



For the past twenty years IDLO has sought to advance the rule of law and good governance in developing countries and transitioning countries by strengthening judicial and local institutions to promote a viable legal framework for commerce, trade and investment. Given its history of using legal empowerment to spur development, IDLO is in a unique position to address the legal/capacity deficiencies that contribute to the spread of HIV/AIDS, itself an impediment to development.

In addressing the link between HIV/AIDS and gender, IDLO has conducted in-country legal, institutional resource studies, videoconference policy discussion forums, and diagnostic sessions.<sup>1</sup> This month's Development Law Update highlights significant lessons learned.

The international community has increasingly recognized the gender dimensions of HIV/AIDS and the need to battle both fronts to halt the spread of the disease.<sup>2</sup> In 2000, 189 UN Member States adopted the Millennium Declaration, in which they pledged to promote gender equality and the empowerment of women as effective ways to combat poverty, hunger, and disease. Two out of the eight Millennium Development Goals are directly related to the issue of Gender and HIV/AIDS. Millennium Development Goal 3 focuses on gender equality and women and girls' empowerment, while Goal 6 aims at reducing the impact of HIV/AIDS, malaria and other diseases.<sup>4</sup> As with all of the goals, these two goals are mutually reinforcing, as article 15 of the Declaration of Commitment on HIV/AIDS signed in 2001 at the United Nations General Assembly Special Session on HIV/AIDS noted "gender equality and the empowerment of women are fundamental in the reduction of the vulnerability of women and girls to HIV/AIDS."<sup>5</sup>

### **I. Background:**

As of 2004, an estimated 40 million people are living with HIV/AIDS and 14,000 new infections are reported every day.<sup>6</sup> In sub-Saharan Africa alone, almost 4.5 million people need antiretroviral treatment, yet only 100,000 currently receive it.<sup>7</sup> With statistics such as these, there is no doubt that AIDS is spreading rapidly in sub-Saharan Africa, and that it continues to cut into the fabric of African households and societies. Equally alarming is the fact that women are disproportionately infected by HIV/AIDS due to sociological and biological factors.<sup>8</sup>

Clearly, the HIV/AIDS crisis has reached epidemic proportions; yet what is even more disturbing is its direct impact on women from developing countries, which is the result of broader societal issues such as gender inequality.<sup>9</sup> These findings have led the UN Commission on the Status of Women to conclude that the main cause of the spread of HIV/AIDS is the imbalance of power between men and women which has been promoted by cultural, social, and religious norms.<sup>10</sup> Gender, which refers to the widely shared expectations and norms within society about appropriate male and female behavior, characteristics, and roles is unfortunately a significant predictor of susceptibility to HIV/AIDS.<sup>11</sup> Women's increased vulnerability to HIV/AIDS is the result of various factors: 1) women, especially young girls, are biologically more

**"IN AFRICA, AIDS  
HAS A WOMAN'S  
FACE."**

**Kofi Annan**  
Secretary General of the United  
Nations

**UPCOMING DLU:**

**DECEMBER—**

*Development projects in  
extractive industries: difficulties  
encountered and implications  
for development policy*

DLRC Research &  
Publications Unit

**DLRC Director**  
Yohannes Kassahun  
[ykassahun@idlo.int](mailto:ykassahun@idlo.int)

**Head, Research &  
Publications**  
Thomas McInerney  
[tmcinerney@idlo.int](mailto:tmcinerney@idlo.int)

**Legal Editor**  
Rosemary Navarrete  
[rnavarrete@idlo.int](mailto:rnavarrete@idlo.int)

**IDLO**

**HEADQUARTERS**

Via S. Sebastianello 16  
00187 Rome, Italy  
Tel: +39 06 6979261  
Fax: +39 06 6781946

[ido@idlo.int](mailto:ido@idlo.int)  
[www.idlo.int](http://www.idlo.int)

**ASIA PACIFIC  
TRAINING CENTER**

Glebe Court House  
2, Talfourd Street  
2037 Glebe NSW  
Australia

Tel: +61 2 85856700  
Fax: +61 2 85856767  
[aptc@idlo.int](mailto:aptc@idlo.int)

**AFGHANISTAN  
PROGRAM OFFICE**

In front of Junction 2  
Charah-i-Shar Pour  
Kabul

[ido@idlo.int](mailto:ido@idlo.int)

susceptible to HIV transmission, particularly in the presence of other sexually transmitted infections; 2) domestic abuse and sexual violence and threats of violence make women and girls physically vulnerable; 3) they are frequently economically dependent and therefore risk abandonment or abuse if they refuse to comply, discuss fidelity, or try to negotiate safer sexual practices; 4) the female right to education is uniformly undervalued, thereby making many women less able to stand up for their rights; 5) women and girls are traditionally responsible for being the caregivers when family members become infected and fall sick; and 6) they are often expected to be socially and culturally subservient to men. It is the combination of these norms and behaviors in many societies that puts women and girls at high risk of HIV/AIDS, and undermines their ability to cope once they become infected.<sup>12</sup>

Understanding the linkage between long-standing cultural norms, large-scale legal disenfranchisement of women and the increasing vulnerability of women to HIV/AIDS should not limit the legal response to the epidemic. On the contrary, the legal response to this disproportionate impact can diminish or further exacerbate the problem. Although controversy exists as to law's ability to influence culture,<sup>13</sup> it can be said that law provides an institutional structure that allows and facilitates cultural interaction, as well as gives expression to culture.<sup>14</sup> Widespread gender abuse, which aggravates the HIV/AIDS epidemic, persists in large part because the legal, policy and program environment in Africa allow them to persist.<sup>15</sup>

Moreover, the failure of the judicial, legal, and policy sectors to address the cultural norms that encourage the spread of HIV/AIDS works to thwart the development of the country as a whole. Underdevelopment, in turn, increases a country's risk of experiencing a serious AIDS epidemic. Contrary to public opinion, the dramatic difference in HIV prevalence between developed and developing countries is not due to differences in sexual behavior patterns, but rather the disparate impact can only be explained "by invoking a number of powerful co-factors that facilitate the transmission of HIV."<sup>16</sup> Again, these co-factors are rooted in uneven and dysfunctional social development, which also manifests itself as gender inequity.<sup>17</sup>

Nevertheless, the potential for law and policy to shape the physical and social environment that determines HIV/AIDS vulnerability is immense, as is its capacity to address the gender inequities that increase the chances for infection. Research shows that legal and judicial remedies for gender abuses that increase women's risk to HIV/AIDS are inadequate or nonexistent, and even where laws are adequate they are rarely enforced.<sup>18</sup> This denial of legal rights—openly available for men—are grounded in custom and cultural mores, but they are not impervious to policy, legal and program solutions. In fact, activities and training programs directed at vital areas in need of reform, such as property and inheritance rights, labor, health, and criminal law could tackle various areas in which women are exposed to HIV/AIDS risks.<sup>19</sup>

## II. IDLO activities on the Legal Implications of HIV/AIDS and Gender:

The following describes IDLO experience on the legal implications of HIV/AIDS and gender gathered through in-country studies, distance-learning sessions, and research conducted.

### **Capacity Building in Civil Society Associations in Uganda (April 30, 2004)**

This study conducted by IDLO and Associates for Development (Kampala, Uganda), as a project of the Gender Unit of the World Bank and the Japanese Development Fund, examines the manner in which Ugandan law determines the property and rights of women and girls, members of socially vulnerable groups and people living with HIV/AIDS, and identifies areas within the law in need of reform. It is part of a larger project to assess the capacity of community-based civil society associations to resolve disputes/conflicts that arise between women, family and community members. The review was undertaken to highlight the gaps and shortcomings in current Uganda law and to emphasize activities that community-based civil service organizations can undertake to address the deficiencies that have been identified (refer to abstract below).

### **IDLO Distance Learning Activities**

With the objective of collecting information from three pilot countries and designing expert capacity building training and technical assistance on legal reform, IDLO conducted a three-part distance learning dialogue series on the multifaceted legal implications of HIV/AIDS in Tanzania, Ethiopia, and Uganda.<sup>20</sup> The experts who attended the dialogues consisted of lawyers, judicial officials, and policymakers with responsibilities that bear on the topic.

In addition to raising awareness on the nexus between gender, HIV/AIDS, and law, the distance learning sessions identified key deficiencies in the law that prevent the participating countries from effectively addressing the spread of HIV infection, discrimination, and ability of HIV/AIDS carriers to manage and live with HIV/AIDS. The sessions also discussed the means by which to draft laws and utilize the legal framework to respond to and mitigate the effects of HIV/AIDS.

As the findings in the following section show, all three participating countries are battling the epidemic, which is in different stages of severity. As a result, each had a unique perspective on the obstacles and lessons learned by the respective countries in their fights against HIV/AIDS.

## III. IDLO Country Findings:

### **Tanzania**

Since the first AIDS cases were reported in Tanzania in 1983, the epidemic has spread rapidly. According to UNAIDS estimates, at the end of 2001, more than 1.3 million people were living with HIV/AIDS, and approximately 800,000 children under age 15 had lost one or both parents to AIDS.<sup>21</sup> Predictions for the epidemic are equally alarming, as data reveal that between 1990-2010, AIDS is expected to have increased the death rate in Tanzania by more than half, with life expectancy dropping from 65 years to 37 years.

Legal experts from Tanzania provided valuable input on the state of the legal sector during the course of



Map of Tanzania: PCL Map Collection, University of Texas

several IDLO distance-learning sessions. The participants highlighted five key legal issues that need to be addressed with respect to HIV/AIDS:

- 1) confidentiality/importance of voluntary counseling, 2) abolition of traditional practices, e.g., customs that make people vulnerable to HIV/AIDS, 3) protecting the rights of those with HIV, 4) protection of children, and 5) governance and mechanisms for enforcing human rights.

Estimated Number of Adults (15 and above) Living with HIV/AIDS (end 2002)	2,229,700
Total Population (2002)	34,600,000
Adult HIV Prevalence (end 2002)	*11%
<b>HIV-1 Seroprevalence in Urban Areas</b>	
Population most at risk (commercial sex workers and clients, patients with a sexually transmitted infection, or other persons with known risk factors)	46.0%
Population least at risk (pregnant women, blood donors, or other persons with no known risk factors)	12.2%

Sources: UNAIDS, U.S. Census Bureau, \*National AIDS Control Program Surveillance Report No. 16, Ministry of Health, Tanzania

Moreover, they also noted that a multisectoral approach to address gender and legal issues related to HIV/AIDS has been implemented in Tanzania. Although there is no law dealing directly with HIV/AIDS, Tanzania experts noted that advocates are relying on the constitution, and national policy guidelines to respond to the effects of the disease. Lastly, expert input revealed the country to be the most advanced among the three with respect to legislative policies. For example, the HIV/AIDS phenomenon has provoked reform of Tanzanian laws, by producing a National Policy on

HIV/AIDS, as well as the mention of HIV/AIDS in the Constitution. Furthermore, amendments have been suggested to the Employment Ordinance, Security of Employment Act, and Workman's Compensation Ordinance to conform to international guidelines on human rights and HIV/AIDS, the Constitution, and its National Policy on HIV/AIDS.

***Uganda***

Uganda is considered a model for reducing HIV/AIDS in the developing world, due to its innovative and rigorous approach to HIV prevention, care and treatment; the strong political will and leadership by President Yoweri Museveni, as well as aid from international and indigenous NGOs.<sup>22</sup> Nevertheless, expert findings from IDLO activities and studies reveal the limited impact legal remedies, legal deficiencies, and cultural norms have on HIV/AIDS generally and women in particular in Uganda.

Ugandan experts identified the critical gender concerns as those relating to the family, criminal aspects of HIV/AIDS, and human rights issues. They also stated that in addition to implementing a multisectoral approach, the Uganda AIDS Commission, established in 1992, is in the process of producing a national policy on HIV/AIDS, which is currently in draft form. Experts also provided their input on practices related to safe sex as well as practices that increase women's exposure to HIV/AIDS (sexual practices, rape, and widow inheritance).



Map of Uganda: PCL Map Collection, University of Texas

According to the Ugandan experts, changes to laws regarding the aforementioned topics are influencing, as well as being influenced by, the HIV/AIDS pandemic. This is especially the case with rape law, for which a bill has been drafted, that includes gender-neutral language and provides the possibility of requiring the accused to undergo HIV testing. Marital rape, on the other hand, is not prescribed in the law, although research is currently being done to incorporate marital rape laws into the legal framework. They

also informed the participants that a domestic relations law has been drafted that would address widow inheritance.

A Ugandan participant acknowledged that the parliament was in the process of passing legal reforms to address these issues (including labor law amendments), and expects to include a provision in the constitution on HIV/AIDS. Participants also attested to the country's lack of information and denial of access to it, as well as the inevitable consequences of such deficiencies. According to them, an information campaign targeted at adolescents is needed as their limited knowledge of the body's basic functions places them at a higher risk for HIV/AIDS.

### **Ethiopia**



Map of Ethiopia: PCL Map Collection, University of Texas

Population	70.7 million
Adult HIV Prevalence	6.6%
Estimated HIV Prevalence in Urban Areas	13.7%
Estimated HIV Prevalence in Rural Areas	3.7%
Estimated Population Living with HIV/AIDS	3.0 million
Estimated Number of Children with HIV/AIDS	230,000
Cumulative Number of AIDS Orphans	1.2 million

Source: UNAIDS, U.S. Census Bureau

As the chart reflects, the HIV/AIDS situation in Ethiopia has reached grave proportions, with a total of 1.7 million Ethiopians having died from AIDS-related causes by the end of 2002. According to USAID estimates, Ethiopia is now among the most heavily affected countries, with the sixth highest number of HIV/AIDS infections in the world.<sup>23</sup> With HIV/AIDS prevalence among females three times greater than among males, the epidemic has affected society along gender lines, severely harming the health of the population and economic progress.<sup>24</sup>

In this seminar, experts from Ethiopia described their country's policy on women. Specifically, the civil and criminal codes contain laws on gender; rape; abduction; traditional practices that expose women to HIV/AIDS; and discriminate against those living with HIV/AIDS. For Ethiopia, a large country with diverse cultural groups and practices, a suggested approach to deal with HIV/AIDS related issues is on a regional basis.

During the session, Ethiopian experts also offered input on Ethiopia's experience with reference to the issue of privacy and confidentiality of voluntary counseling and testing (VCT). For instance, the Ministry of Health conducts HIV testing, and its policy is for testing and surveillance to be anonymous and confidential. However, there is a shortage of facilities and trained counselors, while there is an increased demand for VCT services.

Ethiopian experts also revealed that for the past 10 to 12 years, efforts have been made to apply international agreements to their country. In addition, the Ministry of Health has performed an assessment of all legal aspects concerning HIV/AIDS for the past two years, appointed a special committee to review developing laws for the protection of the rights of people afflicted with HIV/AIDS, and hired consultants for policy work. New legal instruments are expected within a year or two. With respect to laws in the workplace, Ethiopian participants stressed the need to develop the workplace by drafting standards and regulations to protect employees with HIV/AIDS. The participating expert also emphasized the right to

employment in general, the need to prevent discrimination and termination of infected employees, and ensure the adoption and implementation of labor laws that protect employees in the workplace.

**Abstract. Case Study: Capacity Building in Civil Society Associations in Uganda<sup>25</sup>**

Diminished access to law, strong customary norms, and deficiencies in laws have had a detrimental impact on those inflicted with HIV/AIDS, especially women. In Uganda, access to the legal process is fundamentally impeded by factors such as ignorance of the law and legal entitlements, community pressure against enforcement of legal rights, adherence to communal and cultural practices and beliefs that conflict with formal legal rights, lack of resources to pursue legal redress, physical restraint, threats and intimidation by family and community members, serious failings (e.g., inadequately trained and biased officials) in the prosecution of legal claims, and insufficient funding of governmental agencies designed to enforce the law. Furthermore, in spite of the existence of proactive laws and policies,<sup>26</sup> strong customary norms within Uganda continue to prevent women from participating within the family and in society on an equal basis as men. Cultural norms and religious practices perpetuate women's subordination to men and may ultimately contribute to women's vulnerability to HIV infection.

In Africa, women and girls succumb to AIDS-related illness and death in larger numbers than men and boys. Factors that contribute to the higher rates of HIV/AIDS among African women are wide-ranging and include: discriminatory property and inheritance rights; divorce laws that encourage women to remain within abusive marriages and perpetuate economic dependence on husbands; informal enforcement of cultural practices that require women to submit to the sexual advances of husbands—notwithstanding the HIV status of the husband—domestic violence; and, physical and sexual violence against women and girls.

The problem is made worse by the lack of national policy and legislation prohibiting discriminatory treatment of those infected with HIV/AIDS, and by widespread adherence to customary laws and practices that override formal protections found in the Ugandan Constitution and domestic statutes. Moreover, disputes involving the interests of women are routinely directed towards informal, community-based venues not altogether receptive to women's equality rights. Within this context, the most pressing problems facing women and people with HIV/AIDS wishing to access the legal system in Uganda include: 1) inadequate coverage/protection of existing laws; 2) discriminatory provisions within the law; and 3) significant social and institutional barriers impeding access to legal protections.

#### **IV. Vital Areas in Need of Legal Reform Based on Findings:**

##### **Labor Law**

“HIV/AIDS is affecting the fundamental rights at work, particularly with respect to the discrimination and stigmatization aimed at workers and people living with and affected by HIV/AIDS.”<sup>27</sup> The HIV epidemic’s enormous impact on the labor force arises out of the fact that the most devastated groups are the working age population (ages 15-49).<sup>28</sup> Thus, men and women with important economic and social roles in the community are prevented from contributing fully to society.<sup>29</sup> The consequence of the majority of the infected in the prime of their working lives is disastrous—not just for workers and their families, but also for businesses and national economies.<sup>30</sup>

As a result, it is important to acknowledge the workplace as a crucial place where AIDS poses various challenges/threats: discrimination, stigma, lack of productive work, and undermines efforts to provide a decent working environment. However, it can also be an ideal site for battling the disease through preventive actions (information, education and gender awareness), protection of workers’ rights (employment security, gender equality, benefits, and non-discrimination provisions), and general guidance/support. The International Labour Office has developed a Code of Practice on HIV/AIDS and the World of Work (Code) to address the HIV/AIDS epidemic in the world of work.<sup>31</sup> Key principles of the Code focus on the following areas 1) prevention of HIV/AIDS, 2) management and mitigation of the impact of HIV/AIDS in the employment context, 3) care and support of workers infected and affected by HIV/AIDS, and 4) elimination of stigma and discrimination on the basis of real or perceived HIV status.<sup>32</sup>

Country participants attested to the need for specific reforms to protect workers that address the discriminatory practices and abuse directed at HIV/AIDS carriers and their families in the workplace. For instance, although HIV/AIDS has provoked the legal reform of many Tanzanian laws, further labor law amendments are needed (Employment Ordinance, Security of Employment Act, and Workman’s Compensation Ordinance) in order to comply with HIV/AIDS international guidelines, the Tanzanian Constitution and the Tanzanian National Policy on AIDS. Other pertinent issues with respect to labor law include, confidentiality concerns and access to information and services for employees. Technical assistance and training is also needed to increase the capacity of the judiciary, legal, and political community to implement the structural and legislative reforms necessary to deal with these labor issues.

##### **Criminal Procedure**

A key problem in many African countries is the failure of the state and specifically the criminal justice system to deal appropriately with complaints of sexual abuse from women of all ages. This is due in part to the many barriers to effective reporting and prosecution of crimes of sexual assault.<sup>33</sup> Increased HIV/AIDS rates in women are an inevitable corollary of unabated sexual abuse.

Participants in IDLO distance learning activities from Tanzania, Uganda, and Ethiopia highlighted prostitution as a critical area for legal reform in both the labor and criminal sector, as legal protection of informal sex workers is needed in order to diminish the spread of AIDS.<sup>34</sup> In fact, due to the illegality of prostitution, women working in this area avoid official assistance for counseling and medical services, thereby increasing their susceptibility to HIV/AIDS.<sup>35</sup> Moreover, the illegal nature of prostitution also makes this group of people particularly susceptible to criminal acts of willful transmission of HIV.<sup>36</sup>

In addition, the legal reform of rape, domestic relations and marriage laws must, among other things, address marital rape, contain gender-neutral language, and provide for compelled HIV testing of the accused rapist. Although most countries with rising HIV/AIDS prevalence have laws against sexual violence, rape, and child abuse, the criminal justice systems fail to enforce them. What is more, the police and judicial systems are rarely child or gender sensitive and can be hostile to women and girls who seek

legal recourse.<sup>37</sup> In order to address these deficiencies, training programs can be designed to strengthen the capacity of judiciaries to enforce laws that prohibit violence and discrimination against women.

### Marital Law/Domestic abuse



Counterintuitively, marriage in many African countries increases women’s susceptibility to HIV/AIDS. The reason is that the institution of marriage in many countries promotes respect for men’s authority in sexual matters, and dictates sex as a wife’s duty, irrespective of the risks posed.<sup>38</sup> These norms surrounding marriage leave women powerless to negotiate condom use or control their husband’s extramarital behavior and results in a high proportion of HIV-positive married women being infected by their husbands.<sup>39</sup>

Source HIV/AIDS Epidemiological Surveillance Update for the WHO African Region 2002. World Health Organization, Regional Office for Africa, Harare, Zimbabwe, September 2003.

This heightened risk is also due to the increased probability of male violence used to maintain control over sex in marriages.<sup>40</sup> According to the Human Rights Watch, which investigated domestic violence in Uganda—the leading African country in its response to HIV/AIDS—women are becoming infected with HIV at alarming rates because of the state’s failure to protect them from domestic violence.<sup>41</sup> Similarly, the World Health Organization has noted that violence by an intimate partner is one of the most common forms of violence against women, including verbal and/or sexual abuse.<sup>42</sup>

Another equally troubling form of domestic violence is marital rape, and its treatment under law. Marital rape is particularly problematic in the sub-region of Africa, as evidenced by statements by judicial officials in Botswana and Malawi stating that husbands cannot rape their wives as consent to sex is given upon marriage.<sup>43</sup> Although lobbying efforts are in place for marital rape to be outlawed, the majority of Task Force countries<sup>44</sup> do not have legislation against marital rape, and even where it is outlawed, justice can remain elusive.<sup>45</sup> Nevertheless, in countries where legislation has been passed to address gender-based violence there has been a sharp increase in reporting of rape and sexual assault.<sup>46</sup>

Deficiencies in divorce law also promote women’s vulnerability to HIV/AIDS by providing a barrier for women seeking to flee from violent marriages. For example, Ugandan marriage and divorce laws discriminate against women and contravene constitutional provisions providing for nondiscrimination, equal protection of the law, and equal rights in marriage, during marriage, and at its dissolution.<sup>47</sup> Statutory law also poses problems, as is the case in Uganda where grounds for divorce under the Divorce Act impose an inequitable burden on women to prove cruelty, desertion, incest or bigamous adultery—unnecessary requirements for men seeking divorce.<sup>48</sup>

### Property/Succession Laws

Throughout Africa women’s rights to property are, by law, unequal to those of men, as a 1999 ruling from the Zimbabwe Supreme Court illustrated when it ruled unanimously that a wife could not inherit her deceased father’s estate.<sup>49</sup> According to the ruling, “only men can inherit under customary law and all



family members are subordinate to the male head of the family—‘women should never be considered adults within the family, but only as a junior male or teenager.’”<sup>50</sup>

A complicated web of cultural, legal, and social factors lead to violations of women’s property rights. “In many countries, customary laws—largely unwritten but influential local norms that coexist with formal laws—are based on patriarchal traditions in which men inherited and largely controlled land and other property, and women were ‘protected’ but had lesser property rights.”<sup>51</sup> And even though most countries have laws regarding property ownership, such as registry acts, they are often flawed and inadequately enforced.<sup>52</sup> To illustrate, India has a law from 1956 that allows some women to inherit property from their fathers, yet women rarely inherit and are often unaware of their rights.<sup>53</sup> This is attributed to lawyers’ ignorance of the law as it applies to women’s inheritance rights, and the possibility to expedite a case involving a person living with HIV/AIDS.<sup>54</sup>

Property rights violations result in poverty, disease, violence, and homelessness, harming women, their children, and Africa’s development. “Without the enforceable right to own or inherit land and property, women and girls face destitution after the death of their husbands, partners or parents, while poverty and economic dependence leave them exposed to increased sexual exploitation and violence.”<sup>55</sup> These violations further aggravate the HIV/AIDS predicament by representing a deadly form of discrimination that thwarts development programs designed to battle the epidemic.<sup>56</sup> For instance, it is commonplace, upon the death of their husbands from AIDS, for women to be thrown out of the house, or inherited to their brother-in-laws (a.k.a. “wife inheritance”), their belongings and property seized, or coerced into “ritual cleansing,” whereby widows are obliged to have unprotected sex with a man considered a social outcast.<sup>57</sup> Originally, the tradition of “wife inheritance” was a way to ensure the man would take responsibility for the widow and children, however, now it is mainly a way of gaining possession of the property of the deceased.<sup>58</sup>

The “stigma and overwhelming morality of HIV/AIDS are overlaid on a legal system that in many countries has long disadvantaged women through property and inheritance laws.”<sup>59</sup> Although widows and orphans from other causes may also experience the loss of their property and inheritance rights, studies suggest these abuses are much more severe and frequent when HIV/AIDS is the cause.<sup>60</sup> There are various factors that allow for discriminatory and/or inadequate laws. Most southern African countries have dual legal systems that recognize both customary and common law depending on the circumstances.

Usually, when women marry according to customary law they join their husband’s clan and property devolves along the male line.<sup>61</sup> Women, on the other hand, access property through men—fathers, husbands, brothers, sons or male cousins. Also detrimental for women is the payment of a dowry by the men (“lobola” or brideprice) upon marriage, which strengthens their hold over women and property.<sup>62</sup> A survey conducted in Namibia, Uganda and Zambia by the Food Agriculture Organization of the United Nations revealed that a factor contributing to property repossession for women is the conceptual difference between property that was given by both families to formalize marriage (inherited property) and property the couple accumulated during their married life (common property).<sup>63</sup> Common property is often sold during times of hardship to pay for hospital fees and funeral expenses, whereas inherited property is only sold as a last resort.<sup>64</sup> Inheritance disputes usually revolve around inherited property, and a standard interpretation does not exist on how marital property should be inherited, leaving these issues to be resolved on a case-by-case basis.

The succession of property is a vital issue for female carriers of HIV/AIDS and widows of carriers. In various African countries, inheritance rights of AIDS widows and orphans have not been respected or protected. In fact, in Uganda, laws do not address the practice of widow inheritance, which often leaves widows without an inheritance since it is the tribe that pays a dowry to bring the bride into the tribe, and therefore decides what happens to the property of the deceased. Reform of property laws to take this tradition into account can directly protect the surviving family members most at risk by the loss of a spouse or parent: i.e., women and children. However, even if such laws existed, women in much of Africa

encounter many obstacles in making use of formal judicial mechanisms to remedy property-related injustices.<sup>65</sup>

The denial of property rights for women and the complexity of enforcing these rights must be addressed, particularly since understanding the complex systems of land administration in many countries requires resources unavailable to most citizens, let alone women. Correspondingly, there is an urgent need to raise awareness about women's rights to own and inherit property, which requires the involvement and training of all sectors of society (media, women, traditional leaders,<sup>66</sup> local authorities, administrators, justice officials, paralegals, etc.). A further obstacle for enforcing women's property rights is the bias and indifference women face from those responsible for their enforcement, i.e., prosecutors, magistrates, judges and other officials.<sup>67</sup> To counter this bias, training should be provided on needed legal reforms, as well as technical assistance to adequately train legal professionals on the relevant laws and sensitize them to women's rights.<sup>68</sup>

## **V. Conclusion**

The present development law update on the gender aspects of HIV/AIDS focused primarily on the worst hit countries in Africa, yet these are not the only countries plagued by this epidemic.

According to the United Nations, the Asia Pacific region, where more than 7 million people are living HIV/AIDS, could become the center of the AIDS pandemic in the next decade, with China and India facing a potential AIDS catastrophe.<sup>69</sup> Also, as of 2003, 1.3 million people were living with HIV/AIDS in Eastern Europe and Central Asia, a quarter million of which were infected in 2003 (the worst affected countries were the Baltic States, the Russian Federation, and Ukraine).<sup>70</sup> Additionally, around 2 million people between the ages of 15 and 49 are living with HIV/AIDS in Latin America and the Caribbean, with 36 percent women in Latin America, and 49 percent in the Caribbean.<sup>71</sup>

As for the Middle East and North Africa, HIV prevalence is still very low with the exception of Sudan.<sup>72</sup> Lastly, in North America, where HIV/AIDS was thought to be under control, women's prevalence rates jumped 5 percent between 2001 and 2003, the largest increase among women in any region of the world.<sup>73</sup> Accordingly, these figures demonstrate that HIV/AIDS is unfortunately a growing problem internationally. In this environment it is essential to understand how different societies have responded to the associated legal challenges.

### **Future activities on the Gender & Legal Dimensions of HIV/AIDS**

Although the legal response to the gender and legal dimensions of HIV/AIDS varied in the participating countries, all three countries would benefit from improved institutional and professional capacity to implement such reforms, as well as the technical assistance on drafting and implementing legal reforms.

In light of these findings, IDLO Distance Learning & Research Center, in cooperation with the World Bank, is in the process of creating a series of distance learning dialogues and seminars to further address the key areas in need of legal reform to effectively tackle problems relating to HIV/AIDS. Specifically, future sessions on the Gender & Legal Dimensions of HIV/AIDS will be custom-tailored to deal with such issues through the selection of prominent experts in the areas of reform, and by way of a rigorous training program that will enable the policy makers and participants selected from each country to identify appropriate ways of improving the current legal framework. The breadth and effectiveness of these activities will necessarily depend on the strength of the international community's commitment.

### **Human Rights Accords and Commitments Addressing Gender:**

**1. The Convention on the Elimination of all Forms of Discrimination Against Women, (CEDAW),** addresses many of the problems faced by women, including the discriminatory cultural practices that significantly increase a woman's chance of infection. All sub-Saharan African countries except Somalia and Sudan have ratified CEDAW as of 2003. The following articles address the various deficiencies leading to women's vulnerability to HIV/AIDS.

In its General Recommendation on violence against women, the CEDAW committee notes that States parties have an obligation to take positive measures to eliminate discrimination against women, and that they are responsible for private acts of violence if due diligence is not exercised to prevent and punish them. In its General Recommendation on HIV/AIDS, the CEDAW committee has requested that States parties report on the actions they have taken to prevent specific discrimination against women in response to HIV/AIDS. The committee has also stated that any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a women's practical ability to divorce her husband, support herself or her family and live in dignity as an independent person. Among the laws and practices the Committee identified as contravening the Convention are those that automatically result in women receiving a smaller share of the husband's or father's property at his death than would widowers or sons, and those granting women limited or controlled rights and allow them to receive income only from the deceased's property.

**Article 5** requires States parties to take all appropriate measure to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. They are also required to assess the ways in which the legal order may work to support and reinforce discriminatory stereotypes, such as by failing to impose criminal sanctions for marital rape and to amend laws where necessary.

**Article 6** requires States parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women. The CEDAW has noted that the marginalized and sometimes unlawful status of prostitutes makes them vulnerable to violence at the hands of State and non-State actors, and that they need the equal protection of laws against rape and other forms of violence.

**Article 11** requires States parties to take all appropriate measures to eliminate discrimination against women in the field of employment.

**Article 13** provides that States parties must take measure to ensure the same rights for men and women in relation to matters such as family benefits, bank loans, mortgages and other forms of financial credit.

**Article 15** provides that States parties must accord women equality with men before the law, giving them the same legal capacity and opportunity to exercise that capacity. Women shall, for example, be given equal rights to conclude contracts and administer property.

**Article 16** requires States parties to eliminate discrimination against women in the context of marriage and family relations. To ensure compliance with the Convention, States parties need to review and revise civil, common, and customary laws affecting marriage, in particular to make divorce available to men and women on the same terms, to prohibit coercive forms of marriage, and to ensure equal rights to ownership and control over property within marriage and upon divorce.

**2. In sub-Saharan Africa, the 2003 Protocol on the Rights of Women in Africa** was added to the African Charter on Human and Peoples' Rights, and its guarantees include property and inheritance rights, the right to reproductive health care and the right to be free from harmful practices and gender-based violence.<sup>74</sup>

**3. African Charter on Human and Peoples' Rights** guarantees the right to property, and requires that all rights be implemented in a nondiscriminatory way.<sup>75</sup>

**4. Article 17 of the Universal Declaration of Human Rights,** widely regarded as customary international law, provides the right to property to all, alone and in association with others.<sup>76</sup>

**5. The 1993 Declaration on the Elimination of Violence against Women** exhorts U.N. member states to pursue a range of measures to prevent gender-based violence and ensure accountability for perpetrators.

**6. The International Covenant on Civil and Political Rights** and the **International Covenant on Economic, Social, and Cultural Rights,** both widely ratified in Africa, also prohibit discrimination based on sex.

<sup>1</sup> The IDLO Research and Publication Unit compiles data gathered through IDLO activities and publishes its findings through Development Law Updates (DLU), a monthly online newsletter intended to inform a wide audience in developing and transitioning countries, as well as partner organizations, and academic institutions. For further information on IDLO activities, such as distance learning sessions, training programs, and workshops, visit [www.idlo.int](http://www.idlo.int).

<sup>2</sup> See the United Nations Development Fund for Women at <http://www.unifem.org>, last visited July 10, 2004.

<sup>3</sup> See the United Nations Development Fund for Women at <http://www.unifem.org>, last visited July 10, 2004.

<sup>4</sup> Specifically, Millennium Development Goal 3: Promote gender equality and empower women, aims to eliminate gender disparity in primary and secondary education preferably by 2005, and at all levels by 2015, and Goal 6: Combat HIV/AIDS, malaria and other diseases, aims to halt and begin to reverse the spread of HIV/AIDS, and the incidence of Malaria and other major diseases by 2015. See <http://www.un.org/millenniumgoals> (last visited July 5, 2004).

<sup>5</sup> *Women and Aids: Confronting the Crisis*, a Joint Report by UNAIDS/ UNFPA / UNIFEM (2004) (quoting Article 15 of the UNGASS Declaration of Commitment).

<sup>6</sup> World Health Organization (WHO), *Treating 3 Million by 2005: Making It Happen, the WHO Strategy* (Geneva: WHO, December 2003).

<sup>7</sup> *Id.*

<sup>8</sup> See Janet Fleischman, *Fatal Vulnerabilities: Reducing the Acute Risk of HIV/AIDS Among Women and Girls*, CSIS HIV/AIDS Task Force (a Report of the Working Group on Women and Girls Feb 2003).

In some of the worst-affected countries in southern Africa, HIV prevalence among girls aged 15 to 19 is four to seven times higher than among boys their age, a disparity linked to widespread sexual abuse, coercion, discrimination, and impoverishment. In sub-Saharan Africa, the epicenter of the epidemic, women and girls account for more than half—58 percent—of those living with HIV/AIDS, and infection rates are rising rapidly among young women in many parts of the world.

*Id.*

<sup>9</sup>

If it can be said, as it can, that by the year 2020, the number of deaths from AIDS in Africa will approximate the number of deaths, military and civilian combined, in both world wars of the 20<sup>th</sup> century, then it should also be said that a pronounced majority of those deaths will be women and girls. The toll on women and girls is beyond human imagining; it presents Africa and the world with a practical and moral challenge which places gender at the center of the human condition. The practice of ignoring a gender analysis has turned out to be lethal . . . For the African continent, it means economic and social survival. For the women and girls of Africa, it's a matter of death.

Stephen Lewis, U.N. Secretary-General's Special Envoy on HIV/AIDS in Africa (July 2002).

<sup>10</sup> See Janice Alfred, *The 45<sup>th</sup> Session of the Commission on the Status of Women: Gender Discrimination and the AIDS Pandemic*, 18 N.Y.L. SCH. J. HUM. RTS. 439 (2002) (discussing that in many developing countries, this imbalance of power contributes to the problem of gender-based violence against these women and young girls, which not only violates their human rights, but also exposes them to higher risks of HIV infection).

<sup>11</sup> See Geeta Rao Gupta, Ph.D., *Gender, Sexuality, and HIV/AIDS: The What, the Why, and the How*, International Center for Research on Women (ICRW) Washington, D.C. U.S.A. (July 2000) (discussing the notion of gender and its connection to HIV/AIDS).

<sup>12</sup> See Fleischman, *supra* note 8 at 2-3.

<sup>13</sup> This refers to the age-old debate of whether law shapes culture, or culture shapes law. Montesquieu believed that culture affected law, whereas Jean-Jacques Rousseau promulgated the idea that law shapes culture. See generally CHARLES MONTESQUIEU, *THE SPIRIT OF THE LAWS*, (trans. Thomas Nugent. New York: MacMillan, 1949); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 1762.

<sup>14</sup> Philip M. Nichols, *The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code*, 18 U. PA. J. INT'L ECON. L. 1235 (1997) (discussing how law is shaped by and in turn shapes culture).

<sup>15</sup> *Policy Paralysis: A Call for Action on HIV/AIDS-related Human Rights Abuses Against Women and Girls in Africa* (Human Rights Watch Dec. 2003).

<sup>16</sup> Joseph Collins and Bill Rau, *AIDS in the Context of Development*, UNRISD Programme on Social Policy and Development, Paper Number 4 (December 2000).

<sup>17</sup> *Id.*

<sup>18</sup> *Supra* note 15.

<sup>19</sup> One of the five approaches adopted by the United Nations Secretary-General's Task Force on Women, Girls and HIV/AIDS in Southern Africa to ensure the success of gender and development programs is "strengthening the legal and policy frameworks that support women's rights to economic independence (including the right to own and inherit land and property) e.g. by restructuring justice systems, enacting laws and training NGOs to popularize these laws" available at <http://www.unaids.org> (last visited July 27, 2004).

<sup>20</sup> Diagnostic Dialogue 1, Gender and Legal Issues of HIV/AIDS, organized by the PREM Gender and Law Thematic Group, World Bank Institute in partnership with IDLO, focused on the discussion and understanding of specific gender and legal issues related HIV/AIDS (October 3, 2003).

Policy Dialogue, Legal Implications of HIV/AIDS addressed the problems and issues the participating countries face in defining the policy and legal framework, and the challenges in enforcing the rights of individuals living with, or exposed to HIV/AIDS (October 29, 2003).

Diagnostic Dialogue 2, Gender and Legal Dimensions of HIV/AIDS focused on the identification of the laws and legal/constitutional framework needed to tackle the issues diagnosed in Diagnostic Dialogue 1 (November 10, 2003).

<sup>21</sup> See Tanzania HIV/AIDS Country Profile by USAIDS, available at <http://www.usaid.gov> (last visited July 20, 2004).

<sup>22</sup> See Uganda Country Profile USAIDS, available at <http://www.usaid.gov> (last visited July 20, 2004). At the peak of the epidemic in 1992, some urban areas in Uganda were registering prevalence rates of more than 30 percent; in 1995, the adult national HIV prevalence declined to 18.5 percent and continued to decline to 14.5 percent in 1997, 9.5 percent in 1998, and 8.3 percent in 1999. By the end of 2001, UNAIDS estimated HIV prevalence among the adult population to be 5 percent. *Id.*

<sup>23</sup> See Ethiopia Country Profile for HIV/AIDS, available at <http://www.usaid.gov> (last visited July 20, 2004).

<sup>24</sup> *Id.*

<sup>25</sup> See *Capacity Building in Civil Society Associations in Uganda: Technical Note 1 and Technical Note 2*, Prepared by the International Development Law Organization (Rome, Italy), and Associates for Development (Kampala, Uganda) April 30, 2004: a study prepared by the International Development Law Organization and Associates for Development (Kampala, Uganda) a project of the World Bank (Gender Unit) and the Japanese Development Fund.

<sup>26</sup> The Ugandan Constitution contains provisions paralleling international covenants guaranteeing equal protection of the law between men and women, equality in marriage and its dissolution and inheritance. Despite these constitutional protections, however, there remain significant flaws in the implementation of existing laws and in some cases in the process of repealing or modifying discriminatory laws. *Id.*

<sup>27</sup> Juan Somavia, Director-General, International Labour Office (Geneva June 2001).

<sup>28</sup> Desmond Cohen, *Human Capital and the HIV Epidemic in sub-Saharan Africa*, ILO Programme on HIV/AIDS and the World of Work (Geneva, June 2002).

<sup>29</sup> *Id.*

<sup>30</sup> Franklyn Lisk, *Labour Market and Employment Implications of HIV/AIDS*, ILO Programme on HIV/AIDS and the World of Work (Geneva, June 2002).

<sup>31</sup> See *An ILO code of practice on HIV/AIDS and the world of work* (International Labour Office Geneva) available at <http://www.ilo.org> (last visited May 18, 2004).

<sup>32</sup> *Id.* at 11.

<sup>33</sup> See *supra* note 18, at 23.

<sup>34</sup> Sex workers around the world have dramatically higher HIV prevalence than the rest of the population. See *supra* note 8, at 5 discussing the Joint United Nations Program on HIV/AIDS' estimates that as many as 50 percent of sex workers in Kenya were HIV-positive; 45 percent in Guyana; and 50 percent in Myanmar (Burma). *Id.*

<sup>35</sup> United Nations Development Fund for Women, *Turning the Tide, CEDAW and the Gender Dimensions of the HIV/AIDS Pandemic* (2001).

Criminalization and punitive measures taken by the State against women employed in prostitution drive the industry underground, making their working conditions more dangerous and violent, and impeding their access to prevention methods, treatment and care.

*Id.* at 9.

<sup>36</sup> In fact, "[t]he stigma and illegality associated with sex work "make it difficult for these women to seek treatment, to report abuses, or to negotiate condom use." *Id.*

<sup>37</sup> Fleischman, *supra* note 8, at 5.

<sup>38</sup> U.N. Population Fund, *Addressing Gender Perspectives in HIV Prevention*, UNFPA Programme Briefs, no. 4, February 2002.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 30. "Human Rights Watch's investigation showed that Ugandan women become vulnerable to HIV infection as a result of domestic violence in complex and intertwined ways. Most women interviewed saw domestic violence as innate to marriage, and viewed sex with their husbands as a marital obligation. Traditional attitudes that dictate that women are the physical property of their husbands deprive them of any authority over marital sexual relations." *Id.*

<sup>42</sup> World Health Organization, *World Health Report on Violence and Health*, Geneva, 2003, available at <http://www.who.org> (last visited July 28, 2004).

<sup>43</sup> *Supra* note 19, at 31.

<sup>44</sup> Countries, which according to the UN Task Force on Women, are the nine countries in southern Africa most severely affected by HIV/AIDS (Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe); see *supra* note 19 at 4.

<sup>45</sup> *Id.* A woman's testimony before parliamentary hearings in South Africa reveals the failure to implement laws against marital rape, when she states:

What must we do? Go to the police? Even if you are raped by a stranger they don't believe you and now you must tell them that your husband is raping you? They are just as bad as the husbands. . . You can have scars on your face. . . bleeding. . . and police still send you home to 'sort it out with him'. Rape by your husband is only real in the law.

*Id.*

<sup>46</sup> *Id.* at 33.

<sup>47</sup> *Supra* note 18, at 30 (citing the Constitution of Uganda, 1995, art. 21(2), (1), and 31(1)).

<sup>48</sup> *Id.*

<sup>49</sup> *Supra* note 19 (quoting the 1999 Zimbabwe Supreme Court ruling, Magaya v. Magaya).

<sup>50</sup> *Id.*

<sup>51</sup> *Supra* note 18, at 41.

<sup>52</sup> *Supra* note 19, at 35.

<sup>53</sup> Voluntary Services Overseas (VSO), 2003. Gendering Aids: Women, Men, Empowerment, Mobilisation, London, available at [http://www.vso.org.uk/advocacy/gendering\\_aids.pdf](http://www.vso.org.uk/advocacy/gendering_aids.pdf) (last visited July 12, 2004).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Supra* note 18, at 40.

<sup>57</sup> *Id.* See also Report of the United Nations Secretary-General's Task Force on Women, *supra* note 19, at 9 (noting that in many Task Force countries (Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe) women are legal minors, which prevents them from owning or inheriting immovable property, and requires permission from a male family member for important financial decisions).

<sup>58</sup> *Supra* note 18, at 36.

<sup>59</sup> *Id.* at 18.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 35.

<sup>62</sup> *Id.*

<sup>63</sup> *HIV/AIDS Property & Succession Rights*, IDLO-FAO Dialogue on the Legal Implications of HIV/AIDS (October 2003).

<sup>64</sup> *Id.*

<sup>65</sup> Human Rights Watch's research in Kenya found that governmental authorities often ignore women's property claims and sometimes make the problems worse. Courts overlook and misinterpret family property and succession laws, and women are rarely aware of their rights and seldom have the means to enforce them. See *supra* note 18, at 48.

<sup>66</sup> Traditional authorities and leaders must become directly involved in the fight against AIDS, as they have a crucial role in supporting women in their efforts to recover property. In addition, "these authorities are in a position to reinterpret customary law to enhance the protective aspects of tradition in ways that complement common law and protect women's rights. For example, the Ondonga traditional leaders in Namibia amended their customary law after extensive discussion to provide that women should remain on land after the death of their husbands" *supra* note 19, at 36.

<sup>67</sup> "Lawyers and individual women complain that Kenya's courts are biased against women, slow, corrupt, and often staffed with ill-trained or incompetent judges and magistrates. These perceptions discourage women from using courts to assert property claims." *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* ("Factors affecting the spread of HIV/AIDS among women and girls in the region are poverty, early marriage, trafficking, sex work, migration, lack of education, and gender discrimination and violence").

<sup>70</sup> *Id.* (Women account for 33 percent of people with HIV/AIDS in the region, and young women account for 28 percent. Evidence suggests that their rates are increasing compared to men's).

<sup>71</sup> *Id.* (Young women are 2.5 times more likely to be infected than young men in the Caribbean).

<sup>72</sup> *Id.* (Yet studies have shown that young women aged 15 to 24 are more than twice as likely to be living with HIV/AIDS as young men, although this figure is somewhat skewed due to the high levels of infection in young women in southern Sudan).

<sup>73</sup> *Id.* at 7 ("The epidemic has increased most dramatically among African American and Hispanic women. Together they represent less than one fourth of all women in the US, yet they account for 80 percent of AIDS cases reported among women in 2000").

<sup>74</sup> *Id.* at 54.

<sup>75</sup> African Charter, 1981, art. 14.

<sup>76</sup> Art. 17 UDHR.