aid and fair judicial proceedings, and their access to education, are limited despite having legal policies in place that are intended to prevent such a situation.<sup>47</sup> In Kenya, literacy levels among women remain lower than among men.<sup>48</sup> There are low numbers of women enrolling in secondary school and high rates of young women dropping out of school compared to their male counterparts.<sup>49</sup> The education of girls in Kenya is impeded by the need for girls to help with care and

<sup>45</sup> *ibid.*

<sup>46</sup> KELIN, 'A Commentary on Trends, Actors and Initiatives that Impact Women's Inheritance Rights in Eastern, Nyanza and Coast Provinces' (Traditional Dispute Resolution Mechanisms on women's property rights) <<https://kelinkenya.org/wp-content/uploads/2010/10/ADR-toolkit.pdf>> accessed 6 June 2020.

<sup>47</sup> See eg., 2010 Constitution of Kenya, Article 43 on the right to education and Article 48 on access to justice.

<sup>48</sup> 'Gender Equality And Women's Empowerment' <<https://www.usaid.gov/kenya/gender-equality-and-womens-empowerment-kenya>> accessed 6 June 2020.

<sup>49</sup> *ibid.*

domestic work, farm work and early/forced marriages.<sup>49</sup> On top of the lack of education, technical language, travel expenses, court fees, witness costs, emotional violence and physical violence all exclude women from engaging in the legal process and prevent them from realising their land and inheritance rights.

Customarily in Kenya, men hold the majority of the legal power. Historically, courts and judicial bodies were exclusively comprised of men, and measures such as the requirement that not more than two-thirds of the members of elective and appointive bodies be the same gender<sup>51</sup> did not exist until recently. Not only were women excluded from legal decision making, but also prior to recent legislative amendments seeking to provide better protection for women's land and property rights, only men could participate in decisions involving land transactions, land inheritance or land ownership. Kenya's patriarchal society historically barred women from owning land or achieving education, and now the same cultural beliefs perpetuate these barriers.

Without members of the community implementing the legal rights of women, the legal provisions protecting them have limited scope and power. If government officials and judges are still in the mindset that women should not have access to land or education, there will be no fair execution of the law. Creating a culture that empowers women as much as the law does is crucial in implementing social change.

## Marriage

The law requires registration of all marriages, including the customary ones.<sup>52</sup> However, it also dictates that all customary marriages not registered by August 2017 are illegal without sufficient effort by the government to provide the resources/access necessary for compliance. Women whose marriages were not registered, whether because of a lack of awareness about the declaration or a lack of access to registration resources, there exists "risk losing entitlement to shared matrimonial property" if disputes arise.<sup>53</sup>

In many cases, officials who register these marriages are inaccessible to rural women, and there is no official mechanism that ensures that all spouses are registered. News of these legislative changes are not properly discussed in rural areas.<sup>54</sup> This lack of infrastructure to inform, ensure and carry out requirements of the law leaves rural women, in a precarious position where their marriage may not be recognised, thus jeopardising their right to matrimonial property should their marriage end.

<sup>50</sup> *ibid.*

<sup>51</sup> Constitution of Kenya 2010, art 27(8).

<sup>52</sup> Mary Mutaaru, 'Press Statement on the Registration of Customary Marriages in Kenya' (Office of the Attorney General and Department of Justice 2017) <<https://www.statelaw.go.ke/wp-content/uploads/2017/08/Press-statement-on-registration-of-customary-marriages.pdf>> accessed 6 June 2020.

<sup>53</sup> Federation of Women Lawyers ( FIDA-Kenya) and Global Initiative for Economic, Social and Cultural Rights, 'Shadow Report on Kenya's 8th Periodic Report Scheduled to be reviewed during the CEDAW Committee's 68th Session, 2017' <[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/INT\\_CEDAW\\_NGO\\_KEN\\_29057\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/INT_CEDAW_NGO_KEN_29057_E.pdf)> accessed 6 June 2020.

<sup>54</sup> *ibid.*

## Women's political representation and participation

Women's access to land and property in Kenya is still weak and dependent on male relatives or powerful community leaders.<sup>55</sup> The continued disenfranchisement of women can be attributed partly to their limited access to political participation and representation. Most of the time, women are not represented in leadership roles because of cultural attitudes that dictate different roles for men and women and consolidate power imbalance in favour of men.<sup>56</sup> In Kenya, women's political participation remains curtailed by the failure to implement the two-thirds gender policy and by the increased violence against women who enter politics and government, which discourages them from participating even though they have the legal right to do so. The Constitution provides that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.<sup>57</sup>

Kenya's judiciary has noted the shortcomings of the implementation of the two-third rule in an advisory opinion which cites the constitutional requirement and condemns the parliament for impeding the article's fulfilment.<sup>58</sup> Political participation impacts the implementation of land and inheritance policies that protect and advance women's rights and interests. Ideally, women's political participation would influence the enactment and implementation of land and property laws that are favourable to women. Women representation should not only be advocated for at the parliamentary level but also at the grassroots level. Participation of women in community decision-making, for example, is crucial in advancing women rights to own and access community land.

With this backdrop, this report will analyse the current legal and institutional frameworks safeguarding women's rights to land and property in Kenya and how they guarantee or impede the enjoyment of these rights.

<sup>55</sup> Food and Agriculture Organization of the United Nations (n 46). See also, Annmaria Milazzo and Markus Goldstein, 'Governance and Women's Economic and Political Participation: Power Inequities, Formal Constraints and Norms' (World Bank Research Observer, Oxford University Press, 2019), p 35.

<sup>56</sup> *Ibid.*

<sup>57</sup> Constitution of Kenya 2010, arts 27(8) and 81(b) <<http://www.kenyalaw.org/kl/index.php?id=398>> accessed 6 June 2020.

<sup>58</sup> Advisory Opinion No. 2 of 2012, 'In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR' <<http://kenyalaw.org/caselaw/cases/view/85286>> accessed 6 June 2020.

## 2. The Legal Framework for Women's Land and Property Rights

### Constitutional Guarantees of Women's Rights to Land and Property in Kenya

The Constitution's preamble promises to create a government based on 'the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.'<sup>59</sup> The country is also guided by its national principles and values, which include equality, equity, the rule of law and human rights.<sup>60</sup> On paper, the Constitution is highly progressive, and many in Kenya are working to make the written ideals a reality across the country. The Constitution reflects Kenya's commitment towards international standards on human rights. Article 2(6) states that 'any treaty and convention ratified by Kenya will form part of the laws of Kenya'. The effect of this provision is to make international treaties, including the CEDAW part of Kenyan domestic law.

Kenya's Constitution is lauded for being one of the most progressive constitutions in Africa because of its Bill of Rights.<sup>61</sup> Article 27 provides for equality and freedom from discrimination. Accordingly, everyone shall be accorded the full and equal enjoyment of all rights and fundamental freedoms. The right to equal treatment includes the right to equal opportunities in political, economic, cultural and social spheres<sup>62</sup> and prohibits direct or indirect discrimination based on, among others, sex.<sup>63</sup> Similarly, every person has a right to acquire and own property of any description either individually or in association with others, in any part of Kenya.<sup>64</sup> Therefore, unequal treatment and discrimination of women in respect of land and property use and ownership is prohibited.

Access to justice also plays a significant role to safeguard the rights of women to property and land. The State has an obligation to ensure that all persons, including women, have access justice, and that if there is a required fee, it shall not be unreasonable and an impediment to accessing justice.<sup>65</sup> This provision allows women to approach justice mechanisms to claim their rights to land and property should it be infringed upon. The right also entails availability and easy accessibility of laws so that women are aware of the laws, effective discharge of justice by court systems, and timely enforcement of court orders that affirm the right of women to land and property.<sup>66</sup> This provision should be read together with Article 159 of the Constitution, which outlines principles that courts and tribunals shall adhere to, including that justice shall be done to all, irrespective of status.

<sup>59</sup> Constitution of Kenya 2010 <<http://www.kenyalaw.org/kl/index.php?id=398>> accessed 6 June 2020.

<sup>60</sup> *ibid* art 10.

<sup>61</sup> *ibid*.

<sup>62</sup> *ibid* art 27(3).

<sup>63</sup> *ibid* arts 27(4) and (5).

<sup>64</sup> *ibid* art 40.

<sup>65</sup> *ibid* art 48.

<sup>66</sup> *ibid* art 48.

Property ownership during marriage and upon its dissolution is still an issue of debate and litigation in Kenya. The Constitution provides that parties to a marriage are entitled to equal rights at the time of the marriage, over its duration and at its dissolution.<sup>67</sup> As equal partners in a marriage, women should enjoy equal property ownership rights. This shall be discussed further under the matrimonial property.

Finally, Article 60 of the Constitution sets out the principles of land policy in Kenya, including the elimination of gender discrimination in law and customs and practices related to land and property. This provision is an attempt to right past injustices against women, especially harmful customary practices that put barriers to women's land ownership. Article 60 also encourages settlement of land disputes through recognised local community initiatives which are consistent with the Constitution. Traditional dispute resolution mechanisms (TDR) have been criticised for being patriarchal, but if used properly, could help to safeguard the rights of women to land and property. For this reason, the Constitution provides that TDR mechanisms shall not be used in a way that contravenes the bill of rights, or is in any way inconsistent with the law, justice or morality.<sup>68</sup>

## Key Instruments Safeguarding Rights of Women to Own Land and Property in Kenya

With the promulgation of the Constitution of Kenya 2010, the land law regime in Kenya was transformed, particularly relating to the use and management of land. This gave rise to new land laws, key among them, the Land Act,<sup>69</sup> the Land Registration Act,<sup>70</sup> and the Community Land Act.<sup>71</sup> The Constitution also identifies three types of land – public, private and community land.<sup>72</sup>

Today, land and property issues are governed by overlapping formal and customary or traditional legal practices and authorities, which creates a system that can be complex but is also purposefully flexible. Succession and marriage rights regimes recognise cultural and religious laws.<sup>73</sup> The plurality of authorities and methods of going about resolving a land dispute was meant to make the system accessible to people living in different circumstances and in different parts of the country.<sup>74</sup> However, many people prefer to use customary law mechanisms, rather than the formal courts, and it can

<sup>67</sup> *ibid* art 40.

<sup>68</sup> *ibid* art 159(3).

<sup>69</sup> The Land Act, No. 6 of 2012, Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%206%20of%202012>> accessed 6 June 2020.

<sup>70</sup> The Land Registration Act, No. 3 of 2012 <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%203%20of%202012>> accessed 6 June 2020.

<sup>71</sup> The Community Land Act, No. 27 of 2016, Laws of Kenya, <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2027%20of%202016>> accessed 6 June 2020.

<sup>72</sup> Constitution of Kenya 2010 (n 61) art 61.

<sup>73</sup> Reem Gaafar, 'Women's Land and Property Rights in Kenya' (Landesa 2014) <<https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf>> accessed 6 June 2020.

<sup>74</sup> Witchger, Kathryn E, Equality in Process: Community Land Dispute Resolution Mechanisms in Kenyan Law (Columbia Academic Common 2018) <<https://academiccommons.columbia.edu/doi/10.7916/d8-m87y-tp14>> accessed 9 June 2020.



*Public land is held by both the national and county governments and administered by the National Land Commission. Article 63 contains provisions on community land, which vests in and is held by communities identified based on ethnicity, culture or similar community interest.*

be difficult to ensure that constitutional guarantees are respected in customary law outcomes.<sup>75</sup>

This section analyses the current legal regime guaranteeing the rights of women to land and property, highlighting how these statutes attempt to remedy the challenges hindering the realisation of women's rights to land and property.

## A. Land Act, 2012

The Land Act is one of the most celebrated outcomes of the Constitution of Kenya 2010. The Act, which entered into force in May 2012, was aimed at revising, consolidating and rationalizing land laws as well as providing sustainable administration and management of land and related resources.<sup>76</sup> The Act is substantive and is implemented by its procedural counterpart – the Land Registration Act, 2012.

The Act contains provisions which guarantee women's rights to land. Key among these provisions is Section 5 that provides for various forms of land holding and prohibits discrimination in ownership and access to land. The Act also secures the rights of disadvantaged groups in cases of allocation of public land by the National Land Commission,<sup>77</sup> including women.

The Land Act also deals with loans taken using matrimonial property as security. In the context of the right of women to property, courts are granted power, in the interest of doing justice between the parties, to reopen charges of any amount secured on matrimonial property.<sup>78</sup> This provision can be used by women to challenge charges entered by their spouses that would be detrimental to them or their families.<sup>79</sup>

<sup>75</sup> Reem Gaafar, 'Women's Land and Property Rights in Kenya', 2014. Available at: <https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf> accessed 6 June 2020.

<sup>76</sup> The Land Act, No. 6 of 2012, Laws of Kenya.

<sup>77</sup> *ibid* s 12(1)(b).

<sup>78</sup> *ibid* ss 105-106.

<sup>79</sup> Federation of Women Lawyers, Kenya (FIDA), 'Women's Land and Property Rights in Kenya: A Training Handbook' p 13 <<https://land.igad.int/index.php/documents-1/countries/kenya/gender-3/625-women-s-land-and-property-rights-in-kenya/file>> accessed 6 June 2020.

While the Land Act does a lot to streamline the administration and management of land, it has also been criticised in some respects. Notably, it contains provisions on spousal consent in respect of land transactions but does not have a definition of 'spouses'. This is problematic considering some marriages in Kenya are based on 'come-we-stay' arrangements that do not count as marriage under the new law. Consequently, parties of such arrangements do not enjoy the rights that spouses have.<sup>80</sup>

## B. Land Registration Act, 2012

As already highlighted above, the Land Registration Act contains the procedures necessary for the implementation of the Land Act. One of its key provisions, which has direct implications on the right of women to land and property, is Section 93 on co-ownership and other relationships between spouses. If a spouse buys land during the marriage and intends to be co-owned, the land shall constitute matrimonial property.

Another important provision that touches on spousal rights is Section 94 on partition of land. Among other considerations, the Registrar should consider the interests of spouses and dependents of a tenant in common who wishes to partition land so as to ensure that they are adequately catered for and will not be rendered homeless as a result of such partition or sale.<sup>81</sup>

It is interesting to note that before 2016, Section 28 of the Land Registration Act contained, as an overriding interest in all registered land, spousal right over matrimonial property. The provision ensured that whether or not a spouse's name was on a certificate of registration of land, he or she would be considered in any dealing on the said land. This could be used as a guarantee for women whose husbands left them out of title documents. This provision was deleted by the Land Laws (Amendment) Act, 2016, however in practice spousal consent is still required for land transactions.

## C. Community Land Act, 2016

The Community Land Act, 2016 provides for the recognition, protection and registration of community land rights; management and administration of community land; providing for the role of county governments in relation to unregistered community land.<sup>82</sup> When discharging functions under the Act in respect to community land, every person is bound by the national values and principles under the Constitution, including the principles of equality and non-discrimination.<sup>83</sup> The principles of land policy, including the elimination of gender discrimination in law, customs and practices related to land and property in land, must also be adhered to.<sup>84</sup> Section 30 of the Act also contains provisions on non-discrimination, including that women, men, youth, minority, persons with disabilities and marginalised groups have the right to equal treatment in all dealings in community land. Additionally, the Act provides classes of community land holding, including as communal land, family or clan land, reserve land or any other category recognised under law.<sup>85</sup>

<sup>80</sup> Section 2 of the Land Registration Act defines marriage as a civil, customary or religious marriage.

<sup>81</sup> The Land Registration Act, No. 3 of 2012, Laws of Kenya, s 94 (e) and (f),.

<sup>82</sup> The Community Land Act, No. 27 of 2016, Laws of Kenya, long title.

<sup>83</sup> *ibid* s 3.

<sup>84</sup> The Constitution of Kenya 2010, Article 60; The Community Land Act, No. 27 of 2016, Laws of Kenya, s 3.

<sup>85</sup> *ibid* s 12.



*... The functions of the Committee include facilitating the day-to-day functions of the community and managing and administering registered community land on behalf of the community.*

The Act ensures the protection of community land rights and requires that communities claiming an interest or a right over community land shall register themselves with the Ministry of Lands.<sup>86</sup> All unregistered community land is held by county governments on behalf of the community, and shall not sell, dispose, transfer or convert the land to private property.<sup>87</sup>

The Act also contains provisions on confirmation of the validity of existing customary rights of occupancy.<sup>88</sup> A person, family unit or a group of persons organised as a society, cooperative or a body recognised by law, who are members of a community, may apply as a registered community for the customary right of occupancy. When considering such applications, the law requires the registered community to have regard to equality of all persons, including equal treatment of applications for women and men; and non-discrimination of any person based on gender, disability, minority culture or marital status.<sup>89</sup> This provision protects the right of women, especially, who are mostly discriminated upon in matters community land.

The Act also requires that a registered community shall have a community assembly consisting of adult members of the community and requires women to be included in the assemblies.<sup>90</sup> These community assemblies then elect between 7 and 15 of its members to constitute the community land management committee.<sup>91</sup> The functions of the Committee include facilitating the day-to-day functions of the community and managing and administering registered community land on behalf of the community. The Committee can also decide to alienate community land (for instance, through conversion to private land) and this decision is binding if supported by at least two-thirds of the registered adult members of the community.<sup>92</sup> Just like with the Assembly, the Committee's makeup is not clarified. In the case of the community land management committee, the Act states it should be made up of adults but there are some cultures which view women as children and they would therefore be excluded on this basis. Women's representation on assemblies and committees could therefore be non-existent, or minimal, and if decisions taken at these levels do not take into account the interests of women, their access to and enjoyment of community land could be infringed upon.

<sup>86</sup> *ibid* s 7.

<sup>87</sup> *ibid* s 6.

<sup>88</sup> *ibid* s 14.

<sup>89</sup> *ibid* s 14(4)(b).

<sup>90</sup> *ibid* s 15.

<sup>91</sup> *ibid*.

<sup>92</sup> *ibid*.

<sup>93</sup> *ibid* ss 39-42.

Under the Community Land Act, it is envisioned that community land can be converted to private or public land. It is also envisaged that individuals can obtain an individual right to use part of community land exclusively. Women can be benefitted by applying for such a right, but the process is dependent on the approval of members of the registered community. In communities where men dominate community leadership roles, women may not enjoy such rights.

Lastly, the Act provides for dispute resolution mechanisms to be used in community land disputes.<sup>93</sup> This will be discussed further under the institutional framework for women's land and property rights.

## D. Matrimonial Property Act, 2013

The Matrimonial Property Act, 2013 provides for the rights and responsibilities of spouses in relation to matrimonial property. The Act guarantees the equal status of spouses, providing that a married woman has the same rights as a married man to acquire, administer, hold, control, use and dispose of movable or immovable property. Under this Act, matrimonial property includes the matrimonial home or homes, household goods and effects in the matrimonial home or homes, and any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.<sup>94</sup> Spouses are also permitted to enter an agreement to determine their property rights before marriage. Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.<sup>95</sup>

The law further provides that ownership of matrimonial property vests in spouses according to their contribution towards its acquisition and shall be so divided upon the dissolution of the marriage.<sup>96</sup> In order to be entitled to matrimonial property, spouses must prove their contribution to that property. However, since most women contribute non-monetarily, or through care and domestic work, it is difficult for them to quantify their contribution to the property.<sup>97</sup> This position was supported in practice in the Court of Appeal case of *Echaria v Echaria* in which the judge focused on the quantified contribution of each spouse to matrimonial property in order to make his judgement.<sup>98</sup>

<sup>94</sup> Matrimonial Property Act, No. 49 of 2013, Laws of Kenya, ss 4 and 6.

<sup>95</sup> *ibid* s 9.

<sup>96</sup> *ibid* s 7.

<sup>97</sup> Federation of Women Lawyers (FIDA-Kenya) and Global Initiative for Economic, Social and Cultural Rights, 'Shadow Report on Kenya's 8th Periodic Report Scheduled to be reviewed during the CEDAW Committee's 68th Session' (2017) <[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/INT\\_CEDAW\\_NGO\\_KEN\\_29057\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/INT_CEDAW_NGO_KEN_29057_E.pdf)> accessed 6 June 2020.

<sup>98</sup> *Echaria v Echaria* [2007] eKLR (Civil Appeal 75 of 2001) <<http://kenyalaw.org/caselaw/cases/view/37371>> accessed 6 June 2020.



*If a man acquires property with his first wife, the property shall be retained equally between them. If he marries other wives, from that point onwards, any property acquired by the man shall be regarded as owned by him and his wives taking into account each of their contributions.*

This provision is contrary to the Kenyan Constitution that protects women's right to inherit land and assures equal rights to all members of a marriage during and at the dissolution of said marriage.<sup>99</sup> The High Court in *CMN v AWN* reaffirmed Article 45(3) of the Kenya Constitution in the judge's conclusion.<sup>100</sup> In conclusion, it is imperative to repeal Section 7 of the Matrimonial Property Act 2015, which disproportionately disadvantages women who are required to quantify their non-monetary contribution to matrimonial property in order to be entitled to it, which is unconstitutional.<sup>101</sup>

## i. Polygamous marriages and the Matrimonial Property Act

Customary and Islamic marriages may be polygamous under the law, and polygamous unions are recognised if they are registered.<sup>102</sup> Proving contribution to matrimonial property as a second or subsequent wife is significantly more challenging. It is more difficult to confirm that a matrimonial property sale has the necessary consent of all wives in a polygamous marriage. Several provisions support and enact the inequalities of polygamous marriage.

The Matrimonial Property Act deals with property rights in polygamous marriages.<sup>103</sup> If a man acquires property with his first wife, the property shall be retained equally between them. If he marries other wives, from that point onwards, any property acquired by the man shall be regarded as owned by him and his wives taking into account each of their contributions.<sup>104</sup> The law allows for a woman to enter an agreement to have her matrimonial property separated from the property of the other wives, and she is entitled to own that property equally with her husband without the other wives' participation.<sup>105</sup>

The 2017 CEDAW Committee's COs to Kenya and the parallel reports call for correcting incongruence between the Constitution and various laws and treaties, including by repealing the retrogressive clause in the Matrimonial Property Act and prohibiting polygamous marriages.<sup>106</sup>

<sup>99</sup> Constitution of Kenya 2010, art 45(3).

<sup>100</sup> *CMN v AWN* [2013] eKLR (Environmental & Land Case 208 of 2012) <<http://kenyalaw.org/caselaw/cases/view/88588>> accessed 6 June 2020.

<sup>101</sup> FIDA-Kenya (n 104).

<sup>101</sup> The Marriage Act, No. 4 of 2014, Laws of Kenya, s 5.

<sup>101</sup> The Matrimonial Property Act, No. 49 of 2013, Laws of Kenya, s 8.

<sup>104</sup> *ibid*.

<sup>105</sup> *ibid* s 8(2).

<sup>106</sup> FIDA-Kenya (n 104).; CEDAW Committee, 'Concluding observations on the eighth periodic report of Kenya' (CEDAW/C/KEN/CO/8, 2017) <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKEN%2fCO%2f8&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKEN%2fCO%2f8&Lang=en)> accessed 6 June 2020.

## ii. Other safeguards

The Matrimonial Property Act also prohibits the alienation, in any form, of an estate or interest in matrimonial property without the written and informed consent of both spouses.<sup>107</sup> Accordingly, a spouse cannot sell or lease or take a loan using their matrimonial property without the consent of the other spouse. The law also prohibits the eviction of a spouse from their matrimonial home, unless by a court order.

The law allows for separate ownership of property by spouses, providing that that marriage does not affect the ownership of property other than matrimonial property to which either spouse may be entitled, or affect the right of either spouse to acquire, hold or dispose of any such property.<sup>108</sup> However, where matrimonial property is acquired during marriage in the name of one spouse, it will be presumed that the property is held in trust for the other spouse. Where it is in the names of the spouses jointly, it will be presumed that their beneficial interests in the matrimonial property are equal.

The Act also addresses the issue of gifts and debts. Where a spouse gives any property to the other spouse as a gift during the subsistence of their marriage, it will be presumed that the property belongs absolutely to the recipient.<sup>109</sup> Also, a spouse is not liable, solely by reason of marriage, for any personal debt contracted by the other spouse prior to their marriage.<sup>110</sup>

Lastly, the Act allows a person to apply to a court for a declaration of rights to property as contested between the person and their current or former spouse.<sup>111</sup>

## E. The Law of Succession Act

The Law of Succession Act of Kenya dates back to the 1980s and provides the law relating to both successions in case there is a will and cases where there is none.<sup>112</sup> The Act contains several provisions that guarantee the right of women to property, especially upon the death of their spouse.

Firstly, the law acknowledges the equal right of men and women to make a will. Whether married or not, a female person has the same capacity to make a will as does a male person.<sup>113</sup> The implication of this provision is that a married woman can make a will in respect of her own property. However, where matrimonial property is involved, and it is registered in the name of her husband, difficulties may arise.

In many customary practices in Kenya, women are left out of inheritance for the benefit of their male counterparts.<sup>114</sup> Where there is a will in place, women's inheritance

<sup>107</sup> The Matrimonial Property Act, No. 49 of 2013, Laws of Kenya, s 12.

<sup>108</sup> *ibid* s 13.

<sup>109</sup> *ibid* s 15.

<sup>110</sup> *ibid* s 16.

<sup>111</sup> *ibid* s 17.

<sup>112</sup> The Law of Succession Act, Laws of Kenya, ch 160.

<sup>113</sup> *ibid* s 5.

<sup>114</sup> The Centre on Housing Rights and Evictions (COHRE) et al, 'Tools for Change: Applying United Nations standards to secure women's housing, land, and property rights in the context of HIV' <<https://kelinkkenya.org/wp-content/uploads/2010/10/tools-for-change-20120416.pdf>> accessed 6 June 2020.<sup>114</sup> Section 12, the Matrimonial Property Act, No. 49 of 2013, Laws of Kenya.



*In 2015, the government also proposed a law that criminalizes widow eviction and widow cleansing called, the Prohibition of Violence against Widows and Widowers Bill.*

rights can be better safeguarded. In cases where there is no will, even while the Law of Succession Act provides safeguards, in practice women are still disenfranchised. The law provides that a surviving spouse who has a child or children shall be entitled not only to all the household effects of the deceased, but also the remaining property, after the children have received what they are entitled to, for the rest of the surviving spouse's life.<sup>115</sup> However, there is a discriminatory limitation to this right: if the surviving spouse is a widow, she loses her right to that property upon her re-marriage to any person.<sup>116</sup> This requirement does not apply to men. This is also the case where the couple had no children.<sup>117</sup>

The Law of Succession Act also deals with succession in cases of polygamous marriages. Section 3(5) of the Act provides that notwithstanding the provisions of any other written law, a woman married under a system of law that permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for purposes of succession and similarly her children are also entitled to inherit property from their deceased father. Civil society organisations recommend the repeal of the proviso under Section 35 of the Law of Succession Act and other laws that discriminate against widows' inheritance and succession of land.<sup>118</sup>

In response to the concerns raised regarding retrogressive legal provisions and cultural practices, the Kenyan government introduced the Social Assistance Act (2013) in compliance with the Constitution,<sup>119</sup> to provide social assistance for persons in need, such as widows and widowers.<sup>120</sup> In 2015, the government also proposed a law that criminalizes widow eviction and widow cleansing called, the Prohibition of Violence against Widows and Widowers Bill.<sup>121</sup> However, it is yet to be tabled in Parliament.

<sup>115</sup> The Law of Succession Act, Laws of Kenya, ch 160, s 35 (1).

<sup>116</sup> *ibid.*

<sup>117</sup> *ibid* s 36.

<sup>118</sup> The Kenyan Section of the International Commission of Jurists (ICJ Kenya) and the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), '2017 Alternative Report to the Committee on the Convention on Elimination of all Forms of Discrimination against Women (CEDAW)' <[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/INT\\_CEDAW\\_NGO\\_KEN\\_29163\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/INT_CEDAW_NGO_KEN_29163_E.pdf)> accessed 6 June 2020.

<sup>119</sup> Constitution of Kenya 2010, art 43 (1) (e).

<sup>120</sup> The Act allows the government to support food, shelter, clothing, fuel, utilities, household supplies, personal requirements, health-care services, transport expenses, funeral and burial expenses.

<sup>121</sup> Faith Muiruri, 'Proposed Law Targets Widows' (The Kenyan Woman 2016) <<http://kw.awcfs.org/article/proposed-law-targets-widows/>> accessed 6 June 2020

### 3. Institutional Framework for the Protection of Women's Right to Land and Property

#### Relevant State Agencies

##### A. Ministry of Lands and Physical Planning

The Ministry of Lands and Physical Planning (MOLPP) is in charged with land adjudication and settlement; administration, management, control and regulation of land use and property; and registration of land transactions pursuant to the Land Registration Act.<sup>122</sup> A Gender Focal Point is assigned to the MOLPP by the Ministry of Public Service and Gender, as part of the government initiative to mainstream a gender perspective in all departments.

##### B. The National Land Commission

Established under Article 67 of the Constitution, the National Land Commission is primarily tasked with managing public land on behalf of the national and county governments. It is also in charged with recommending a national land policy to the national government as well as advising it on a comprehensive programme for the registration of title in land throughout Kenya.

In relation to the right of women to land and property, the NLC has an important function of initiating investigations, on its own initiative or on a complaint, into present or historical land injustices and recommending appropriate redress. It is also tasked with encouraging the application of traditional dispute resolution mechanisms in land conflicts and assessing tax on land and premiums on immovable property in any area designated by law.<sup>123</sup>

##### C. The Kenya National Human Rights Commission

One of the constitutional safeguards for the protection of human rights in Kenya was the establishment of a national human rights institution to monitor, investigate and report alleged abuses of human rights in Kenya. Established pursuant to Article 59 of the Constitution, the Kenya National Commission on Human Rights (KNCHR) was created to restructure its predecessor and to discharge functions assigned to it under Section 8 of the Kenya National Commission on Human Rights Act.<sup>124</sup>

One of the key functions of the Commission is to act as the principal organ of the State in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights except those that relate to the rights of special interest groups protected under the law relating to equality and non-discrimination.<sup>125</sup>

<sup>122</sup> Functions of Ministry of Lands and Physical Planning, Government of Kenya <<http://lands.go.ke/functions/>> accessed 6 June 2020

<sup>123</sup> Constitution of Kenya 2010, art 67; The National Land Commission Act, No. 5 of 2012, Laws of Kenya, s <<http://www.landcommission.go.ke/media/erp/upload/nationallandcommission5of2012.pdf>> accessed 6 June 2020.

<sup>124</sup> Kenya National Commission on Human Rights Act, No. 14 of 2011, Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2014%20of%202011>> accessed 6 June 2020.

<sup>125</sup> *ibid* s 8.



*In 2015, the government also proposed a law that criminalizes widow eviction and widow cleansing called, the Prohibition of Violence against Widows and Widowers Bill.*

Apart from promoting the respect of human rights, the Commission has been tasked with receiving and investigating complaints about alleged human rights abuses, except those relating to the violation of the principle of equality and freedom from discrimination. KNCHR works in collaboration with the National Gender and Equality Commission and the Commission on Administrative Justice.

#### D. The National Gender and Equality Commission

The National Gender and Equality Commission (NGEC) is also a constitutional body established pursuant to Article 59 of the Constitution. NGEC's primary function includes monitoring, facilitating and advising on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws and administrative regulations in all public and private institutions.<sup>126</sup>

The Commission leads the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalised persons, women, persons with disabilities and children.<sup>127</sup>

NGEC investigates, on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned.<sup>128</sup>

<sup>126</sup> National Gender and Equality Commission Act, 2011, Laws of Kenya, s 8.

<sup>127</sup> *ibid.*

<sup>128</sup> *ibid.*

## E. Judicial System

The Constitution guarantees access to justice for all and places an obligation on the state to ensure that nothing impedes access to justice.<sup>129</sup> The following courts provide judicial dispute resolution mechanisms to ensure women's rights to land and property.

### i. Environment and Land Court

For land and property-related disputes, women can now access the Environment and Land Court which is specialised to hear disputes related to the use and occupation of and title to land, as well as disputes related to the environment. In discharging its judicial authority, the ELC shall be governed by principles espoused in the Constitution, which includes the principles of equality and non-discrimination.

### ii. Other Courts

The usual civil and criminal procedure is open to use by all persons, including women whose rights to land and property is infringed upon. Particularly, the High Court has jurisdiction, in accordance with Article 165 of the Constitution, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Women can also appeal their cases to superior courts. The High Court hears appeals from subordinate courts, while appeals from the High Court are heard by the Court of Appeal, whose appeals lie to the Supreme Court. Women can also follow up succession matters such as administration of the deceased's property and challenge succession decisions that discriminate against them based on their gender.

### iii. Alternative and Traditional Dispute Mechanisms

As already mentioned earlier, the Constitution of Kenya encourages alternative dispute resolution mechanisms such as reconciliation, mediation, arbitration and traditional dispute resolution (TDR).<sup>130</sup> Bodies dealing with land management, such as the National Land Commission, are also encouraged to promote the use of TDR in land conflicts.<sup>131</sup>

<sup>129</sup> Constitution of Kenya 2010, art 48.

<sup>130</sup> Constitution of Kenya 2010, art 159.

<sup>131</sup> *ibid.*

## How Concluding Observations have addressed these challenges?

CEDAW Committee and the treaty bodies of other human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR), have made various Concluding Observations which address women's land and property rights in Kenya.

The table below highlights some of the latest COs by these treaty bodies and demonstrates the cross-cutting nature of the question of women's access to land and property rights while highlighting the unique role the CEDAW Committee plays in articulating more nuanced reflections and recommendations for women's rights to land and property. The table also includes an assessment of the progress made towards the full implementation of the COs. To prepare this assessment, interviews with various local actors were undertaken. The persons interviewed are listed in the acknowledgements section of this report.

| Concluding Observations                                                                         | Recommendation                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Issues Addressed                                                                                                                                                                                       | Status                                                                                                                          |
|-------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------|
| <b>CEDAW'S CONCLUDING OBSERVATIONS ON THE 8TH PERIODIC REPORT OF KENYA (2017)<sup>132</sup></b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                        |                                                                                                                                 |
| <b>CEDAW/C/KEN/CO/8 para. 15(c)</b><br>National machinery for the advancement of women          | Collect and publish data disaggregated by sex, gender, ethnicity, disability and age in order to inform policy and programmes on women and girls, as well as to assist in the tracking of progress in the achievement of the gender-related targets of the Sustainable Development Goals.                                                                                                                                                                                                                                                 | Awareness and ability to claim land and inheritance rights<br>Access to Justice and Education<br>Access to Health<br>Women's Political Representation<br>Monetary Contribution to Matrimonial Property | Ministry of Lands coordinating with the Kenya National Bureau of Statistics to incorporate elements of this in the next census. |
| <b>CEDAW/C/KEN/CO/8 para. 17</b><br>Temporary special measures                                  | State Party to ensure the application of the constitutional two-thirds gender rule and the use of temporary special measures to improve the situation of women and girls with disabilities and rural women, accompanied by sanctions for non-compliance, with a view to achieving substantive equality of women and men in all elected and appointed positions, as well as all areas of public life, and also that it set time-bound targets and allocate sufficient resources for the implementation of such temporary special measures. | Women's Political Representation<br>Citizenship                                                                                                                                                        | The two-thirds gender rule has not yet been implemented                                                                         |

<sup>132</sup> CEDAW Committee, 'Concluding observations on the eighth periodic report of Kenya' (CEDAW/C/KEN/CO/8, 2017) <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/KEN/CO/8&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/KEN/CO/8&Lang=En)>.

| Concluding Observations                                                           | Recommendation                                                                                                                                                                                                                                                                                         | Issues Addressed                                                                  | Status                                                                                                                                                                                                                                                                                                                                                 |
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| <b>CEDAW'S CONCLUDING OBSERVATIONS ON THE 8TH PERIODIC REPORT OF KENYA (2017)</b> |                                                                                                                                                                                                                                                                                                        |                                                                                   |                                                                                                                                                                                                                                                                                                                                                        |
| <b>CEDAW/C/KEN/CO/8 para. 19(a)</b><br>Stereotypes and harmful practices          | Develop and implement a comprehensive strategy to eliminate harmful practices and stereotypes that discriminate against women, including through more awareness-raising campaigns for community and religious leaders and the general public and by prosecuting and adequately punishing perpetrators. | Customary Practices<br>Access to Justice and Education                            | The Directorate of Gender Affairs within the Ministry of Lands now regularly undertakes awareness raising campaigns for communities and the general public, in partnership with CSOs.                                                                                                                                                                  |
| <b>CCEDAW/C/KEN/CO/8 para. 43(b)</b>                                              | Facilitate the access of rural women to land, eliminate all customs and traditional practices that impede their equal access to land and establish a clear legislative framework to protect their rights to inheritance and land ownership.                                                            | Customary Practices<br>Awareness and ability to claim land and inheritance rights | The Community Land Act was enacted in 2016 which provides a legislative framework to protect rural women's land rights within community land. However, the process of implementing this statute has been slow and more needs to be done to clarify the legislative framework with respect to expressly protecting women's interests in community land. |
| <b>CEDAW/C/KEN/CO/8 para. 45(a)</b><br>Indigenous women                           | Take immediate steps to implement the ruling of the African Commission on Human and Peoples' Rights regarding the rights of the Endorois people to their ancestral land and ensure consultation with Endorois women during this process.                                                               | Community land<br>Access to justice                                               | The term of the Task Force formed to follow up on the implementation of this decision lapsed in 2016. Government yet to reconstitute the Task Force and therefore implementation of the decision has stalled, though the community continues to receive royalties from the game reserve.                                                               |

| Concluding Observations                                                           | Recommendation                                                                                                                                                                                                                                                                                                                                                                               | Issues Addressed                                                                            | Status                                                                                                |
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| <b>CEDAW'S CONCLUDING OBSERVATIONS ON THE 8TH PERIODIC REPORT OF KENYA (2017)</b> |                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                             |                                                                                                       |
| <b>CEDAW/C/KEN/CO/8 para. 50 (a)</b><br>Marriage and family relations             | The Committee notes that the Marriage Act of 2014 consolidated all marriage regimes in the State Party, and that other laws intended to promote equality in marriage have been passed. It remains concerned, however, about: (a) The fact that the Marriage Act is not in conformity with the Constitution, in that it recognizes polygamy in the context of customary and Muslim marriages. | Polygamous Marriage Customary Practices                                                     | The relevant sections of the Marriage Act have not been repealed                                      |
| <b>CEDAW/C/KEN/CO/8 para. 50(b)</b><br>Marriage and family relations              | The Committee remains concerned about: The requirement to prove contribution to marital property under the Matrimonial Property Act of 2013, which discriminates against women who face challenges proving the existence of and quantifying non-monetary contributions.                                                                                                                      | Monetary Contribution to Matrimonial Property                                               | The requirement of proof of contribution still exists                                                 |
| <b>CEDAW/C/KEN/CO/8 para. 50(c)</b><br>Marriage and family relations              | The Committee remains concerned about: The removal of the requirement of spousal consent for transactions relating to marital property.                                                                                                                                                                                                                                                      | Awareness and ability to claim land and inheritance rights                                  | The relevant section of the Land Laws (Amendment) Act has not been repealed                           |
| <b>CEDAW/C/KEN/CO/8 para. 50(d)</b><br>Marriage and family relations              | The Committee remains concerned about:] Discriminatory inheritance laws, including rules governing intestate succession that directly discriminate against women and girls, and the fact that the Law of Succession Act of 1981 renders a widow's inheritance rights void if she remarries, with no parallel provision for widowers.                                                         | Law of Succession Widow's Rights Awareness and ability to claim land and inheritance rights | The relevant provisions in the Law of Succession Act still remain valid – they have not been repealed |
| <b>CEDAW/C/KEN/CO/8 para. 51(a)</b><br>Marriage and family relation               | Repeal section 7 of the Matrimonial Property Act and recognize the principle of equality in all areas of marriage, including property.                                                                                                                                                                                                                                                       | Drawback Clauses Monetary Contribution to Matrimonial Marital Status                        | Section 7 of the Matrimonial Property Act has not been repealed                                       |

| Concluding Observations                                                                                                          | Recommendation                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Issues Addressed                                                                              | Status                                                                                                                                                           |
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| <b>CEDAW'S CONCLUDING OBSERVATIONS ON THE 8TH PERIODIC REPORT OF KENYA (2017)</b>                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                               |                                                                                                                                                                  |
| <b>CEDAW/C/KEN/CO/8 para. 51(e)</b><br>Marriage and family relations                                                             | Raise awareness of the detrimental effects of polygamy on women and bring the Marriage Act into line with article 45 (3) of the Constitution, by prohibiting polygamous marriages.                                                                                                                                                                                                                                                                                 | Polygamous Marriages<br>Customary Practices<br>The Marriage Act of 2014<br>Drawback Clauses   | The relevant provisions of the Marriage Act have not been revised.                                                                                               |
| <b>CEDAW/C/KEN/CO/8 para. 51(f)</b><br>Marriage and family relations                                                             | Allow for the division of property during marriage in order to protect the property interests of women when their husbands take subsequent wives.                                                                                                                                                                                                                                                                                                                  | Marital Status<br>Customary Practices<br>Polygamous Marriages                                 | The Matrimonial Property Act permits parties to a marriage to enter into an agreement to protect their property before marriage, including polygamous marriages. |
| <b>CESCR'S CONCLUDING OBSERVATIONS ON THE COMBINED 2<sup>ND</sup> TO 5<sup>TH</sup> PERIODIC REPORTS OF KENYA <sup>133</sup></b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                               |                                                                                                                                                                  |
| <b>E/C.12/KEN/CO/2-5 para. 6</b><br>Domestic application of the Covenant                                                         | The Committee urges the State Party to expedite the adoption of pending legislation and policies, including the Community Land Bill, the Social Protection Bill, the Water Bill, the Housing Bill, the Health Bill and the National Social Health Insurance Fund Bill, to give full effect to the economic, social and cultural rights enshrined in its Constitution. It also recommends that the State Party implement the decisions of its courts without delay. | Awareness and ability to claim land and inheritance rights<br>Access to Justice and Education | The Community Land Act was enacted in 2016                                                                                                                       |
| <b>E/C.12/KEN/CO/2-5 para. 8</b><br>Domestic application of the Covenant                                                         | The Committee urges the State Party to repeal section 21 (4) of the Government Proceedings Act, since it places the State Party above the law in that it does not oblige the State Party to comply with court orders and it infringes the rights to equality and the right of access to courts in that it denies the right of an effective remedy in case of a violation by the State Party of the economic, social and cultural rights of an aggrieved party.     | Access to justice                                                                             | Section 21(4) of the Government Proceedings Act has not been repealed.                                                                                           |

<sup>133</sup> Committee on Economic, Social and Cultural Rights, 'Concluding observations on the combined second to fifth periodic reports of Kenya' (E/C.12/KEN/CO/2-5, 2016) <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/KEN/CO/2-5&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/KEN/CO/2-5&Lang=En)> accessed 6 June 2020.

| Concluding Observations                                                                                                          | Recommendation                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Issues Addressed                                                                              | Status                                                                 |
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| <b>CESCR'S CONCLUDING OBSERVATIONS ON THE COMBINED 2<sup>ND</sup> TO 5<sup>TH</sup> PERIODIC REPORTS OF KENYA <sup>140</sup></b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                               |                                                                        |
| <b>E/C.12/KEN/CO/2-5 para. 6</b><br>Domestic application of the Covenant                                                         | The Committee urges the State Party to expedite the adoption of pending legislation and policies, including the Community Land Bill, the Social Protection Bill, the Water Bill, the Housing Bill, the Health Bill and the National Social Health Insurance Fund Bill, to give full effect to the economic, social and cultural rights enshrined in its Constitution. It also recommends that the State Party implement the decisions of its courts without delay. | Awareness and ability to claim land and inheritance rights<br>Access to Justice and Education | The Community Land Act was enacted in 2016                             |
| <b>E/C.12/KEN/CO/2-5 para. 8</b><br>Domestic application of the Covenant                                                         | The Committee urges the State Party to repeal section 21 (4) of the Government Proceedings Act, since it places the State Party above the law in that it does not oblige the State Party to comply with court orders and it infringes the rights to equality and the right of access to courts in that it denies the right of an effective remedy in case of a violation by the State Party of the economic, social and cultural rights of an aggrieved party.     | Access to justice                                                                             | Section 21(4) of the Government Proceedings Act has not been repealed. |
| <b>E/C.12/KEN/CO/2-5 para. 10</b><br>Legal aid                                                                                   | The Committee recommends that the State Party expedite the adoption of the Legal Aid Bill, expand the National Legal Aid and Awareness Programme and allocate sufficient resources to the Programme so that disadvantaged and marginalized individuals, particularly indigenous peoples, women, people living in rural areas and urban informal settlements, are able to claim their economic, social and cultural rights.                                         | Awareness and ability to claim land and inheritance rights<br>Access to Justice and Education | The Legal Aid Act was enacted into law                                 |

| Concluding Observations                                                                                           | Recommendation                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Issues Addressed                                                                              | Status                                                                                                                                                    |
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| <b>CESCR'S CONCLUDING OBSERVATIONS ON THE COMBINED 2<sup>ND</sup> TO 5<sup>TH</sup> PERIODIC REPORTS OF KENYA</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                               |                                                                                                                                                           |
| <b>E/C.12/KEN/CO/2-5 para. 15-16</b><br>The Endorois                                                              | <p>The Committee is concerned that the implementation of the decision of the African Commission on Human and Peoples' Rights relating to the Endorois has been long delayed, despite acceptance of the decision of the Commission. While noting the establishment of the Task Force on the implementation of the decision of the African Commission on 26 September 2014 contained in communication No. 276/2003, the Committee regrets that the Endorois are not represented on the Task Force and that they have not been sufficiently consulted on the work of the Task Force (art. 1 (2)).</p> <p>The Committee recommends that the State Party implement, without further delay, the decision of the African Commission on Human and Peoples' Rights (276/2003) and ensure that the Endorois are adequately represented and consulted at all stages of the implementation process. It also recommends that the State Party set up a mechanism that will facilitate and monitor the implementation, with active participation of the Endorois. It further recommends that the State Party ratify the Indigenous and Tribal Peoples Convention, 1989 (No. 169), of the International Labour Organization.</p> | Community land<br>Access to justice                                                           | Government yet to reconstitute the Task Force to follow up on the implementation of the decision of the ACHPR following the lapse of its mandate in 2016. |
| <b>E/C.12/KEN/CO/2-5 para. 20</b><br>Non-discrimination                                                           | The Committee recommends that the State Party adopt a comprehensive anti-discrimination law that prohibits discrimination, direct or indirect, on all grounds expressed in article 2 of the Covenant.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Awareness and ability to claim land and inheritance rights<br>Access to Justice and Education | There is no separate legislation on non-discrimination beyond Article 27 of the Constitution of Kenya.                                                    |

| Concluding Observations                                                                                           | Recommendation                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Issues Addressed                                                                                                                                                 | Status                                                                                                                                                                                                                                                                                                                             |
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| <b>CESCR'S CONCLUDING OBSERVATIONS ON THE COMBINED 2<sup>ND</sup> TO 5<sup>TH</sup> PERIODIC REPORTS OF KENYA</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                    |
| <b>E/C.12/KEN/CO/2-5 para. 24</b><br>Equal rights of women and men                                                | The Committee recommends that the State Party take all the steps necessary to review the existing laws with a view to repealing gender discriminatory provisions, including those in customary law, especially in relation to polygamous marriages and to the rights of women to inheritance and ownership of land. It also recommends that the State Party review the Matrimonial Property Act of 2013 and take all the measures necessary to strengthen its enforcement once reviewed, including raising awareness among women, local and traditional communities and their leaders, the judiciary and land administration officials and providing legal support to women to claim their rights. | Drawback Clauses<br>Customary Practices<br>Polygamous Marriages<br>Awareness and ability to claim land and inheritance rights<br>Access to Justice and Education | The Matrimonial Property Act has not been revised as recommended                                                                                                                                                                                                                                                                   |
| <b>E/C.12/KEN/CO/2-5 para. 26</b><br>Representation of women at the decision-making level                         | The Committee recommends that the State Party take all the measures necessary to fully implement the two-thirds gender rule in the public sector, in both elective and appointive bodies, and expeditiously adopt and implement the Duale Bill.                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Women's Political Representation                                                                                                                                 | The Duale Bill has not been adopted as law.                                                                                                                                                                                                                                                                                        |
| <b>E/C.12/KEN/CO/2-5 para. 46</b><br>Right to housing                                                             | The Committee recommends that the State Party take all the measures necessary to provide affordable social housing units for low-income families and to improve living conditions in informal settlements, including through the adoption of the Housing Act, the Community Land Bill and the National Slum Upgrading and Prevention Policy, and allocate sufficient budgetary resources to ensure the implementation of such measures.                                                                                                                                                                                                                                                            | Awareness and ability to claim land and inheritance rights                                                                                                       | The Community Land Act was enacted into law in 2016.<br><br>For the National Slum Upgrading and Prevention Policy, a National Slum Upgrading and Prevention Bill was developed and subjected to public participation and the final draft is now before the Office of the Attorney General for review and submission to Parliament. |

| Concluding Observations                                                                                       | Recommendation                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Issues Addressed                        | Status                                                                             |
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| CONCLUDING OBSERVATIONS ADOPTED BY THE HUMAN RIGHTS COMMITTEE AT ITS 105TH SESSION (JULY 2012) <sup>141</sup> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                         |                                                                                    |
| <p><b>CCPR/C/KEN/CO/3 para. 6</b><br/>Principal matters of concern and recommendations</p>                    | <p>While welcoming the establishment of the National Gender and Equality Commission and the inclusion of the principle in article 27(8) of the Constitution that requires that “no more than two-thirds of members of elective and appointive bodies shall be of the same gender”, the Committee notes with concern that women remain underrepresented in the public sector and other elected and appointed bodies. The Committee is also concerned at the lack of data on the representation of women in the private sector (arts. 2, 3 and 26). The State Party should strengthen its efforts to increase the participation of women in the public and private sectors, and where necessary, through appropriate temporary special measures to give effect to the provisions of the Covenant. In this regard, the Committee recommends that the State Party ensure that the two-thirds rule enunciated by the new Constitution is implemented as a matter of priority. Furthermore, the Committee urges the State Party to include in its next periodic report, disaggregated statistical data on the representation of women in the private sector.</p> | <p>Women's Political Representation</p> | <p>The Duale Bill on the two-thirds gender rule has not been enacted into law.</p> |

| Concluding Observations                                                                                             | Recommendation                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Issues Addressed                                                                                       | Status                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
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| <b>CONCLUDING OBSERVATIONS ADOPTED BY THE HUMAN RIGHTS COMMITTEE AT ITS 105TH SESSION (JULY 2012)<sup>134</sup></b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>CCPR/C/KEN/CO/3 para. 7</b><br>Principal matters of concern and recommendations                                  | The Committee recalls its previous concluding observations (CCPR/CO/83/KEN, para. 10) and regrets that the draft Marriage bill endorses polygamous marriages. The Committee also regrets that the Law of Succession Act discriminates between the property interests of widows and widowers. The Committee also regrets that the State Party has not passed the Matrimonial Property bill (arts. 2, 3, 23 and 26). The Committee reiterates its recommendation in its previous concluding observations (CCPR/CO/83/KEN, para. 10) that polygamous marriages undermine the non-discrimination provisions and are incompatible with the Covenant. The State Party should, therefore, take concrete measures to prohibit polygamous marriages. Furthermore, the State Party should revise the Law on Succession Act to guarantee equality between men and women in the devolution and succession of property after the death of a spouse. The State Party should also enact legislation reforming its matrimonial property law. | Polygamous Marriage<br>Customary Practices<br>Drawback Clauses<br>Inheritance rights<br>Widow's Rights | The Marriage Act was enacted in 2014 and the Matrimonial Property Act in 2013. The Law of Succession Act has not been revised as recommended by the Human Rights Committee. A draft bill on to amend the Law of Succession Act was prepared by the Office of the Attorney General, but it is yet to be tabled in Parliament. Separately, an amendment bill to this Act was submitted to the Senate, but it has not factored in the issues raised by civil society. |

<sup>134</sup>Human Rights Committee, 'Consideration of reports submitted by State parties under article 40 of the Covenant: Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012' (CCPR/C/KEN/CO/3, 2012) <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fKEN%2fCO%2f3&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fKEN%2fCO%2f3&Lang=en)> accessed 6 June 2020.

| Concluding Observations                                                                                       | Recommendation                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Issues Addressed                                                  | Status                                                                                                                                                                                                                                                                                                                                                                                                                               |
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| CONCLUDING OBSERVATIONS ADOPTED BY THE HUMAN RIGHTS COMMITTEE AT ITS 105TH SESSION (JULY 2012) <sup>141</sup> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <p><b>CCPR/C/KEN/CO/3 para. 24</b><br/>Principal matters of concern and recommendations</p>                   | <p>The Committee is concerned at reports of forced evictions, interference and dispossession of ancestral land by the Government from minority communities such as the Ogiek and Endorois communities who depend on it for economic livelihood and to practice their cultures. The Committee is further concerned at reports that the Ogiek community is subjected to continued eviction orders from the Mau forests complex. The Committee notes that the State Party has not implemented the decision of the African Commission on Human and Peoples' Rights in the case <i>Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya</i>. (arts. 12, 17, 26 and 27).</p> <p>The Committee recommends that, in planning its development and natural resource conservation projects, the State Party respect the rights of minority and indigenous groups to their ancestral land and ensure that their traditional livelihood that is inextricably linked to their land is fully respected. In this regard, the State Party should ensure that the inventory being undertaken by the Interim Coordinating Agency with a view to obtaining a clear assessment of the status and land rights of the Ogiek community be participatory and that decisions be based on free and informed consent by this community.</p> | <p>Community land<br/>Indigenous people<br/>Access to justice</p> | <p>The most recent Task Force mandated with advising the Government on the implementation of the judgment by the African Court on Human and Peoples Rights on the rights of the Ogiek community did not include representatives from the Ogiek community. While its term ended in January 2020, the Task Force has not made its report public yet and consequently no progress has been made towards implementing the judgement.</p> |



## **Part III.**

# **HOW TO USE CONCLUDING OBSERVATIONS TO ADVANCE WOMEN'S ACCESS TO LAND AND PROPERTY RIGHTS?**

This report draws on the work of local and international NGOs to describe how COs have and could further be used to advance women's access to land and property rights. This report draws on the work of local and international NGOs to describe how COs have and could further be used to advance women's access to land and property rights.

## 1. Movement building and narrative shift

The process of developing parallel reports to the CEDAW Committee is often participatory. It brings together organisations with an aligned goal and interest to work together to present an accurate picture of the compliance with particular rights and concrete proposals to be made to the State. As it is more effective to think beyond simply obtaining favourable COs and consider also the potential use of these COs in follow up advocacy, it becomes possible to use the reporting process to build a movement of like-minded organisations. Even those with a different approach, niche or focus area could be included harnessing synergies to build up a more concerted movement for change.

The collaborative process also provides an opportunity to raise awareness on particular issues and therefore, recruit more allies to the advocacy and calls for change within civil society, social movements, and individuals with interest and expertise. The advocacy for change from the different quarters helps to increase the pressure and attention on the issue. Also, this makes it possible to approach the issue from different angles. Among the different angles includes the potential to have the issue framed differently for different audiences. For instance, the potential impact may be amplified where issues are framed in the development lens, and utilizing the SDGs reporting process to do so, in addition to approaching the advocacy from a human rights perspective. This would make it possible to get supports from those who would be less receptive to the rights framing of the discussion and as a result, helps expand strategic options and avenues to build momentum. For example, in Kenya, while the Kenya Land Alliance is engaging in legal advocacy on the issue of women's access to land and property, KELIN is working to change perceptions and mindset of widows and women in rural societies so that the community is more accepting of the idea that women are in fact entitled to property, including land. These efforts are complemented by the work done by the Global Initiative for Economic, Social and Cultural Rights in partnership with FIDA-Kenya to raise these issues before international human rights bodies, including CEDAW.

Further, a shift in cultural, societal beliefs and narratives is necessary for the sustained progress in the effort towards the realisation of women's land rights. Progressive legislation is important towards making this shift but needs to be accompanied by additional measures including public discussions and awareness creation. The CEDAW Committee COs can play a helpful role here in grounding and validating a more progressive narrative that acknowledges and advances women's rights to property. Relevant government bodies and CSOs can use the recommendations in the COs in their public awareness programmes targeted toward changing behaviour and beliefs. For example, the Kenya Human Rights Commission and KELIN Kenya have included references to the Concluding Observations in trainings conducted at the grassroots



*The Directorate of Gender within the Ministry of Lands in Kenya recommends the importance of utilizing these COs to increase awareness and start to shift the narrative within government institutions so that the people who are tasked with enforcing the progressive laws can believe in them and actually do what they cannot make them a reality.*

levels to teach men the importance of including women in decision-making and to affirm the importance of women being able to own and control land and resources. Such concepts can also be included in school-curricula or discussed in informal settings such as community gatherings and social events.

Shifting the narrative, particularly the patriarchal and traditional narrative that women are considered as children and cannot own property, is pervasive even in the government institutions and structures.<sup>135</sup> The Directorate of Gender within the Ministry of Lands in Kenya recommends the importance of utilizing these COs to increase awareness and starting to shift the narrative within government institutions so that the people who are tasked with enforcing the progressive laws can believe in the laws and actually do what they can to make them a reality. At the end of the day progressive laws alone are not enough. The implementers also must have transformed perspectives in order to play their roles to bring change. State representatives readily admit that in some instances, some government officials, including the local administration such as the office of the Chief, can be stumbling blocks to realising women's property rights because they hold the patriarchal notions that women cannot own property and would therefore not support their attempts to claim land and property rights.<sup>136</sup>

## 2. Litigation

Women and civil society organisations can use COs of CEDAW to initiate litigation or to support their arguments before courts. This is made possible as the Constitution of Kenya incorporates general rules of international law and treaties and conventions ratified by Kenya into the law of Kenya.<sup>137</sup> It is also possible to utilize the CEDAW reporting process to advocate for the implementation of court cases on women's land and property rights.

<sup>135</sup> See, for instance, Section 40 of the Law of Succession Act which provides that when determining how to distribute the estate of a deceased polygamous man, his estate shall be divided among the 'houses' according to the number of children in each house, and wives shall be 'an additional unit to the number of children'.

<sup>136</sup> Interview with Gender Focal Point, Ministry of Land and Physical Planning.

<sup>137</sup> Constitution of Kenya 2010, art 2(5) and (6).

For instance, in 2016, the FIDA Kenya moved the court to challenge the constitutionality of Section 7 of the Matrimonial Property Act which provides that matrimonial property shall be owned by the spouses in accordance with their contribution to the acquisition of the property.<sup>138</sup> FIDA Kenya challenged this on the basis of violating the constitutional guarantees of equality between partners in a marriage. This case was filed following the progressive recommendations given by the Committee on Economic Social and Cultural Rights (CESCR) advising the Government to review the gender discriminatory provisions in the Matrimonial Property Act.<sup>139</sup> The CESCR issued these COs following a parallel report flagging the gender discriminatory provisions submitted by FIDA Kenya, Hakijamii and GI-ESCR.<sup>140</sup> While this case was not successful, it is a demonstration of the potential of using COs in litigation.

### 3. Advocacy for amendment of legislation

Advocacy for a legislative amendment to make the law more conducive for the realisation of women's rights to property. For instance, KELIN has used the COs issued by CEDAW to push for changes to the Law of Succession Act in order to protect widows' rights to property. In many communities, widows would be evicted from their matrimonial homes by their spouses' relatives, and the law of succession act even provides that a widow would lose her inheritance from her deceased spouse upon her remarriage.<sup>141</sup> KELIN carried out advocacy leveraging the COs to have the Law of Succession Act amended, including meetings with representatives from the Office of the Attorney General and working with a legislator who would champion the bill in Parliament community forums. Their advocacy efforts resulted in a draft bill prepared by the Office of the Attorney General. However, this bill stalled before being introduced into the Parliament and the amendments have, therefore, not been effected. In parallel, a different draft was submitted to the Senate; however, it does not address the concerns raised by civil society on the discriminatory provisions.<sup>142</sup> This also highlights some of the challenges of advocacy in general.

Some concluding observations by CEDAW highlight the inefficiencies in some of the laws enacted by the Kenyan parliament. These COs suggest amendments to such legislation, for example, Section 7 of the Matrimonial Property Act. Civil society organisations could use such COs as backups to advocate for the amendment of problematic laws.

<sup>139</sup> CESCR, 'Concluding observations on the combined second to fifth periodic reports of Kenya' (2016) <<https://undocs.org/E/C.12/KEN/CO/2-5>> accessed 6 June 2020.

<sup>140</sup> Economic and Social Rights Centre – Hakijamii, Federation of Women Lawyers (FIDA) Kenya and Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), 'Joint Shadow Report to the United Nations Committee on Economic, Social and Cultural Rights' (Kenya, 57th Session (22 Feb 2016 - 04 Mar 2016)) <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCSS%2fKEN%2f22790&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCSS%2fKEN%2f22790&Lang=en)> accessed 6 June 2020.

<sup>141</sup> KELIN, 'Interview with Jessica Oluoch, Senior Programme Officer, Women's, Land and Property Rights'. See also, Section 35(1) and 36(1) of the Law of Succession Act which provide that a surviving spouse loses their right to the property they inherit from their deceased spouse upon their (the surviving spouse) re-marriage.

<sup>142</sup> The Law of Succession (Amendment) Bill, Laws of Kenya (2020) <<http://www.parliament.go.ke/sites/default/files/2020-02/The%20Law%20of%20Succession%20%28Amendment%29%20Bill%2C%202020.pdf>> accessed 6 June 2020.

## 4. Advocacy for implementation of legislation

Apart from using COs to advocate for the amendment of legislation, CSOs can use them to push for implementation of existing legislation. One of the COs by CEDAW, for example, was with respect to the enactment of the Duale Bill, which would assist in the implementation of the two-third gender constitutional requirement. Where the law already exists but is not being implemented on the ground, CSOs can utilize COs for this purpose.

On 22nd April 2005, a coalition of NGOs in Kenya, among them Hakijamii, FIDA-Kenya and the Kenya Human Rights Commission (KHRC), issued a press release following the 83rd session of the Human Rights Committee (HRC) in New York. Among the issues discussed by the Committee was the situation of women in Kenya. The coalition not only welcomed the recommendations of the Committee but urged the Kenyan government to take measures to incorporate the provisions of the International Covenant on Civil and Political Rights (ICCPR) into domestic law. Most importantly, the coalition urged the government to implement the recommendations of the HRC regarding the situation of women by addressing the absence of constitutional safeguards against discrimination and issues such as sexual violence, female genital mutilation and maternal mortality. The coalition promised to closely monitor the government's implementation of the HRC's recommendations and regularly update treaty bodies on any actions taken in this regard.<sup>143</sup>

While this action was not specifically on CEDAW's Concluding Observations, it illustrates the kind of influence which CSOs wield in monitoring, reporting and demanding compliance with COs of treaty bodies. Such roles exercised by CSOs come in handy in stimulating legal reform. Some of the recommendations by the HRC, thanks to pressure by CSOs, found their way into the 2010 Constitution and subsequent legislation. Notably, the new Constitution restated the prohibition on discrimination in clearer terms. While the 1963 Constitution did not provide for sex or gender as grounds for discrimination, the 2010 one does. The latter also contains provisions on gender equality, notably, the two-thirds gender rule in political representation, as well as elimination of gender discrimination in law, customs and practices related to land and property in land.<sup>144</sup> The principles of non-discrimination and gender equality have been transposed to laws that were enacted after 2010, including the Land Act, Land Registration Act and the Community Land Act.

<sup>143</sup> 'NGOs welcome the concluding observations on Kenya adopted by the UN Human Rights Committee (HRC) and ask for their full and prompt implementation' (Press Release, 2005) <[https://www.omct.org/files/2005/04/2800/press\\_release\\_hrc\\_kenya.pdf](https://www.omct.org/files/2005/04/2800/press_release_hrc_kenya.pdf)> accessed 6 June 2020.

<sup>144</sup> Constitution of Kenya 2010, arts 27, 59, 60, 81, 175, 197.

Similarly, on 21st February 2014, Sengwer community leaders and land and human rights advocacy organisations sent an open letter to the Government of Kenya regarding the forcible evictions of indigenous peoples living in the Embobut Forest. The coalition, including Katiba Institute and the Kenya Human Rights Commission (KHRC), condemned the evictions terming them as a grave violation of the Kenyan Constitution and international human rights law. Among the recommendations given by the NGOs included the use of the National Land Commission (NLC) to find a sustainable solution for the indigenous communities living in Embobut and other forests. The NGOs also recommended the enactment of the Community Land Bill to solve some of the problems related to indigenous communities and their ancestral land rights. They also called upon the NLC to conduct evictions in a manner consistent with the 2010 Constitution and provisions of the Land Act.<sup>145</sup>

While this press release does not directly refer to CEDAW Concluding Observations, it highlights the role of civil society organisations in using COs to influence changes and compliances with existing human rights obligations of the state. Examples can be drawn from COs of other treaty bodies such as the Committee for Economic, Social and Cultural Rights (CESCR), the Human Rights Committee (HRC) and the Committee on the Elimination of Racial Discrimination (CERD), which have previously condemned the eviction of indigenous communities without proper process and access to justice.<sup>146</sup> The Human Rights Committee, in its 2005 Cos, reminded the state that such evictions infringe upon rights under the ICCPR.<sup>147</sup> Kenya was asked to develop transparent eviction policies and procedures, which also include consultations with those affected.<sup>148</sup> In 2016, the CESCR expressed concern at the lack of a legislative framework for the recognition and protection of community rights to land and recommended that the state take steps to guarantee security of tenure to all and to enact the Community Land Bill.<sup>149</sup> In 2017, CERD lauded Kenya for enacting the Legal Aid Act, 2016, but expressed concern that there still existed barriers in access to justice by indigenous people and women.<sup>150</sup>

<sup>145</sup>Kenya Human Rights Commission, 'The Truth About Embobut Forest Evictions and A Way Forward: Land and Human Rights Advocacy Organizations' Open Letter to the Government of Kenya and Other State Actors on Land, Environment and Natural Resources' <<https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/395-the-truth-about-embobut-forest-evictions-and-a-way-forward.html>> accessed 6 June 2020.

<sup>146</sup> Committee on the Elimination of Racial Discrimination, 'Concluding observations on the fifth to seventh periodic reports of Kenya' (CERD/C/KEN/CO/5-7, 2017) para 19; Human Rights Committee Eighty-third session, 'Consideration of Reports submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Kenya' (CCPR/CO/83/KEN, 2005).

<sup>147</sup>Human Rights Committee Eighty-third session (n 153) para 22.

<sup>148</sup>ibid.

<sup>149</sup> Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the combined second to fifth periodic reports of Kenya' (E/C.12/KEN/CO/2-5, 2016).

Committee on the Elimination of Racial Discrimination (n 153) paras 15 and 16.

<sup>150</sup>The Community Land Act, Laws of Kenya, s 30.

Just as the NGOs pushed for the enactment of the Community Land Bill pursuant to recommendations by the HRC and the CESCR COs in the present press release, they could also clamour for changes based on CEDAW COs requiring legislative change.

The Community Land Act was eventually enacted, and it contains provisions safeguarding not only the rights of communities to their customary land but also safeguards for women rights to land in this context. For example, the law prohibits discrimination and gives members of a community the right to be equally benefitted from community land, including full and equal enjoyment to use and access it. It also specifically provides that women have a right to equal treatment in all dealings related to community land. Additionally, a woman married to a member of a community gains automatic membership to that community unless she remarries upon divorcing her spouse or upon her spouse's death.

## 5. Advocacy with other international and regional human rights mechanisms

### The Endorois Case

The Endorois are an indigenous community found around Lake Bogoria, in the Rift Valley, Kenya. In the 1970s, the community was evicted from their ancestral land by the government to facilitate the creation of a national reserve. The Endorois filed a case before the African Commission on Human and Peoples' Rights challenging the forced displacement and the violation of their right to property among other rights.

In 2010, the ACHPR issued a landmark ruling calling for the statement that the government of Kenya had violated the rights of the Endorois people and calling on the State to restore the Endorois to their ancestral land, including ensuring that the women are able to enjoy their rights to that property.

*In their 2017 COs to Kenya, the CEDAW Committee 'notes with concern that indigenous women in the State Party, including Endorois women, have limited access to traditional lands owing to the failure to implement the ruling of 2010 by the African Commission on Human and Peoples' Rights, which recognised their rights to ancestral land in the Rift Valley, and the lack of consultation with them'.*

*As a result, they recommended that Kenya should: 'Take immediate steps to implement the ruling of the African Commission on Human and Peoples' Rights regarding the rights of the Endorois people to their ancestral land, and ensure consultation with Endorois women during this process'.*

However, since the issuance of the COs in 2017, not much progress has been made towards their implementation. The mandate of the taskforce that was established in 2014 to oversee the implementation of the African Commission ruling expired in 2016, and no new mandate holders have been appointed by the State since. Without this taskforce, no progress has been made towards implementation of the ruling or the concluding observations on this matter. The Endorois Welfare Council highlighted the challenges of pushing for the implementation of these COs, highlighting in particular vested interests and lack of political will and limited resources.

Concluding Observations issued by treaty bodies can also be used as leveraging tools for advocacy before other UN human rights institutions and mechanisms. Governments that refuse to address or ignore COs might be encouraged through other human rights institutions and mechanisms to advance in their implementation. Cross-referencing in UN human rights recommendations and decisions can be an effective means to press States to take effective action.

In this section, we will provide with a brief overview of key UN human rights institutions and mechanisms where COs can be used as leveraging tools to draw attention to, further document and support human rights claims. This can be part of a larger advocacy strategy to change national laws, policy, and practices, as well as to gain media attention to enhance local advocacy efforts.

### a. Universal Periodic Review

The Universal Periodic Review (UPR) is a process where the national human rights situation of each one of the 193 members of the United Nations is evaluated once every four years.<sup>154</sup> The reviews are conducted by the UPR Working Group, which consists of 47 state members of the Human Rights Council; however, any UN Member State can take part in the evaluation process of the States. The UPR gives to each country the opportunity to share actions undertaken to advance the national human rights agenda and to comply with its international human rights obligations.<sup>155</sup> In response, the UPR Working Group issues an outcome report, which includes tailored recommendations to the country being reviewed, to draw attention to and provide advice on how to best address its main human rights challenges.

The review is based on three main documents: i) the national report produced by the government; ii) the report compiling relevant information on the country's human rights situation issued by UN human rights entities, including Concluding Observations delivered by treaty bodies; and iii) information from other stakeholders, namely national human rights institutions, non-governmental organizations and other members of civil society.

CSOs play an essential role throughout the process by raising essential human rights concerns that the UPR Working Group should consider in the outcomes report, including by referring to unimplemented COs. Moreover, COs can be used in lobbying activities with the Delegations and Diplomatic Missions of third states to persuade them to raise certain human rights topics and concerns during the country's UPR exam.

**Detailed information about contributions and participation of civil society and other stakeholders in the UPR may be found at the Website of the Office of the High Commissioner for Human Rights (<https://www.ohchr.org/en/hrbodies/upr/pages/ngosnhris.aspx>).**

<sup>154</sup> United Nations Human Rights Council, 'Basic facts about the UPR' (2018) <<https://www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx>> accessed 6 June 2020.

<sup>155</sup> *ibid.*

**An organization called UPR-Info also maintains a website with a searchable database of UPR recommendations that could be consulted to identify potentially receptive countries to key human rights issues** (<https://www.upr-info.org/en>).

## B. Special Procedures of the Human Rights Council

Concluding observations can also be leveraged in other special procedures within the UN Human rights system. These 'Special Procedures' include independent experts or mandate holders that address specific human rights thematic issues (e.g. right to education, rights to water and sanitation, right to adequate housing, etc.) and specific country situations (e.g. human rights situation in Myanmar, Iran, Burundi, etc). Special Procedures typically monitor, evaluate and advise various bodies on human rights situations; assessing and responding to individual complaints on human rights violations and engaging in human rights standards development and promotion.<sup>156</sup>

Most Special Procedures can receive information on specific allegations of human rights violations from civil society and other non-state actors. Advocates and NGOs can send written submissions to the Special Procedures to invoke COs as compelling and reliable evidence of the human rights abuses occurring in the territory of a State.

Similarly, civil society can make use of COs as leveraging tools to raise human rights concerns during Special Procedures' country visits. The main purpose of the visit is for Special Procedures to directly observe the human rights situation in the country and to facilitate dialogue with all relevant national stakeholders. At the end of the visit, Special Procedure will issue a country report providing an in-depth analysis of the situation with key recommendations.

In this context, advocates could take advantage of previously issued COs to draw the Special Procedure's attention to women's right to land and property. Special Procedure tends to give careful consideration to recommendations issued by treaty bodies when analysing the human rights situation in the country and drafting its final country visit report.

For instance, the report issued by the 'Working Group on the issue of human rights and transnational corporations and other business enterprises' (Working Group) after the conclusion of its country-visit to Kenya in 2018 is an illustrative example. In the report, the Working Group expressly mentioned that the lack of enforcement of laws and policies relating to women equality in Kenya was hindering the achievement of the expected outcomes of some key incentives, such as the Women Enterprise Fund and the Youth Enterprise Development Fund. The Special Procedure echoed the COs made by the CEDAW Committee exhorting Kenya 'to design and establish enforcement mechanisms [and] assist women and vulnerable groups to gain access to these funds and facilitate their applications'.<sup>157</sup>

<sup>156</sup> International Justice Resource Centre, 'The Human Rights Council's Special Procedures' (2020) <<https://ijrcenter.org/un-special-procedures/>> accessed 6 June 2020.

<sup>157</sup> Human Rights Council Forty-first Session, 'Visit to Kenya: Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (A/HRC/41/43/Add.2, 2019) para 65.



*The United Nations has one common set of instructions for contacting and submitting information to the various UN Special Procedure mandate-holders, and the updated list of all thematic and country-specific Special Procedures can also be consulted in the United Nations High Commissioner for Human Rights website*

The Working Group also cited CEDAW Committee's recommendations to Kenya regarding the adoption of legislation criminalizing sexual harassment in the workplace.<sup>158</sup> These references to Concluding Observations served the double purpose of highlighting a widespread pattern of women's human rights violation in Kenya and to reinforce and support the recommendations previously made by the human rights treaty bodies to press the government to undertake decisive steps to address the situation.

The United Nations has one **common set of instructions** for contacting and submitting information to the various UN Special Procedure mandate-holders, and the updated list of all **thematic** and **country-specific** Special Procedures can also be consulted in the United Nations High Commissioner for Human Rights website. (<https://spsubmission.ohchr.org>).

## C. Other treaty body's human rights accountability mechanisms

In addition to the examination of periodic national and alternative reports and the issuance of COs to State Parties, most treaty bodies also have established an individual complaint mechanism and an inquiry procedure as accountability human rights mechanisms. In the same fashion as other human rights procedures, COs can be cited by advocates, NGOs and human rights defenders on written submissions presented to treaty bodies to demonstrate the occurrence of human rights abuses.

### i. Individual complaint procedure

Currently, eight of the human rights treaty bodies may, under certain conditions, receive and consider individual complaints or communications from individuals.<sup>159</sup> Under this procedure, any individuals who have been victim of a human right violation can file a complaint before the relevant treaty body against the State that is a party to the convention and has recognised the competence of the treaty body to consider complaints from individuals.

<sup>158</sup> *ibid* para 67.

<sup>159</sup> The Human Rights Committee (CCPR), the Committee on the Elimination of Racial Discrimination (CERD), Committee against Torture (CAT), Committee on Elimination of Discrimination against Women (CEDAW), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED), Committee on Economic, Social and Cultural Rights (CESCR) and Committee on the Rights of the Child (CRC).

Commonly, on individual communications to treaty bodies, advocates cite previous COs that raise concerns over the conduct of the State Party at hand related to human rights questions that are the subject matter of an individual complaint. Referring to previous COs issued by the same and/or other treaty bodies can serve as effective proof of the existence of a pattern or context of human rights violations directly related to the case.

Kenya has not ratified the Optional Protocol to the CEDAW; thus, it has not recognised the competence of the CEDAW Committee to receive and consider individual communications. However, an illustrative example of cross-referencing COs on individual complaint case can be found on the CEDAW Committee decision, *L.C. v Peru*.<sup>160</sup> The decision deals with the lack of adequate recognition of sexual and reproductive rights referred to CEDAW Committee's COs addressed to Peru in 2007, which among other things, expressed concern at the lack of implementation of recommendations made by the Human Rights Committee in the case *KL v Peru*.<sup>161</sup> This decision illustrates well how human rights treaty bodies rely on COs previously issued by the same or other human rights treaty bodies to further emphasise a State Party reiterative conduct causing human rights violations and reinforce relevant recommendations as mean to press State Parties to take effective action to address the situation.

A similar example of cross-referencing can be found in the *Ms. V.K. v Bulgaria* decision issued by the CEDAW Committee. In this case, the complainant submitted that the lack of a law on equality between women and men, the lack of recognition of violence against women as a form of discrimination, and the lack of positive measures in favour of women victims of domestic violence, resulted in inequality in practice and the denial of the enjoyment of her human rights.<sup>162</sup> In that light, she specifically recalled the 1998 CEDAW Committee COs on Bulgaria, in which the experts identified the problem of violence against women, including domestic violence, and urged the Government 'to develop an array of medical, psychological and other measures to assist women victims of violence and to change prevailing attitudes to domestic violence, which view it as a private problem'.<sup>163</sup> This case illustrates how a claimant may use COs as an advocacy tool to further document, argue and highlight a pattern of human rights violations and the lack of effective State action to respond to the situation directly affecting the realisation of her rights.

Information about the particularities of the process under CEDAW and other treaty bodies can be found on the manual issued by the Office of the United Nations High Commissioner on **Individual Complaint Procedures under the United Nations Human Rights Treaties**. (<https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>)

<sup>160</sup> CEDAW, '*L.C. v Peru*' (CEDAW/C/50/D/22/2009, 2011) <[https://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW.C.50.D.22.2009\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW.C.50.D.22.2009_en.pdf)> accessed 6 June 2020.

<sup>161</sup> *ibid* para 5.5.

<sup>162</sup> CEDAW, '*Ms. V.K. v Bulgaria*' (CEDAW/C/49/D/20/2008, 2011) <[https://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C-49-D-20-2008\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW-C-49-D-20-2008_en.pdf)> accessed 6 June 2020, para 3.

<sup>163</sup> *ibid*



*Like other fact-finding missions, Concluding Observations from treaty bodies can be used as an effective means to prove claims about the severity of the national human rights situation on certain subject matters relevant to the inquiry procedure.*

## ii. Inquiry procedure

Five treaty bodies have established an inquiry procedure whereby they can initiate an investigation upon receiving reliable information on serious, grave or systematic violations allegedly committed in the territory of a State Party of the convention.<sup>164</sup> Only State Parties that have expressly agreed to be subjected to this procedure can be examined under this procedure.

If a treaty body decides to initiate an inquiry procedure based on reliable information of systemic human rights violations, the treaty body will gather information from the State and civil society sources in order to better understand the situation.<sup>165</sup> Like other fact-finding missions, Concluding Observations from treaty bodies can be used as an effective means to prove claims about the severity of the national human rights situation on certain subject matters relevant to the inquiry procedure.

One inquiry procedure concerned grave and systematic violations of rights set forth in the CEDAW, due to: extremely high levels of violence towards aboriginal women and girls in Canada, as shown by the high number of disappearances and murders of aboriginal women and the denial of property rights over aboriginal women's traditional lands and natural resources.<sup>166</sup> The Committee noted that the legacy of colonization, the development of post-colonial policies that embodied institutionalized discrimination against and stigmatization of aboriginal people, such as the adverse impact of gender inequality embedded in the Canadian Indian Act, and persistent tensions resulting from land claims and treaty rights are all factors that cannot be analysed separated from the current violence against aboriginal women and the continued and increased vulnerability of aboriginal women to such violence.<sup>167</sup>

<sup>164</sup> Committee against Torture (article 20 CAT), Committee on the Elimination of Discrimination against Women (article 8 of the Optional Protocol to CEDAW), Committee on the Rights of Persons with Disabilities (article 6 Optional Protocol to CRPD), Committee on Enforced Disappearances (article 33 of CED), Committee on Economic, Social and Cultural Rights (article 11 of the Optional Protocol to ICESCR) and Committee on the Rights of the Child (article 13 of the Optional Protocol (on a communications procedure) to CRC).

<sup>165</sup> Women Enabled International, 'accountABILITY toolkit, A Guide to Using U.N. Human Rights Mechanisms to Advance the Rights of Women and Girls with Disabilities' (2017), <<https://womenenabled.org/atk/Women%20Enabled%20International%20accountABILITY%20toolkit%20-%20Using%20UN%20Human%20Rights%20Mechanisms%20to%20Advance%20the%20Rights%20of%20Women%20and%20Girls%20with%20Disabilities%20-%20ENGLISH%20-%20FINAL.pdf>> accessed 6 June 2020, p 5.

<sup>166</sup> CEDAW, 'Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' (CEDAW/C/OP.8/CAN/1, 2015) <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fOP.8%2fCAN%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fOP.8%2fCAN%2f1&Lang=en)> accessed 6 June 2020, para 4.

<sup>167</sup> ibid para 129.

The view of the Committee was corroborated by information received by several civil society organizations and by several Special Procedures, including Special Rapporteur on the rights of indigenous peoples.<sup>168</sup> Information was also received by the Committee on the Elimination of Racial Discrimination under that Committee's reporting procedure, including previous COs address to Canada on the situation of aboriginal peoples.<sup>169</sup> Furthermore, the Committee explicitly mentioned that the decision to open an inquiry procedure was taken after Canada's repeated and consistent failure to comply with CEDAW Committee's COs and follow-up recommendations.<sup>170</sup>

Once again, in this human rights mechanism, we see human rights treaty bodies' cross-referencing to mutually support efforts to respond to critical human rights situations and to build up the pressure to compel State Parties to comply with previously issued COs and follow-up recommendations.<sup>170</sup>

General information on the steps of the inquiry procedure conducted by treaty bodies can be found on the website of the **Office of the United Nations High Commissioner for Human Rights** and details about the specific inquiry process under CEDAW can be found here. (<https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#inquiries>)

## 6. Leveraging the 2030 Agenda for Sustainable Development

The 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs) constitute a non-legally binding global framework adopted by UN General Assembly to tackle the most pressing challenges of our times, including the reduction of poverty and gender inequalities, economic development, climate change, health and education, urbanization, and environmental protection.<sup>171</sup> In particular, SDG 5 addresses gender inequality, including ending all forms of discrimination and harmful practices against women and girls and ensuring women's 'equal rights to economic resources, as well as ownership and control over land and other forms of property and natural resources.<sup>172</sup> The SDGs, therefore, provide a generally accepted standard which can be utilised to advance human rights gains for women.

States have the primary obligation to advance in the implementation of the SDGs, but other stakeholders, including civil society organizations, private actors, local authorities, academics and citizens, are strongly encouraged to participate and contribute, aligning their actions to these global efforts.<sup>173</sup> To measure and support the multi-stakeholder progress towards the 2030 Agenda, States have established several follow-up and review processes at the global, regional, national and even, sub-national levels that

<sup>168</sup> *ibid* para 13.

<sup>169</sup> *ibid*.

<sup>170</sup> *ibid* paras 10-12.

<sup>171</sup> UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (A/RES/70/1, 2015) <[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_1\\_E.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf)> accessed 6 June 2020.

<sup>172</sup> *ibid*, SDG 5.

<sup>173</sup> *ibid* no 1, para 47.

<sup>174</sup> Mark Halle and Robert Wolfe, 'Follow-Up and Review for the 2030 Agenda: Bringing coherence to the work of the HLPF' (International Institute for Sustainable Development 2016) <<https://www.iisd.org/sites/default/files/publications/hlpf-follow-up-review-2030-agenda.pdf>> accessed 6 June



*One inquiry procedure concerned grave and systematic violations of rights set forth in the CEDAW, due to: extremely high levels of violence towards aboriginal women and girls in Canada, as shown by the high number of disappearances and murders of aboriginal women and the denial of property rights over aboriginal women's traditional lands and natural resources.*

provide a wide array of opportunities for advocates and civil society organizations to participate and make their voices heard by decisionmakers.<sup>174</sup>

At the global level, the High-Level Political Forum (HLPF) is the main UN platform on sustainable development that meets every four years at the level of Head of States and Government under the auspices of the UN General Assembly and annually under the auspices of the Economic and Social Council.<sup>175</sup> It has the central role in overseeing the follow-up and review process of the 2030 Agenda in collaboration with other relevant UN organs and forums.<sup>176</sup> The HLPF serves as a multi-stakeholder forum to review States' progress in the implementation of the SDGs through the Voluntary National Review (VNR) process.<sup>177</sup>

The VNR is a state-driven, non-compulsory and periodic review mechanism that is undertaken by countries to share good practices, challenges, accomplishments and ideas for the development of partnerships in the advancement of the 2030 Agenda.<sup>178</sup> Like other reporting processes, the VNR countries submit a written report in advance of the HLPF and State representatives present it to a multi-stakeholder audience, receive questions and provide answers during the HLPF.<sup>179</sup> This open dialogue includes time for 'Major Groups and other Stakeholders', which, inter alia, include civil society members and organizations, to deliver collaborative statements and pose questions to the respective government.<sup>180</sup>

Against this backdrop, we can identify three phases in the VNR process that provide several opportunities for advocates and civil society members to participate and bring to the attention of decisionmakers key concerns and demands related to women's rights to land and property, namely: i) planning and drafting of the State's report; ii)

<sup>175</sup> 'High Level Political Forum' (UN Sustainable Development Goals Knowledge Platform) <<https://sustainabledevelopment.un.org/hlpf>> accessed 6 June 2020.

<sup>176</sup> UN General Assembly, 'Follow-up and review of the 2030 Agenda for Sustainable Development at the global level' (A/70/L.60, 2020) <[https://www.un.org/ga/search/view\\_doc.asp?symbol=A/70/L.60&Lang=E](https://www.un.org/ga/search/view_doc.asp?symbol=A/70/L.60&Lang=E)> accessed 6 June 2020.

<sup>177</sup> ibid no 1, para 79. 'Voluntary National Review Database' (UN Sustainable Development Goals Knowledge Platform) <<https://sustainabledevelopment.un.org/vnrs/>> accessed 6 June 2020.

<sup>178</sup> OHCHR, 'Voluntary National Reviews' (High Level Political Forum on Sustainable Development, 2020) <<https://www.ohchr.org/EN/Issues/SDGS/Pages/2020VoluntaryNationalReviews.aspx>> accessed 6 June 2020.

<sup>179</sup> 'Voluntary common reporting guidelines for voluntary national reviews at the high-level political forum for sustainable development (HLPF)' (Sustainable Development Knowledge Platform) <[https://sustainabledevelopment.un.org/content/documents/17346Updated\\_Voluntary\\_Guidelines.pdf](https://sustainabledevelopment.un.org/content/documents/17346Updated_Voluntary_Guidelines.pdf)> accessed 6 June 2020.

<sup>180</sup> 'Process for Major Groups and other Stakeholders (MGoS) Engagement in the Voluntary National Review (VNR) Sessions' (High Level Political Forum for Sustainable Development) <[https://sustainabledevelopment.un.org/content/documents/22610Process\\_for\\_MGoS\\_engagement\\_in\\_the\\_VNR\\_Sessions\\_FINAL2.05.2019.pdf](https://sustainabledevelopment.un.org/content/documents/22610Process_for_MGoS_engagement_in_the_VNR_Sessions_FINAL2.05.2019.pdf)> accessed 6 June 2020.

presentation and dialogue before the HLPF; and iii) implementation of the goals and commitments acquired by the State.

In the initial phase, during the planning and drafting of the national report, almost all States have developed participatory mechanisms to include relevant stakeholders in the discussions about the national and subnational progress achieved in the SDGs implementation. These mechanisms have taken many forms: consultations, workshops, conferences and online tools to engage and collect the views of a wide diversity of non-state actors. For instance, in Guyana, the government makes use of special-purpose committees and other fora to engage with, among others, civil society organisations, youth indigenous peoples and the private sector.<sup>181</sup> Mauritius, on the other hand, developed a Stakeholder Engagement Plan to ensure engagement and participation in the VNR process whereby it sent an SDGs questionnaire with specific criteria to gather information from several constituencies and civil society organisations.<sup>182</sup> Another example is Chile, where the government promoted the participation of established networks representing the civil society and the private sector, organised participatory workshops on key priorities and actions for implementation, and created an open online portal for submissions by non-governmental actors for their inclusion in the VNR report.<sup>183</sup>

All these national mechanisms provide examples of the many different responses that governments have taken to promote engagement with and participation of civil society, which provide with valuable opportunities for activists and civil society organisations to voice concerns and demand State action. In this context, COs issued by human rights treaty bodies on subject matters related to the SDGs and its targets, for instance, women's rights to access land and property, could effectively be used to document, support and raise awareness on these issues.

On the second phase, during the presentation of the VNR report at the HLPF, advocates, activists and other representatives of civil society can participate as part of the Major Groups and other Stakeholders in the review process delivering statements, posing questions and making recommendations to the reviewed State. CSOs can also attend official meetings and organise side events alongside the HLPF in cooperation with the Member States and the Secretariat. This provides another leveraging space to use COs and remind States of their duty to make further specific efforts towards addressing issues preventing women from enjoying their right to land and property.<sup>184</sup>

Finally, on the third phase concerning the implementation of the goals and commitments acquired by the State, civil society can participate by informing, monitoring, measuring progress and evaluating challenges and achievements at the national and subnational levels. For example, Benin has a steering committee

<sup>181</sup> UN Department of Economic and Social Affairs, 'Multi-stakeholder engagement in the 2030 Agenda implementation: a review of Voluntary National Reports (2016-2019)' <<https://sustainabledevelopment.un.org/content/documents/26012VNRStakeholdersResearch.pdf>> accessed 6 June 2020.

<sup>182</sup> *ibid.*

<sup>183</sup> *ibid.*

<sup>184</sup> Detailed information about civil society engagement in the VNR process can be found here: <[https://sustainabledevelopment.un.org/content/documents/22610Process\\_for\\_MGoS\\_engagement\\_in\\_the\\_VNR\\_Sessions\\_FINAL2.05.2019.pdf](https://sustainabledevelopment.un.org/content/documents/22610Process_for_MGoS_engagement_in_the_VNR_Sessions_FINAL2.05.2019.pdf)> accessed 6 June 2020.



*As demonstrated by the case study on Kenya, concluding observations are a versatile advocacy instrument that can serve multiple purposes to leverage a wide range of national and international spaces and decision makers to ensure State Parties comply with their international obligations and take effective action to address women's rights to land and property*

that supervises government's policies for the implementation of the SDGs, and it is composed by, *inter alia*, representatives of civil society organisations.<sup>185</sup> Similarly, the provincial government of Azuay Province in Ecuador put into practice a Participatory Planning System for the implementation of the SDGs in its territory, using a People's Provincial Parliament and the Cantonal and Community Assemblies to bring together a wide range of stakeholders for coherent institutional planning.<sup>186</sup>

Reporting through the SDG forum provides a different framing and entry point for the discussion on women's right to land and property. It provides an opportunity to draw in actors from different perspectives and build momentum for the necessary changes required for women's rights to land and property to be realised. It also provides a space to mainstream human rights principles and asks in the development agenda, adding a development-based framework, which may resonate with a broader audience.

## Conclusion

Following up on instrumental resources on women's land rights and using the treaty reporting process, this report was designed to provide NGOs and advocates with the targeted information to encourage their broader participation in UN human rights mechanisms, particularly in treaty bodies processes, to continue to create change and improve the human rights situation in their countries. As demonstrated by the case study on Kenya, concluding observations are a versatile advocacy instrument that can serve multiple purposes to leverage a wide range of national and international spaces and decision makers to ensure State Parties comply with their international obligations and take effective action to address women's rights to land and property.

COs are more effective as part of a comprehensive and long-term advocacy strategy, which opens new dialogue opportunities with decision-makers, rights-holders, partner organisations and other relevant stakeholders. The reporting and follow up process provide advocates with the opportunity to collect data, lobby state authorities and raise awareness about the most pressing issues impeding the realisation of women's rights to property. human rights questions to create the conditions for the realization of human rights.

<sup>185</sup> *ibid* no 13.

<sup>186</sup> PNUD, UN Habitat and Global Task Force of Local and Regional Governments, 'Roadmap for Localizing the SDGs: Implementation and Monitoring at Subnational Level' (2016) <[https://www.uclg.org/sites/default/files/roadmap\\_for\\_localizing\\_the\\_sdgs\\_0.pdf](https://www.uclg.org/sites/default/files/roadmap_for_localizing_the_sdgs_0.pdf)> accessed 6 June 2020.

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