



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 162 OF 2023
(Before Hon. Justice Tembo)**

BETWEEN:

AC (A MINOR)

ACTING THROUGH LITIGATION GUARDIAN MR. CJ

CLAIMANT

AND

MR. JENALA SOLOMON

1ST DEFENDANT

BLANTYRE CITY COUNCIL

(ONE STOP SERVICE CENTRE AT CHILEKA)

2ND DEFENDANT

ATTORNEY GENERAL

(MINISTRY OF HEALTH)

3RD DEFENDANT

HUMAN RIGHTS COMMISSION

4TH DEFENDANT

CENTER FOR REPRODUCTIVE RIGHTS

INTENDED AMICUS CURIAE

APPLICATION FOR PERMISSION TO BE ADMITTED AS AMICUS CURIAE

Inherent Jurisdiction of the High Court

LET ALL THE CONCERNED attend before the Honorable Judges of the High Court of Malawi, Principal Registry, on the _____ day of _____ 2024 at _____ o'clock in the _____ noon on the hearing of an application on the part of the **CENTER FOR REPRODUCTIVE RIGHTS (CRR)** for an order that they be granted permission to appear

in these proceedings as *amicus curiae* (friends of the court) in Civil Cause No. 162 of 2023 and on admission that the filed Amicus Brief marked as exhibit CRR 4 in the sworn statement of **SALIMA NAMUSOBYA** be admitted as the complete position of the amicus curiae.

TAKE NOTICE that the Sworn Statement of **SALIMA NAMUSOBYA** filed herewith shall be read in support of the Application.

Signed: Hilda Nicole Soko
Legal Practitioner for the intended Amicus Curiae

Dated this _____ day of _____ 2024

REGISTRAR/JUDGE

To be served Upon:

The Claimant
Messrs Mlauzi Legal Solutions
BLANTYRE

The 1st Defendant
BLANTYRE

The 2nd Defendant
BLANTYRE

The 3rd Defendant
The Attorney General
P.O Box 333
LILONGWE.
The Malawi Human Rights Commission
LILONGWE.



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**SWORN STATEMENT OF SALIMA NAMUSOBYA MADE ON 19 NOVEMBER 2024
IN SUPPORT OF AN APPLICATION TO BE ADMITTED AS AMICUS CURIAE**

I, **SALIMA NAMUSOBYA**, of the Center for Reproductive Rights, P.O Box 48136-00100, 4th Floor, Pinetree, Off Ngong Road, Kamburu Drive, Kindaruma Road Junction, Nairobi, Kenya, Make Oath and say as follows:

1. I am the Vice President for Africa at the Center for Reproductive Rights and as such, duly authorized to represent the intended Amicus in this matter and therefore duly competent to make this Oath.

Background

2. The Center for Reproductive Rights, herein after referred to as ‘**The Center or CRR**’, is a global legal advocacy human rights organization having its Africa regional office in Nairobi, Kenya and collaborating with partners in Uganda, Kenya, Malawi, Nigeria, Tanzania, Rwanda, and Zambia. I exhibit a copy of the Certificate of registration marked as ‘**CRR 1**’.
3. The Center uses the power of the law to defend and promote reproductive rights as fundamental human rights worldwide. The Center’s international legal program, in collaboration with human rights advocates around the world, documents violations of reproductive rights, monitor and comments on laws concerning reproductive healthcare, and advocates before the United Nations (the “U.N.”) and other regional human rights fora.
4. The Center has also undertaken and published significant research on reproductive health and rights in various countries in Asia, Europe, and Africa including Kenya, Uganda and Tanzania. There is now produced by me and exhibited hereto a copy of the list of publications marked ‘**CRR 2**’.
5. The Center has intervened in cases before domestic, regional and international courts to inform how key reproductive rights issues at stake are understood and decided. To this end, the Center has been admitted as *amicus curiae* in courts of law in various jurisdictions across the world. I exhibit a list of cases to which the intended Amicus has contributed marked ‘**CRR 3**’.

Interest of the amicus curiae in these proceedings

6. The case before the Court raises issues that are within the intended amicus curiae’s expertise as they relate to the interpretation and implementation of sections 19 and 20 of the Gender Equality Act (the “**GEA**”).
7. Specifically, the case interrogates:
 - 7.1 whether the right to adequate sexual and reproductive health including access to reproductive health services include the right to safe abortion for girls who are victims of rape or defilement,

- 7.2 Whether the right to have a child or not implicitly includes the right to safe abortion for girls who are victims of rape or defilement includes
- 7.3 Whether the duty to provide adequate health information further include the information on all guidelines passed in relation to sexual and reproductive health.
8. Considering that the Center, by virtue of its involvement in reproductive health and rights litigation as a party, as a legal representative and as *amicus curiae*, has amassed valuable knowledge, expertise, and experience in the area from an international and regional perspective, it is able to make pertinent contribution towards a just determination of the pending matter.
9. The intended amicus curiae is not partisan and does not intend in any way to support either party to the suit or descend into the arena of the dispute between the parties and that the intended amicus curiae will be able to make a unique submission and contribution to the suit without taking away litigation from the parties. There is now produced by me and exhibited hereto a copy of the intended brief marked 'CRR 4'

Position to be advanced by the amicus curiae

10. The Applicant will limit its brief to matters of law with specific focus on the following:
- 10.1 The right to access sexual and reproductive health services, as provided for both under international and domestic law.
- 10.2 The legislative position in Malawi where abortion is permitted to preserve the mother's life, mental and physical health should be interpreted widely by this Court to includes cases where the woman is a victim of rape and/or is a minor.
11. It is in the public interest the interest of developing the jurisprudence in Malawi that the application be granted.
12. I therefore seek permission that the Center for Reproductive Rights be allowed to appear in these proceedings as amicus curiae.

Sworn at **NAIROBI** by me **SALIMA NAMUSOBYA**
of Center for Reproductive Rights P. O, BOX 48136-00100
Nairobi, Kenya in my capacity as the Vice President for Africa
at the Centre Reproductive Rights, this 19 November 2024
in full understanding that this statement shall be used



in a proceeding and in further acknowledgement that
I may be found liable to substantial penalty for perjury
if I knowingly state false matters in this
Statement.

Before Me:

NOTARY PUBLIC



NOTARY EXPIRES
31/12/2024



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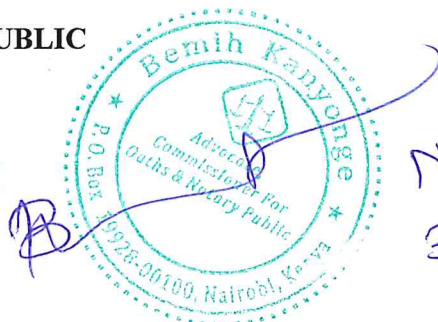
INTENDED AMICUS CURIAE

EXHIBIT MARKED CRR 1

This is the exhibit marked **CRR 1** referred to in the Sworn Statement of **SALIMA NAMUSOBYA**.

BEFORE ME:

BY PUBLIC



NOTARY EXPIRES
31/12/2024



No. CF/2011/39085

CERTIFICATE OF COMPLIANCE

With section 366 of the companies Act, Cap. 486

I hereby CERTIFY, that

CENTER FOR REPRODUCTIVE RIGHTS

a Company incorporated in **UNITED STATE OF AMERICA**, has this day delivered to me for registration the documents in particulars specified in section 366 of the Companies Act (Cap.486)

GIVEN under my hand at Nairobi this **11TH** day of **JANUARY** Two Thousand and **ELEVEN**


Registrar of Companies



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**SKELETON ARGUMENTS IN SUPPORT OF APPLICATION FOR PERMISSION TO
BE JOINED AS AMICUS CURIAE**

Introduction

1. This is an application by the Center for Reproductive Rights (CRR) for leave to be allowed to intervene as Amicus Curiae and make representations within proceedings, in such manner as the court may direct.

The issue for determination

2. Whether this is an appropriate case for the Court to admit CRR as friend of Court.

The law and its application to the facts of this case

3. In our jurisdiction, there are no rules of general application for organizations to be admitted as friends of Court in proceedings before Court except for specific rules that are applicable to matters under the Constitution.
4. It has been held by the Supreme Court of Ireland in **I v. Minister for Justice Equality and Law Reform, [2004] 1 ILRM 27; [2003] IESC 38**, however, that a court has got inherent jurisdiction to allow people and organizations to join court proceedings as friends of court. In defining the role of an amicus, the court observed as follows:

‘A friend of the court, that is to say a person, whether a member of the bar not engaged in the case or any other bystander, who calls the attention of the court to some decision, whether reported or unreported, or some point of law which would appear to have been overlooked.’

5. A three-member panel of the High Court in **Attorney General v Malewezi [2004] MLR 8** at page 14, stated as follows as regards constitutional matters and the role of amici curiae:

‘Disputes of a constitutional nature are matters that affect many in a nation, therefore, they attract amicus curiae from the Government who may be represented by the Attorney-General, academia, law society, civil society and other interested parties, whose thorough research should assist the court and ease its task.’

6. Submissions from amicus can be extremely helpful to the Court and can help the Court in meeting its constitutional duty under section 11 of the Constitution in developing principles for the interpretation of the Constitution. See the ruling by the Supreme Court of Kenya on

an application for leave to be joined as amicus in **Trusted Society of Human Rights Alliance v Mumo Matemo and others, Petition No. 12 of 2013.**

7. The intended amicus curiae herein is a well-established civil society organization. The arguments that they are making in this case have not been made by any of the parties to the case. There is no prejudice that any of the parties will suffer through the addition of the organization. The Court on the other hand stands to benefit a great deal through a well-researched legal submission if the organization is added.
8. There is an added imperative for adding the organization considering the public ramifications of whatever decision that the court will arrive at in these proceedings. Considering such public interest, it is only appropriate that as many voices as are practically possible be given an opportunity to assist the court in arriving at a correct decision in this matter.
9. Wherefore, it is my prayer that Center for Reproductive Rights be added to these proceedings and the filed Amicus Brief be considered as the complete submission from the Amicus Curiae.

Respectfully submitted.

HILDA NICOLE SOKO
SOKO & CO.,
LEGAL PRACTITIONERS FOR THE INTENDED AMICUS CURIAE
19 November,2024.



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EXHIBIT MARKED CRR 2

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BEFORE ME:



BY PUBLIC



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LIST OF PUBLICATIONS BY THE CENTRE FOR REPRODUCTIVE RIGHTS

1. Criminalizing adolescence: A call to reform the sexual offenses act (Briefing Paper)
<https://reproductiverights.org/wp-content/uploads/2020/12/Designed-Long-Version-of-Briefing-Paper-on-Adolescent-SRHR-Covers1.pdf>
2. Failure to Prevent Unwanted Pregnancies: The Case of Tanzania
<https://reproductiverights.org/wp-content/uploads/2020/12/Failure-to-Prevent-Unplanned-Pregnancies.pdf>
3. CAPACITY AND CONSENT: Empowering Adolescents to Exercise their Reproductive Rights.
<https://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/GA-Adolescents-FINAL.pdf>
4. Open Secret: The toll of Unsafe Abortion in Tanzania
<https://reproductiverights.org/wp-content/uploads/2020/12/The-Toll-of-Unsafe-Abortion-in-Tanzania.pdf>
5. An International Human Right: Sexuality Education for Adolescents in Schools
<https://www.reproductiverights.org/sites/default/files/documents/SexualityEducationforAdolescents.pdf>
6. Implementing rights-based accountability for sexual and reproductive health and rights in humanitarian settings
<https://reproductiverights.org/wp-content/uploads/2022/05/Implementing-rights-based-accountability-for-SRHR-in-humanitarian-settings.pdf>
7. Forced out: Mandatory Pregnancy Testing and the Expulsion of Pregnant Students in Tanzanian Schools
https://reproductiverights.org/wp-content/uploads/2019/04/crr_Tanzania_Report_Part1.pdf
8. Punishing Pregnancy: The Expulsion, Forced Drop Out, and Exclusion of Pregnant Students
https://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/crr_Tanzania_Report_Part2.pdf
9. ICPD and Human Rights: 20 Years of Advancing Reproductive Rights through UN Treaty Bodies and Legal Reform
https://reproductiverights.org/wp-content/uploads/2020/12/crr_ICPD_and_Human_Rights.pdf
10. Legal Grounds II: Reproductive and Sexual Rights in African Commonwealth Courts
https://www.reproductiverights.org/sites/default/files/documents/pub_legalgrounds_vol2_2.10.pdf
11. Legal Grounds III: Reproductive and Sexual Rights in Sub-Saharan African Courts
<https://reproductiverights.org/wp-content/uploads/2020/12/ONLINE-GLP-LegalGround.pdf>



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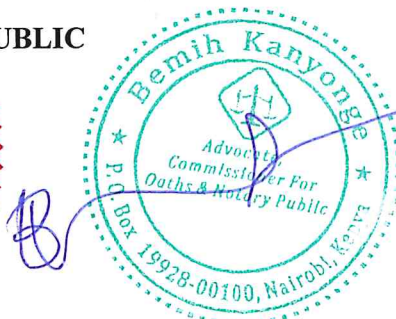
EXHIBIT MARKED CRR 3

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BEFORE ME:



PUBLIC



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LIST OF AMICUS BRIEFS SUBMITTED BY THE CENTRE FOR REPRODUCTIVE RIGHTS TO VARIOUS COURTS IN AFRICA, ASIA, EUROPE AND AMERICAS.

1. AFRICA

- 1.1. Malawi: Constitutional Petitions 4 & 5 of 2021: Two minors, namely, A.J. and T.S. challenged the constitutionality of section 138(1) of the Penal Code of Malawi in so far as it applies to adolescent, non-coercive, non-exploitative, consensual sex. Both minors had been charged with defilement under the section.
- 1.2. Kenya – Criminalization of HIV transmission in Kenya – Aids Law Project v Attorney General & 3 others [2015] eKLR. This case challenged the constitutionality of section 24 of the HIV and AIDS act that criminalize transmission and allows for involuntary partner disclosure of HIV status.
- 1.3. Kenya - Sexual violence against schoolgirls in Kenya – Teachers Service Commission v WJ & 5 others [2020] eKLR. The issue was whether the Teachers Service Commission is vicariously liable for alleged acts of sexual abuse against two students. The Court of Appeal of Kenya held that the State and the Teachers Service Commission have a higher duty to exercise reasonable care so as not to expose children to dangerous elements within the school. The court further held that providing a safe learning environment does not only refer to infrastructure, but also ensuring the dignity of the child is not violated by their caregivers.
- 1.4. Kenya –Nairobi High Court Constitutional Petition E008 of 2020, the petitioners, Ann Kioko, Pearls & Treasures Trust, and the Kenya Christian Professionals forum (KCPF) challenge the decision by the Kenya Medical Practitioners & Dentist Council lifting the ban on Marie Stopes Kenya (MSK) from offering Post Abortion Care.

2. ASIA

- 2.1. India – Memo to the High Court of Haryana and Punjab at Chandigarh in the Matter of Himmat Mahila Samooh v Haryana (2013) – Comments support the Application by establishing the government’s core obligation to provide access to the full range of contraceptive methods.

- 2.2.** India – People’s Union for Civil Liberties (PUCL) v Union of India, Supreme Court of India – supplemental arguments criticizing restrictions on maternal nutrition policies for women with more than two children or under the age of 19. Sought condemnation of measures excluding poor pregnant women and girls from maternal health and nutrition programmes based on population control goals or to deter early marriage and recognition of pregnant women’s and girls’ rights to survive pregnancy and childbirth under Indian and international law.
- 2.3.** Nepal – Lakshmi v Government of Nepal, Supreme Court of Nepal (2008). The petition challenged the Nepal government’s failure to ensure adequate access to safe abortion services despite the decriminalization of abortion on broad grounds in 2002. The court ruled that the government must set up a fund to cover the cost of abortion for poor and rural women and invest enough resources to meet the demand for abortion services and to educate the public and health service providers about the existing abortion law.

3. EUROPE

- 3.1.** Ireland – D. v Ireland – Amicus brief addressing the question of whether restrictive abortion laws particularly those that prohibit abortion in cases of fetal impairment and restrictions on abortion-related information and referrals violate the state’s obligations under international law to protect a woman’s rights to dignity, privacy, life, health, and non-discrimination.
- 3.2.** Northern Ireland – Northern Ireland Human Rights Commission v Attorney General for Northern Ireland (Judicial Review) Amicus addressing the importance of interpreting ECHR in line with IHRL and specifically Mellet and Whelan v Ireland decision of the Human Rights Committee as well as development in jurisprudence since ABC v Ireland. Also addressed how laws that ban abortion in case of rape or fatal foetal impairment breach ECHR Articles 3 and 8.
- 3.3.** Northern Ireland: Application by Sarah Jane Eware for Judicial Review (Reference No: 2018/60061/01) High Court of Northern Ireland (2019). Sarah Ewart claimed that her right to private life, as enshrined in Article 8 of the European Convention on Human Rights and national implementing legislation, was violated when she was prohibited from accessing abortion care in Northern Ireland following a diagnosis of fatal foetal impairment during

her pregnancy. On 3 October 2019, the Northern Irish High Court upheld her claims and ruled that Northern Ireland's highly restrictive abortion law contravened the European Convention and relevant national legislation.

- 3.4. Northern Ireland: Judicial Review of the Law on Termination of Pregnancy in Northern Ireland (UKSC 2017/0131) Supreme Court of the United Kingdom (2017). The Northern Ireland Human Rights Commission initiated legal proceedings seeking a declaration that the law on abortion in force at the time in Northern Ireland was incompatible with the European Convention on Human Rights. On 7 June 2018, most of the UK Supreme Court recognized that, by prohibiting abortion in situations of rape, incest and fatal foetal impairment, Northern Irish law contravenes the European Convention on Human Rights. The Court underlined that the restrictive nature of Northern Ireland's abortion law is untenable and called on lawmakers to undertake swift and radical reform as soon as possible.
- 3.5. Slovakia: Review of the Constitutionality of the Act No 73/1986 Coll. On Induced Abortion (PL ÚS/12.01). Constitutional Court of the Slovak Republic (2007). On 4 December 2007, the Constitutional Court confirmed that the Slovak Abortion Act, which allows abortion on request during first 12 weeks of pregnancy, follows the Slovak Constitution.
- 3.6. Czech Republic - Expert Opinion submitted by the Center for Reproductive Rights in the case of Jiřina Dzurková and Others v the Czech Republic, CEDAW Communication No 102/2016 – Expert opinion requested by the European Roma Rights Centre and the League of Human Rights for submission to the CEDAW Committee for its consideration of the case. On the nature and scope of the Czech Republic's obligations under the CEDAW Convention to provide effective remedies and reparations to Roma women survivors of forced and coercive sterilization.
- 3.7. Sweden – Third party intervention by the Swedish Association for Sexuality Education and the Center for Reproductive Rights
- 3.8. France – Gauer and Others v France – Amicus filed by the Center and partners to the European Court of Human Rights in the case of Joelle Gauer and Others – five women with mental disabilities in France who were forcibly sterilized – arguing that forced sterilization constitutes a violation of the European Convention on Human Rights.

3.9. Poland – *Tysiac v Poland* – CRR filed Amicus on behalf of Tysiac – a visually impaired Polish woman who was denied access to legal abortion on health grounds – arguing for States’ duty to ensure effective access to legal abortion by establishing appeals and review mechanisms for medical decisions about abortion, regulating the practice of conscientious objection, and instituting other procedural safeguards.

3.10. Croatia – Amicus brief in Constitutional Court rebutting an application challenging the constitutionality of abortion.

3.11. Moldova – *Z. v Moldova/L.S. v the Republic of Moldova* – Amicus to the Supreme Court of Moldova, case pending at the ECtHR. – (Case declared inadmissible by Court).

4. LATIN AMERICA

4.1. Colombia – On the practice of forced sterilization against women and girls with disabilities.

4.2. Colombia – Amicus presented to the Constitutional Court on legal abortion.

4.3. Chile – on constitutionality of the project of the Law No 1230-362, which regulates the decriminalization of abortion under three exceptions.

4.4. El Salvador – Amicus brief in consideration of the asylum application for Maria Teresa, formerly imprisoned under El Salvador’s abortion law and currently living in Sweden.

4.5. Peru – Amicus brief before the Constitutional Tribunal to support the free distribution of emergency contraception.

4.6. Peru – On forced sterilization of thousands of Peruvian women under the National Family Planning Program during the 1990s.

5. UNITED STATES

5.1. *Cochran v Gresham* [2021]. The Department of Health and Human Services ("HHS") granted states’ requests to impose work requirements as a condition for receiving Medicaid benefits. The Supreme Court agreed to review lower court rulings that HHS acted unlawfully by failing to consider the extent to which people would lose health coverage and resulting harms. The Center joined an amicus brief led by National Women’s Law Center that outlines how Medicaid benefits improve the health and economic well-being of women and people of color, and that imposing work requirements would lead to

loss of benefits for reasons that include job discrimination and caretaking duties. Loss of those benefits would inflict harm on maternal and reproductive health. (This case was removed from the calendar after the change in administration.)

- 5.2. *Little Sisters of the Poor v Pennsylvania* [2020]. Together with Americans United for Separation of Church and State and other civil rights and religious organizations, the Center co-counseled and joined an amicus brief arguing that the exemptions, if permitted to stand, would violate the Establishment Clause by preferencing religion and imposing substantial harms and costs on women's access to healthcare. For these reasons, the brief further argued the Religious Freedom Restoration Act does not permit, let alone require, the exemptions.
- 5.3. *California v Texas* [2020]. Texas argued that the elimination of the ACA's tax penalty for those who do not have health insurance rendered the ACA's individual mandate provision unconstitutional and called for the ACA to be entirely struck down. The Center joined the National Women's Law Center and 80 other organizations in an amicus brief urging the Supreme Court to uphold the law because a central purpose of the ACA was to eliminate discriminatory insurance practices undermining the health and economic security of women and their families, and Congress did not intend to repeal the ACA when it removed the tax penalty.
- 5.4. *California et al. V Azar et al.* Filed with the U.S. Court of Appeals for the Ninth Circuit on May 29, 2018, in consideration of the nationwide injunction secured by the State of California blocking the Trump Administration's Interim Final Rules that broadly exempt employers from complying with the Affordable Care Act contraceptive coverage benefit. The brief was submitted on behalf of nine civil rights and equal justice organizations to address two intersecting constitutional concerns at stake in the case – the fundamental right to contraception and women's right to equal protection under the law.
- 5.5. *NIFLA v Becerra*, filed with the U.S. Supreme Court on February 27, 2018, in consideration of the California Freedom, Accountability, Comprehensive Care and Transparency (FACT).
- 5.6. *Planned Parenthood of Indiana and Kentucky v Commissioner of the Indiana State Department of Health*. Filed with the U.S. Court of Appeals for the Seventh Circuit on August 3, 2017, in consideration of a *Planned Parenthood (PP)* and *American Civil*

Liberties Union (ACLU) challenge to an Indiana mandatory ultrasound and waiting period law.

- 5.7. Planned Parenthood of Greater Texas Family Planning and Preventive Health Services, et al. v Smith, et al., we drafted this, but Black Mamas Matter Alliance and other RJ groups were the signers, it was filed with the U.S. Court of Appeals for the Fifth Circuit on October 13, 2017, in consideration of a PP challenge to a Texas defunding measure (specially highlighting the impacts defunding would have on Black women).
- 5.8. Alabama Women's Center v Williamson. Filed with the U.S. Court of Appeals for the Eleventh Circuit on May 1, 2017.
- 5.9. McCullen, et al. v Coakley, Attorney General for the Commonwealth of Massachusetts, et al., Filed with the U.S. Supreme Court on November 22, 2013, in consideration of a Massachusetts clinic buffer zone law.
- 5.10. Burwell v Hobby Lobby. Filed with the U.S. Supreme Court on January 28, 2014.
- 5.11. Francis A. Gilardi v U.S. Department of Health and Human Services. Filed with the U.S. Court of Appeals for the DC Circuit on June 14, 2013.
- 5.12. Conestoga Wood Specialties Corporation v Sebelius. Filed with the U.S. Court of Appeals for the Third Circuit on April 22, 2013, this case was consolidated with Hobby Lobby and taken by the U.S. Supreme Court.
- 5.13. Autocam Corp. v Sebelius. Filed with the U.S. Court of Appeals for the Sixth Circuit on March 21, 2013.
- 5.14. Korte v Sebelius. Filed with the U.S. Court of Appeals for the Seventh Circuit on March 8, 2013.
- 5.15. O'Brien v U.S. Department of Health and Human Services. Filed with the U.S. Court of Appeals for the Eighth Circuit on December 28, 2012.
- 5.16. Stormans v Selecky. Filed with the U.S. Court of Appeals for the Ninth Circuit on September 4, 2012, in consideration of Washington regulations requiring pharmacies to fill all prescriptions in a timely manner, including for contraception, the Ninth Circuit upheld the rules as constitutional in 2015 and the U.S. Supreme Court denied.

- 5.17.** Hoyer v City of Oakland. Filed with the U.S. Court of Appeals for the Ninth Circuit on February 23, 2010, in consideration of an Oakland buffer zone law (as a note we drafted and signed this, but many other orgs signed onto it and ACOG was the lead signer).
- 5.18.** AT&T Corporation v Hulteen, et al., Filed with the U.S. Supreme Court on November 14, 2008, the Applicant prepared this brief, and it was signed by various legal scholars in this case which involved individual women who were challenging their employers' calculation of their pension benefits (they included maternity leave and leave taken for complications due to childbirth that was before the Pregnancy Discrimination Act had been passed).



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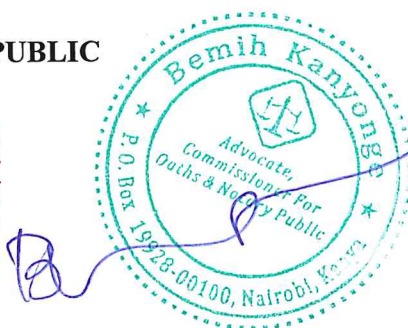
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1ST DEFENDANT

BLANTYRE CITY COUNCIL

(ONE STOP SERVICE CENTRE AT CHILEKA)

2ND DEFENDANT

ATTORNEY GENERAL

(MINISTRY OF HEALTH)

3RD DEFENDANT

HUMAN RIGHTS COMMISSION

4TH DEFENDANT

CENTER FOR REPRODUCTIVE RIGHTS

AMICUS CURIAE

**AMICUS CURIAE BRIEF OF
THE CENTER FOR REPRODUCTIVE RIGHTS**

I. INTRODUCTION

1. The Center for Reproductive Rights (the “**Center**” or the “**Intervener**”) has prepared this *amicus curiae* brief to assist the Court and draw attention to the relevant international human rights landscape and comparable case law related to the sexual and reproductive health rights of victims of rape¹, and in particular the position of adolescent girls.
2. The underlying claim in this case pursued by AC (A Minor) acting through a litigation guardian, Mr CJ raises issues under the current laws of Malawi that are pertinent to the sexual and reproductive health rights of women and girls in Malawi. In particular, the claim raises the legal question of whether Part VI of the Gender Equality Act (the “**GEA**”) (construed in light of the general prohibition of abortion in the Malawi Penal Code², as amended (the “**Penal Code**”)) has been interpreted and implemented in a way to provide safe termination of pregnancy to victims of rape, in particular where those victims are adolescent girls. In light of the Center’s extensive experience in this field, the Center will demonstrate in this brief that (a) the legislative position in Malawi is inconsistent with its obligations in respect to the provision of abortion services under international human rights law, and (b) the Court has an opportunity to clarify that the circumstances in which abortions are permitted to preserve the mother’s life and mental and physical health, includes cases in which the woman is a victim of rape and/or is an adolescent girl.
3. The objective of this brief is accordingly to provide the Court with information regarding international and comparative law and standards from the international, regional and domestic legal systems, in recognition that this body of jurisprudence can inform the Court’s interpretation of the provisions of the GEA (and the exceptions in the Penal Code) in this case.
4. This brief is structured as follows: after this Introduction, Section II briefly describes the interest of the Intervener; Section III explains the context of the situation in Malawi; Section IV explores the relevant legal landscape under international and regional human rights law, focusing on sexual and reproductive health rights that are afforded to victims of rape and in

¹ This brief refers to “rape” generically. However, the normative language used in the literature describes “sexual and gender-based violence” and should be construed accordingly.

² Malawi Penal Code, Chapter 7:01.

particular the rights of adolescent girls, and Section V provides an overview of comparative jurisprudence. Section VI sets out a conclusion.

II. INTEREST OF THE INTERVENER

5. The Center, founded in 1992, is an international non-profit legal advocacy organisation and is one of the world's leading legal human rights organisations in the field of women's reproductive health. It uses the power of the law to defend and promote reproductive rights as fundamental human rights worldwide. It is headquartered in New York City, with regional offices in Nairobi, Bogotá, Geneva, and Washington, D.C. The Center's International Legal Program, in collaboration with human rights advocates around the world, documents violations of reproductive rights, monitors and comments on laws concerning reproductive healthcare, and advocates before the United Nations (the "U.N.") and other regional human rights fora.
6. Leveraging on its legal expertise, original research and analysis in international human rights law, the Center has intervened as a third party in cases before domestic, regional and international courts to inform how key issues at stake are understood and decided. By way of example, the Center has submitted *amicus curiae* briefs before regional and national courts and bodies in Africa,³ Asia,⁴ Europe,⁵ Latin America⁶ and the United States of America.⁷ The Center's expertise is also frequently called upon by U.N. human rights treaty monitoring bodies⁸, the Office of the High Commissioner of Human Rights, and the Human Rights Council.

³ *Teachers Service Commission v WJ & 5 Others* [2020] eKLR (Court of Appeal of Kenya) – vicariously liable for failure to protect students from sexual violence.

⁴ *Lakshmi Dhikta v Government of Nepal*, Decision No. 8464 (2009) (Supreme Court of Nepal) – failure to ensure adequate access to safe abortion services despite the decriminalization of abortion on broad grounds.

⁵ *In Re NIHRC Application for Judicial Review* [2018] UKSC 27 (Supreme Court of the United Kingdom) – prohibition of abortion in situations of rape, incest and fatal fetal impairment, violates the European Convention on Human Rights. *A, B and C v. Ireland* (App. No. 25579/05) (European Court of Human Rights) - failure to adopt legislation and establish an effective and accessible procedure to access lawful abortions for women whose lives were at risk violated the right to respect for private life under the ECHR.

⁶ *I.V. v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-American Court of Human Rights (ser. C) No. 329 (November 30, 2016), (Inter-American Court of Human Rights) – Sterilisation without consent is a breach of rights to personal integrity, private life, personal liberty, access to information, and freedom to start a family.

⁷ *Alliance for Hippocratic Medicine v. FDA*, 23 U.S. 235 (Supreme Court of the United States) - challenge to a district court decision blocking the FDA's long-standing approval of mifepristone, a drug used in medical abortion procedures.

⁸ *A.S. v. Hungary* (Communication No. 4/2004), CEDAW/C/36/D/4/2004 (Committee for the Elimination of Discrimination against Women) - Hungary had failed to protect the Applicant's rights under the Convention on the

III. CONTEXT OF THE SITUATION IN MALAWI

7. According to a UNICEF Malawi report (2020), an estimated 38% of women in rural communities and 33% of women in urban communities between the ages of 15 and 49 have experienced sexual violence.⁹
8. It is also inevitable that victims of sexual violence tend to be adolescent girls, due to their vulnerability. The World Health Organisation has estimated (as of 2018) that

adolescents aged 15–19 years (24%) are estimated to have already been subjected to physical and/or sexual violence from an intimate partner at least once in their lifetime, and 16% of adolescent girls and young women aged 15–24 have been subjected to this violence within the past 12 months.¹⁰
9. Where rape and sexual violence result in pregnancy, women often turn to unsafe illegal abortions. Whilst statistics are difficult to source, an estimated 141,000 abortions were performed in Malawi in 2015, roughly 38 abortions per 1,000 women of reproductive age.¹¹ These women and girls face serious risk of complications and death in seeking abortion care.¹² For example, “*out of the estimated 141,000 abortions performed in Malawi in 2015, approximately 60 percent resulted in complications that required medical treatment in a health facility.*”¹³ Some estimates suggest that unsafe abortions account for approximately 18% of the maternal deaths in Malawi.¹⁴

Elimination of Discrimination against Women and that its failure to provide reproductive health information and to ensure that women’s full and informed consent was obtained prior to sterilisation violated the Convention.

⁹ UNICEF Malawi, ‘Ending Violence against women and girls in Malawi: What do we know?’ (2020), 13, fig 2. https://www.unicef.org/malawi/sites/unicef.org.malawi/files/2020-07/Spotlight_Ending_Violence_Against_Women_andGirls_v2_15062020_WEB_0.pdf accessed 8 April 2024.

¹⁰ WHO, ‘Violence Against Women Prevalence Estimates, 2018: global, regional and national prevalence estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women’ (9 March 2021), XII <https://www.who.int/publications/i/item/9789240022256> accessed 3 April 2024.

¹¹ Guttmacher, ‘Abortion and Postabortion Care in Malawi Fact Sheet’ (April 2017) <https://www.guttmacher.org/fact-sheet/abortion-malawi> accessed 3 April 2024.

¹² *ibid*, “The majority of induced abortion procedures in Malawi are performed under clandestine and unsafe conditions. Complications from abortions have been estimated to account for between 6 percent and 18 percent of maternal deaths in Malawi”.

¹³ *ibid*.

¹⁴ Ipas, ‘Malawi’, <https://www.ipas.org/where-we-work/africa/africa-southern-region/malawi/> accessed 3 April 2024.

10. The data also suggests that abortions are sought largely by girls under the age of 19, meaning that abortion care in Malawi is largely a child-health concern. Of women seeking post-abortion care, one study found that approximately 20% are aged 10 to 19,¹⁵ although data from some areas suggests that number is closer to 50%, with the vast majority of abortions being sought by women under the age of 20.¹⁶
11. That the need for adolescent girls in particular to have access to safe and comprehensive reproductive or sexual health services is crucial for their well-being and general health. This is particularly so in light of increased risks to the life and physical health that the pregnancy itself can present.¹⁷ Complications relating to pregnancy and childbirth are among the leading cause of death for girls aged 15 to 19.¹⁸ In addition to the risk of fatality, according to available medical studies, adolescents have an increased risk of adverse maternal outcomes, including maternal anaemia, preterm delivery, postpartum haemorrhage, and preeclampsia.¹⁹ Aside from physical health risks, adolescent pregnancies may also trigger adverse outcomes to the girl's mental health and social circumstances, particularly if she is required by policy or stigma to cease formal education.

¹⁵ Brooke Levandowski et al, 'Reproductive health characteristics of young Malawian women seeking post-abortion care' (2012) 16(2) *Afr J Reprod Health*, 253-261.

<[https://pubmed.ncbi.nlm.nih.gov/22916557/#:~:text=This%20study%20collected%20data%20on,\(age%2020%2D24\)](https://pubmed.ncbi.nlm.nih.gov/22916557/#:~:text=This%20study%20collected%20data%20on,(age%2020%2D24)>)> accessed 3 April 2024.

¹⁶ International Campaign for Women's Right to Safe Abortion, 'Malawi – Young girls bear the brunt of unsafe abortions' (22 March 2024) <<https://www.safeabortionwomensright.org/news/malawi-young-girls-bear-the-brunt-of-unsafe-abortions/>> accessed 3 April 2024. ("Data from Blantyre District Health Office shows that the majority of those seeking post-abortion care in the district are young girls. Of the 2,003 reported cases treated with post-abortion care for unsafe abortions in the last quarter of 2023, as many as 1,003 were under the age of 20, while the rest were only slightly over 20 years of age.").

¹⁷ Not addressing here, the risks and health threats post-pregnancy, and the adverse fetal outcomes that can arise.

¹⁸ WHO, 'Adolescent and young adult health' (28 April 2023) ('Early pregnancy and childbirth').

<<https://www.who.int/news-room/fact-sheets/detail/adolescents-health-risks-and-solutions>> accessed 3 April 2024.

¹⁹ Tetsuya Kawakita et al, 'Adverse Maternal and Neonatal Outcomes in Adolescent Pregnancy' (2016) 29(2) *J Pediatr Adolesc Gynecol*, 130-136 <[https://www.jpagonline.org/article/S1083-3188\(15\)00307-1/abstract](https://www.jpagonline.org/article/S1083-3188(15)00307-1/abstract)> and manuscript at <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4886236/>> accessed 3 April 2024.

IV. RELEVANT LEGAL FRAMEWORK IN MALAWI

A. The Legal Framework of Reproductive Health in Malawi

1. The GEA²⁰, enacted in 2013, enshrines the right to adequate sexual and reproductive health for every person. This right includes the rights to access sexual and reproductive health services and to choose whether to have a child. Section 19 enumerates specific components of this right in the following manner:
 1. Every person has a right to adequate sexual and reproductive health which includes the right to—
 - (a) access sexual and reproductive health services;
 - (b) access family planning services;
 - (c) be protected from sexually transmitted infection;
 - (d) self-protection from sexually transmitted infection;
 - (e) choose the number of children and when to bear those children;
 - (f) control fertility; and
 - (g) choose an appropriate method of contraception.
 2. Subject to any other written law, every person has the right to choose whether or not to have a child.
2. As discussed in this brief, the consensus under international human rights jurisprudence is that the right to access sexual and reproductive health services encompasses, at least in specific circumstances, the right to safe and legal termination of pregnancy.
3. While the GEA guarantees this right, the Penal Code broadly criminalizes the administration of an abortion²¹, with the only stated exception provided at Section 243. That section states that a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation on any person for her benefit, or on an unborn child for the preservation of the mother's life.

²⁰ GEA, Chapter 25:06.

²¹ Under Section 149 of the Penal Code, it is a criminal offence to unlawfully administer to a woman any noxious substance or use any force with the intent to procure a miscarriage. Section 150 of the Penal Code makes it a criminal offence to unlawfully supply to or procure for any person anything with the knowledge that it is intended to be unlawfully used to procure the miscarriage of a woman. Section 151 of the Penal Code criminalizes the supply of drugs or instruments to procure an abortion.

4. The meaning of ‘preservation of the mother’s life’ had however remained ambiguous and as noted by the Law Commission in its 2016 report advocating abortion law reform²²: “*health professionals are not clear on what could fall under the exception provided by the law and that has meant that safe abortion services on the available exception has largely been inaccessible.*”²³
5. In *State (On the Application of HM (Guardian) on Behalf of CM (Minor)) v Hospital Director of Queen Elizabeth Central Hospital and Another* [2021] MWHC 43, the Court observed that the exception in Section 243 of the Penal Code encompasses the mental health of the woman. The Court stated:

The applicant was informed by the medical officers at OSCC that QECH could not perform the procedure because termination of pregnancy is illegal in Malawi. Sections 149, 150, and 151 of the Penal Code restricts it. However, section 243 of the Penal Code makes exceptional in the circumstances where ***the life of the woman, is in danger because of the pregnancy, and the preservation of a woman’s life includes preservation of her mental and physical health.***²⁴
6. Accordingly, the Court’s recent clarification that the exception under Section 243 applies to preservation of a women’s “*mental health*” is a significant step towards recognition that abortion is available in a wider range of circumstances, and provides this Court with basis to interpret the legal position in Malawi in light of the consensus position under international human rights law.²⁵ Section VI of this brief will explore how other national courts have interpreted and applied similar legislative exceptions.

²² The Center recognizes that upon the recommendation of the Malawi Law Commission to reform and significantly liberalise abortion laws (further to its 2016 report), the Termination of Pregnancy Bill had been presented to the Malawi National Assembly in 2017, but did not progress and has since been withdrawn. See VOA, ‘Malawi Parliament Withdraws Abortion Rights Bill after Objections’ (19 June 2021) <https://www.voanews.com/a/africa_malawi-parliament-withdraws-abortion-rights-bill-after-objections/6207221.html> accessed 8 April 2024.

²³ Report of the Law Commission on the Review of the Law of Abortion (15 March 2016, Commission Report No. 29), p. 15.

²⁴ *State (On the Application of HM (Guardian) on Behalf of CM (Minor)) v Hospital Director of Queen Elizabeth Central Hospital and Another* [2021] MWHC 43, p. 3.

²⁵ Indeed, Malawi has acknowledged that the 2021 High Court judgment recognized that safeguarding mental and physical health is part of preserving life. See, for example, ‘Replies of Malawi to the list of issues in relation to its

B. The Application of International Law in Malawi

7. Malawi takes a dualist approach to the application of international treaties. Section 211(1) of the Constitution of the Republic of Malawi (the “**Constitution**”) states that international treaties are part of Malawian law if so, provided in an Act of Parliament. Commenting on this provision, the High Court in *Re David Banda* [2008] MWSC 243 held that courts must interpret the Constitution, statutes, and all other laws in a manner that, as far as possible, avoids conflict with international law. At pages 10 and 11, the court stated as follows (bold added):

In other words, Malawi has consciously and decidedly undertaken the obligations dictated by these Conventions. It is therefore our solemn duty to comply with the provisions of the Conventions. If for a moment the argument that the Conventions are not part of our law found favour, **then at least on part of the Court the duty is to interpret and apply our statutory law, so far as the spirit of the statute could allow, so that it is in conformity and not in conflict with our established obligation under these Conventions.** And therefore, that unless the statute, by its words and spirit compels our Courts to ignore international laws that is binding on us, **the practice of our Courts is to avoid a clash and the way is to construe the domestic statute in such a way as to avoid breaching the obligation,** See *Mwakawanga v Rep* (1968 – 1970) 5 MLR 14 and *Gondwe v Attorney General* [1996] MLR 492.²⁶

8. The Malawi Supreme Court of Appeal (the “**MSCA**”) reaffirmed this principle in *In the Matter of CJ (A Female Infant) of C/o Post Office Box 30871, Chichiri, Blantyre 3* [2009] MWSC 1 (“**In the Matter of CJ**”). It observed that:

In all cases therefore the courts will have to look at our Constitution and our statutes and see if the international agreement in question or the customary international law in question is consistent or in harmony with the law of the land and the Constitution.²⁷

initial report to the Committee on Economic, Cultural and Social Rights’, (5 April 2024) UN Doc E/C.12/MWI/RQ/1, para 98.

²⁶ *Re David Banda* [2008] MWSC 243, p10-11.

²⁷ *In the Matter of CJ (A Female Infant) of C/o Post Office Box 30871, Chichiri, Blantyre 3* [2009] MWSC 1.

9. Additionally, Section 11(2)(c) of the Constitution requires courts, where applicable, to have regard to current norms of public international law and comparable foreign case law when interpreting and applying the Constitution. While international treaties may lack the force of law and are therefore not binding authority, they are persuasive authority on the normative framework. Consequently, courts must consider them when interpreting and applying the Constitution, as well as domestic statutes. This is exactly what the MSCA did in *In the Matter of CJ* in which it considered and applied the Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child to decide the case before it.
10. The Court is therefore invited to properly consider the import of international human rights law and jurisprudence in the interpretation of the provisions of the GEA and the Penal Code.

V. RELEVANT LEGAL LANDSCAPE UNDER INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW

11. As will be set out in this section of the brief, international human rights treaty bodies have affirmed that ensuring access to safe legal abortion in accordance with human rights standards is part of the State's obligation to eliminate discrimination against women, and to ensure women's rights to health, amongst other fundamental rights. The jurisprudence also recognizes that victims of rape are vulnerable categories of persons requiring treatment with dignity and respect. The distress suffered by victims of rape is often exacerbated by risk of unwanted pregnancy or actual pregnancy resulting from rape. The denial of timely access to necessary medical treatment, including legal abortion, exposes victims to additional suffering. Not only does this have a clear and direct impact on the woman's mental health, but it also amounts to an act of inhuman or degrading treatment. International and comparative jurisprudence also acknowledges the unique position of minors as a vulnerable group, and the need to realize and protect their human rights in the context of their reproductive health.
12. As further explained in this section, there is broad consensus in international and regional human rights law that States should decriminalize abortion, and at the very least, must include exceptions to any abortion bans for situations of rape. International law affirms the importance of providing adolescents access to sexual and reproductive health services.

13. Reference will be made primarily to the human rights instruments promulgated by the U.N. and regional institutions, the comments and decisions of their treaty monitoring bodies, and cases determined by regional human rights courts and decision-making bodies.²⁸²⁹

A. Protocol To the African Charter on Human and Peoples' Rights on The Rights of Women in Africa

14. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa³⁰ (the “**Maputo Protocol**”), was ratified by Malawi on 20 May 2005 and entered into force in November 2005. The Maputo Protocol comprises a comprehensive articulation of women’s civil and political rights, economic, social and cultural rights, group rights and health and reproductive rights. As at June 2023, 44 out of 55 African Union member states have ratified the Maputo Protocol.³¹

15. Health and reproductive rights are set out at Article 14, which in particular directs that “*States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.*”³² In doing so, State Parties have expressly agreed to take “*all appropriate measures*” to “***protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.***”³³ (bold added). The Maputo Protocol is the only human rights treaty to expressly recognize access to safe abortion as a human right in certain circumstances.

²⁸ Treaty monitoring bodies are committees of independent experts that monitor implementation of the core international human rights treaties. ‘General Comments’ issued by those bodies are legally non-binding clarifications of treaty obligations that however influence the development of international human rights law. Certain treaty monitoring bodies are also empowered to hear and determine complaints raised by individuals as to violation of their human rights.

²⁹ Malawi is one of only states to have filed a declaration permitting the African Court on Human and Peoples’ Rights to consider applications filed against it by individuals and NGOs and accordingly Malawi accepts the Court has jurisdiction to determine cases of infringement of the African Charter on Human and Peoples’ Rights “*and any other relevant human rights instruments ratified by the States concerned*” (art 7 of the Protocol to the African Charter on Human and Peoples’ Rights).

³⁰ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005) (“**Maputo Protocol**”).

³¹ African Union, ‘Maputo Protocol On The Rights Of Women In Africa: Commemorating 20 Years’ (5 July 2023) <<https://au.int/en/newsevents/20230705/maputo-protocol-20-years#:~:text=As%20at%20June%202023%2C%2044,the%207th%20of%20June%202023>> accessed 7 June 2024.

³² Maputo Protocol, art 14(1).

³³ Maputo Protocol, art 14(2)(c).

16. In part, this appears to be natural recognition that carrying a pregnancy following rape has significant health -- particularly mental health -- implications for women and girls. In November 2014, the African Commission on Human and Peoples' Rights (the "**African Commission**"), the treaty monitoring body overseeing implementation of the African Charter including the Maputo Protocol, issued General Comment No. 2 on Article 14, noting that:

the Protocol provides for women's right to terminate pregnancies contracted following sexual assault, rape and incest. Forcing a woman to keep a pregnancy resulting from these cases **constitutes additional trauma which affects her physical and mental health.**³⁴ (bold added)

17. It is therefore clear that the current legislative position in Malawi is inconsistent with the obligations expressly set out in the Maputo Protocol. The African Commission in its most recent Concluding Observations (on the 2nd and 3rd Combined Period Report for Malawi for the period from 2015-2019) has pointedly expressed concern regarding continued delays to Malawi's implementation of the proposed amendment to abortion law developed by the Law Commission.³⁵

B. International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights

18. Provisions in other international human rights instruments also recognize that any restrictions on access to abortion must not result in a woman or girl's physical or mental pain and suffering.

19. The International Covenant on Civil and Political Rights³⁶ ("**ICCPR**") and the International Covenant on Economic Social and Cultural Rights³⁷ ("**ICESCR**") are complementary global human rights instruments which were both ratified by Malawi on 22 December 1993 and are widely ratified by countries around the world.³⁸

³⁴ African Commission, 'General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights', (adopted November 2014), para 37. Para 51-52 also stress the importance of access to information and education on, *inter alia*, safe abortion for women, especially adolescent girls and young people.

³⁵ African Commission, 'Concluding Observations and Recommendations on the 2nd and 3rd Combined Periodic Report of the Republic of Malawi, 2015-2019' (adopted March 2022), paras 79 and 91.

³⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ("**ICCPR**").

³⁷ International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 ("**ICESCR**").

³⁸ The ICCPR and ICESCR were initially passed by the UN General Assembly in 1996 as a codification of the U.N.'s 1948 Universal Declaration of Human Rights (adopted 10 December 1948) 217 A (III).

20. Article 6 of the ICCPR recognizes and protects the right to life. According to the Human Rights Committee (the treaty monitoring body overseeing implementation of the ICCPR), this right should not be interpreted narrowly, and “*concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity.*”³⁹ Article 7 of the ICCPR guarantees that no one shall be subject to cruel, inhuman or degrading treatment or punishment, which protection applies to “*in particular, children*”.⁴⁰ Article 2 provides that the treaty articles shall apply “*without distinction of any kind*”.

21. In the context of reproductive rights, the Human Rights Committee has stated in its General Comment No. 36 (2019) on Article 6 that:

restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy.⁴¹
(bold added)

22. Moreover:

States parties **must provide safe, legal and effective access to abortion** where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term **would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape** or incest or where the pregnancy is not viable.⁴² (bold added)

³⁹ Human Rights Committee, ‘General Comment No. 36 on article 6: right to life’, (2019) UN Doc CCPR/C/GC/36, para 3.

⁴⁰ Human Rights Committee, ‘General Comment No. 20: Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (article 7)’ (1992), paras 5-6.

⁴¹ Human Rights Committee, ‘General Comment No. 36 on article 6: right to life’, (2019) UN Doc CCPR/C/GC/36, para 8.

⁴² *ibid.*, para 8.

23. The Human Rights Committee's Working Group on the issue of discrimination against women in law and in practice has in fact expressly recommended, in recognition of its discriminatory effect on women of a lower socio-economic demographic, that States:

Repeal restrictive laws and policies in relation to termination of pregnancy, **especially in cases of risk to the life or health, including the mental health, of the pregnant woman, rape, incest and fatal impairment of the foetus**, recognizing that such laws and policies in any case primarily affect women living in poverty in a highly discriminatory way.⁴³ (bold added)

24. Similar to other treaty monitoring bodies, the Human Rights Committee has been critical about Malawi's general criminalization of abortion, expressing "*deep concern*" in its 2014 Concluding Observations over the "*high percentage of unsafe abortion-related maternal deaths*".⁴⁴ Whilst the Committee noted the special commission set up at the time (in around 2014) to review the abortion law, it remained concerned about the excessive delays in reforming the law and recommended that Malawi "*urgently review its legislation on abortion and provide for additional exceptions in cases of pregnancy resulting from rape or incest and when the pregnancy poses a risk to the health of women*" and that "*the law should ensure that reproductive health services are accessible for all women and adolescents*".⁴⁵

25. As noted by the Committee, the position is similarly expressed where the mother and victim of rape is an adolescent girl. In the case of *LMR v Argentina*, the Human Rights Committee found that the State violated the complainants' Article 7 rights to be free from cruel, inhuman and degrading treatment, by failing to guarantee her right to a termination of pregnancy as a result of rape (as provided under the Argentina criminal code), as this caused her physical and mental suffering. This was made especially serious "*by the victim's status as a young girl with a disability*".⁴⁶ In that case, the complainant was a girl who suffered from a permanent mental impairment and had been diagnosed as having a mental age of between 8 and 10 years old.

⁴³ UN Human Rights Council, 'Report of the Working Group on the issue of discrimination against women in law and in practice' (2016), UN Doc A/HRC/32/44, para 107(b).

⁴⁴ Human Rights Committee, concluding observations on the initial periodic report for Malawi' (2014) UN Doc CCPR/C/MWI/CO/1/Add.1, para 9.

⁴⁵ *ibid.*, para 9.

⁴⁶ Human Rights Committee, *L.M.R v Argentina* (2017) UN Doc CCPR/C/101/D/1608/2007, para 9.2.

26. Even outside of the situation of rape, the Human Rights Committee has recognized the vulnerable position of adolescent girls carrying a pregnancy to term. In the case of *KL v Peru*⁴⁷, which was heard by the Human Rights Committee, and in respect of which the Center intervened, the complainant was a girl who discovered at age 17 she was pregnant with an anencephalic foetus – meaning that the foetus was developing without parts of its brain or skull and had no chance of survival after birth. As the prospect of carrying a non-viable pregnancy to term exposed KL to severe mental suffering, emotional instability, and symptoms of depression, she sought to terminate the pregnancy. Although Peru’s law permits abortion where pregnancy poses a risk to the person’s life or health, the hospital staff refused to administer abortion services to KL and the Ministry of Health refused to intervene on her behalf. KL was compelled to carry the pregnancy to term and breastfeed the baby over the course of the two days it survived, ultimately leaving her in a deep state of depression.
27. The Human Rights Committee determined that denying abortion services to a child carrying a non-viable pregnancy, which posed a risk to her life and her physical and mental health, violated her rights under the ICCPR, including the rights to be free from cruel, inhuman and degrading treatment (Article 7) to privacy (Article 17), to special protection as a minor (Article 24), and to a legal remedy (Article 2). Significantly, the Human Rights Committee acknowledged “*the special vulnerability of the [complainant] as a minor girl*”.⁴⁸
28. Whilst the ICCPR’s lens for scrutinising abortion restrictions has stemmed from the right to life and to be free from cruel, inhuman or degrading treatment or punishment, the ICESCR has adopted a sexual and reproductive health-rights lens to the issue. Article 12(1) of the ICESCR recognizes the right of everyone to the enjoyment of the “*highest attainable standard of physical and mental health*”, which includes both “*physical and mental health*”. Article 3 guarantees the equal right of men and women to the enjoyment of all economic, social and cultural rights.⁴⁹

⁴⁷ Human Rights Committee, *K.L. v Peru* (2005) UN Doc CCPR/C/85/D/1153/2003, paras 6.3-6.5.

⁴⁸ *ibid.*, para 6.5.

⁴⁹ ICESCR, art 3: “*The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.*”

29. The Committee on Economic, Social and Cultural Rights (“**ICESCR Committee**”), the treaty monitoring body overseeing implementation of the ICESCR, has directed in its General Comment No. 22 (2016) (on the right to sexual and reproductive health under Article 12) that,

States parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual and reproductive health. This requires States **to repeal or reform laws and policies that nullify or impair the ability of certain individuals and groups to realize their right to sexual and reproductive health... for example criminalization of abortion or restrictive abortion laws.**⁵⁰ (bold added)

30. This reflects the ICESCR Committee’s views in an earlier General Comment No. 16 (2005) on Article 3, that the implementation of Article 3, in relation to Article 12, requires at a minimum “*removal of legal restrictions on reproductive health provisions*”.⁵¹ The Committee has also emphasized more generally the need for States to provide access to sexual and reproductive health services, without distinction, to adolescents.⁵²

C. Convention on the Elimination of All Forms of Discrimination against Women

31. Restrictions on access to abortion, particular to victims of rape, amounts under international law to discrimination in the form of gender-based violence.

32. Malawi has committed to end all forms of discrimination against women (including girls) in its accession to the Convention on the Elimination of All Forms of Discrimination against Women⁵³ (“**CEDAW**”) in March 1987.

⁵⁰ ICESCR Committee, ‘General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)’ (2016) UN Doc E/C.12/GC/22, para 34.

⁵¹ ICESCR Committee, ‘General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3)’ (2005) U.N. Doc. E/C.12/2005/4, para. 29. See also the ICESCR Committee, ‘General Comment No. 14: The right to the highest attainable standard of health (Art 12)’ (2000) UN Doc E/C.12/2000/4, para 21.

⁵² The ICESCR Committee has urged a State Party to “*ensure that sexual and reproductive health services, including abortion... services and information, are available, accessible and affordable without discrimination, including to adolescents.*” ICESCR Committee, ‘Concluding observations on the combined third to fifth periodic reports of Romania’ (2014) UN Doc. E/C.12/ROU/CO/3-5, para 22.

⁵³ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), 1249 UNTS 13 (“**CEDAW**”)

33. Article 12 of CEDAW requires State parties to take appropriate measures in the field of health care. The Committee for CEDAW in its General Recommendation No. 24 (1999) on Article 12, which applies equally to adolescents and girls⁵⁴, has called on States to implement national strategies to “*ensure universal access for all women to a full range of high-quality and affordable health care, including sexual and reproductive health services*”.⁵⁵ It further observed that:

it is only women that must live with the physical and emotional consequences of unwanted pregnancy. Denying women access to medical services that enable them to regulate their fertility **or terminate a dangerous pregnancy amounts to a refusal to provide health care that only women need.**⁵⁶ (bold added)

34. It is clear that the CEDAW Committee considers that abortion bans without any exception for rape amount to violations of State Party obligations under the CEDAW. In the context of an inquiry into the position in Northern Ireland, the CEDAW Committee found “*grave violations of rights under the Convention*”, considering that the State’s “*criminal law compels... victims of rape or incest to carry pregnancies to full term, thereby **subjecting them to severe physical and mental anguish, constituting gender-based violence against women***”.⁵⁷ (bold added)

35. Moreover, the CEDAW Committee has observed the ‘mental suffering’ resulting from a woman who was a victim of rape, finding the State to be in violation of its obligations under the Convention. In the case of *LC v Peru*⁵⁸ (a case in which the Center acted) the CEDAW Committee found that Peru had violated an adolescent girl’s rights to freedom from stereotyping (Article 5), health (Article 12) and to a remedy (Article 2), in denying her urgently needed spinal surgery on the basis that it could harm the unborn foetus. The complainant was a 13-year-old girl who had been repeatedly raped by an older neighbour. When the girl discovered she fell pregnant, she attempted suicide and suffered a severe spinal injury which

⁵⁴ Paragraph 7 of the General Comment No. 24 notes that “*women*” includes girls and adolescents.

⁵⁵ CEDAW Committee, ‘General Recommendation No. 24: Article 12 of the Convention (Women and Health)’ (1999) UN Doc A/54/38/Rev.1, Chap.I, para 29.

⁵⁶ CEDAW Committee, ‘General Recommendation No. 24: Article 12 of the Convention (Women and Health)’ (1999) UN Doc A/54/38/Rev.1, Chap.I, as cited in the Report of the Law Commission on the Review of the Law of Abortion (15 March 2016, Commission Report No. 29), p.29.

⁵⁷ CEDAW Committee, ‘Report of the Committee: Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ (2018) UN Doc CEDAW/C/OP.8/GBR/1, para. 83 (a).

⁵⁸ CEDAW Committee, *L.C. v Peru* (2011) UN Doc CEDAW/C/50/D/22/2009.

required urgent surgical treatment in order to avoid likely paralysis. Despite an exception under Peruvian law for abortions where the mother's health and life were at risk, the hospital board denied the girl's request for termination of her pregnancy on the basis that her life was not in danger, and the hospital would not conduct the spinal surgery whilst she remained pregnant.

36. The CEDAW Committee found, in respect of the violation of the right to health under Article 12, that the complainant had not been given access to an effective and accessible procedure allowing her to establish the medical services that her physical and mental state required, being spinal surgery and therapeutic abortion. This was “*even more serious considering that she was a minor and a victim of sexual abuse*”, noting that her suicide attempt was a “*demonstration*” of the amount of mental suffering she had experienced.⁵⁹ Peru was ordered to amend its law to allow women to obtain an abortion in cases of rape and sexual assault.
37. In its most recent Concluding Observations of Malawi's country reports, the CEDAW Committee has expressed concern over the continuing criminalization of abortion without any express exception for rape.
- a. In its 2015 Concluding Observations of Malawi's Seventh Period Report, the CEDAW Committee noted concerns of “*the criminalization of abortion, except when the life of the pregnant woman or girl is at risk, and the impact that such criminalization has on the maternal mortality ratio, as well as compelling women, in particular women under 25 years of age and girls, to resort to unsafe abortion*”,⁶⁰ and recommended Malawi to “***amend legal provisions regulating abortion to legalize it... at least in cases in which the life and/or health of the pregnant woman or girl is at risk, and in cases of rape, incest and serious impairment of the foetus***”.⁶¹ (bold added)
- b. In its 2023 Concluding Observations of Malawi's Eighth Period Report, the CEDAW Committee went even further to express its continuing concerns about “*the criminalization of abortion in all cases, punishable by up to 14 years of imprisonment, except when the life of the pregnant woman or girl is in danger, the lack of clarity*

⁵⁹ *ibid.*, para 8.15.

⁶⁰ CEDAW Committee, ‘Concluding observations on the seventh periodic report of Malawi’ (2015) UN Doc CEDAW/C/MWI/CO/7, para 34(b).

⁶¹ *ibid.*, para 35(c).

*surrounding the law on abortion and the restrictive understanding of the criteria to determine that a life is in danger, notwithstanding the High Court ruling in 2021 that encompasses risks to physical and mental health” (bold added).*⁶² The Committee recommended Malawi to *“immediately implement”* the Law Commission’s recommendation to legalize abortion in cases of rape, incest or defilement, risks to the life or health of the pregnant woman and severe fatal impairment, and consider the decriminalization of abortion in all other cases.⁶³

D. Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment

38. As set out above in respect of Article 7 of the ICCPR, denying a woman or adolescent girl an abortion in cases of rape may also amount to cruel, inhuman or degrading treatment in light of the mental suffering of the woman that could result. Malawi acceded to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment⁶⁴ (the “CAT”) on 11 June 1996, which is a convention that deals specifically with this issue. The treaty monitoring body, the Committee against Torture (the “CAT Committee”), has criticized abortion bans that do not have exceptions for rape and incest, noting that such situation *“entails constant exposure to the violation committed against her and causes serious traumatic stress and a risk of long-lasting psychological problems such as anxiety and depression.”*⁶⁵ (bold added)

E. Convention on the Rights of the Child

39. Whilst international human rights protections apply equally to minors, there are two instruments which Malawi has ratified that enshrine specific provisions for children and adolescents. The primary instrument protecting the rights of children⁶⁶ under international law

⁶² CEDAW Committee, ‘Concluding observations on the eighth periodic report of Malawi’ (2023) UN Doc CEDAW/C/MWI/CO/8, para 35(b).

⁶³ *ibid.*, para 36(b).

⁶⁴ Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (“CAT”).

⁶⁵ CAT Committee, ‘Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding observations of the Committee against Torture: Nicaragua’ (2009) UN Doc. CAT/C/NIC/CO/1, para 16. See also CAT Committee, ‘Concluding Observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013)’ (2013) UN Doc. CAT/C/KEN/CO/2, para 28.

⁶⁶ The CRC defines children as persons under the age of 18 years old unless, under the law applicable, majority is attached earlier (CRC, art 1).

is the Convention on the Rights of the Child⁶⁷ (the “**CRC**”) to which Malawi acceded on 2 January 1991 and is the most widely ratified human rights treaty in the world with 196 state parties. As recognized in the Preamble to the CRC, “*the child, by reason of his physical and mental immaturity, needs special safeguards and care*”. Article 24 of the CRC specifically recognizes the right of the child to the enjoyment of the highest attainable standard of health, and the realization of the right to health is “*indispensable for the enjoyment of all the other rights in the Convention*”.⁶⁸

40. The Committee on the Rights of the Child (the “**CRC Committee**”), the CRC’s treaty monitoring body, has expressly opined on the importance of providing adolescents access to sexual and reproductive health services, including to abortion care. For instance, in its General Comment 15 (2013) (commenting on Article 24 of the CRC), the CRC Committee urged states to “*ensure universal access to a comprehensive package of sexual and reproductive health interventions*”,⁶⁹ and recommended that “*States ensure access to safe abortion and post-abortion care services, irrespective of whether abortion itself is legal*”.⁷⁰ The CRC Committee also expressly recognized that

[g]iven the high rates of pregnancy among adolescents globally and the additional risks of associated morbidity and mortality, States should ensure that health systems and services are able to **meet the specific sexual and reproductive health needs of adolescents**, including family planning **and safe abortion services**.⁷¹ (bold added)

41. The provision of safe abortion services to adolescents in Malawi is therefore well below the standards promulgated in the CRC and anticipated by the CRC Committee. In response to the country reports submitted by Malawi, the CRC Committee raised concerns in its 2017 Concluding Observations, regarding adolescent health “*the criminalization of abortion, except*

⁶⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (“**CRC**”).

⁶⁸ CRC Committee, ‘General Comment No. 15 on the right to the child to the enjoyment of the highest attainable standard of health (art 24)’ (2013) UN Doc CRC/C/GC/15, para 7.

⁶⁹ *ibid.*, para 53-54.

⁷⁰ *ibid.*, para 70.

⁷¹ *ibid.*, para 56.

when the life of the pregnant girl is at risk, leading to girls resorting to risky abortions”⁷² and recommended Malawi to:

decriminalize abortion in all circumstances and remove barriers to abortion, such as the requirement to report to the police before having an abortion in the case of rape, ensure girls’ access to safe abortion and post-abortion care services, and ensure that the views of the child are always heard and given due consideration in abortion decisions.⁷³ (bold added)

42. The position of girls who are subject to sexual violence and rape is even more acute. The CRC Committee expressed “grave concerns” of “*high incidence of sexual violence, including rape... in all settings, including in the family and in schools*”, and “*poor access and availability of the one-stop centres that provide comprehensive service to child survivors of sexual and physical violence*”.⁷⁴

F. African Charter on the Rights and Welfare of the Child

43. At the regional level, the African Charter on the Rights and Welfare of the Child⁷⁵ (the “**ACRWC**”) was ratified by Malawi on 16 September 1999 and entered into force on 29 November 1999. It has been ratified by 50 of 55 member states of the African Union. Of particular relevance, Article 14 guarantees standards with respect to health and health services, and Article 16 protects children against child abuse and torture, requiring State Parties to take “*specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman and degrading treatment*”.
44. Along with the African Commission on Human and Peoples’ Rights, the African Committee of Experts on the Rights and Welfare of the Child (the “**ACRWC Committee**”) (the treaty monitoring body for the ACRWC) issued a joint general comment in 2017 on ending child marriage, noting that because girls in child marriages were at high risk of pregnancy-related

⁷² CRC Committee, ‘Concluding observations on the combined third to fifth periodic reports of Malawi’ (2017) UN Doc CRC/C/MWI/CO/3-5, para 34(c).

⁷³ *ibid.*, para 35(c).

⁷⁴ *ibid.*, para 22.

⁷⁵ African Charter on the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999) CAB/LEG/24.9.49 (“**ACRWC**”).

health complications, “*medical abortion in the instances contemplated by Article 14(2)(c) [of the Maputo Protocol] is of great consequence and must be provided.*”⁷⁶

45. In a 2022 decision of *Legal and Human Rights Centre and Center for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania* (which concerned the question of whether forced pregnancy testing and subsequent mandatory compulsion of pregnant girls from school contravened the State’s obligations under the ACRWC), the ACRWC Committee considered in passing the position of adolescent girls who fall pregnant as a result of rape or sexual violence.⁷⁷

46. Noting that Tanzania’s law on abortion does not provide an exception for cases of rape, the ACRWC Committee observed that:

the prevalence of teenage pregnancy among schoolgirls is a result of a **lack of sexual reproductive health services**... in some instance, it is also a result of the lack of services available for survivors of sexual violence... The lack of such services also **forces schoolgirls to resort to unsafe abortions which further endangers their life, survival and development.**⁷⁸ (bold added)

47. The ACRWC Committee ultimately found that the practice of enforcing mandatory pregnancy testing on schoolgirls and subsequently expelling them from school amounts to a violation of, *inter alia*, Article 14 of ACRWC (the right to health), and amounted to a violation of Article 16 of ACRWC (prohibition against torture and child abuse).⁷⁹ The Committee observed that “*rape is the worst form of sexual abuse and is **severely physically and psychologically damaging to children**... sexual violence is itself a form of cruel, inhuman and degrading treatment and a violation of article 16 of the Charter*” and that “*forced pregnancy testing, expulsion of the pregnant girls, and their illegal detention is **cruel, inhuman and degrading***”

⁷⁶ ‘Joint General Comment of the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child on ending child marriage’ (2017), para 37.

⁷⁷ African Committee of Experts on the Rights and Welfare of the Child, *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania*, Decision No 002/2022.

⁷⁸ *ibid*, para 87.

⁷⁹ *ibid*, para 88.

treatment and subjects them to further trauma if these girls are survivors of sexual violence.”⁸⁰ (bold added)

G. Decisions of other regional human rights bodies

48. Cases before regional human rights bodies (in respect of which Malawi is not bound as a state party) has also firmly recognized that victims of rape -- who are often adolescent girls -- denied timely access to legal abortion are not treated in accordance with State obligations under regional human rights law. By way of example:

- a. The European Court of Human Rights expressly noted in the case of *P&S v Poland*, determined in 2013, that the complainant had only been 14 years old at the relevant time and a victim of rape, when her access to abortion care had been obstructed and delayed. The Court found that Poland violated her rights to liberty, respect for private and family life, and to be free from inhuman and degrading treatment.⁸¹
- b. The Inter-American Commission on Human Rights heard the case of *Paulina Ramírez v Mexico* (a case in which the Center submitted an *amicus curiae* brief), in which the complainant, who fell pregnant at 13 years old as a result of rape by an intruder into her home, was forced to continue her pregnancy after public health officials used a series of obstacles to convince her to withdraw her request for an abortion as a victim of sexual assault, which is a permitted exception to abortion bans in the Mexican State of Baja California. In 2007, the complainant reached a settlement with the State government, in which the government, *inter alia*, admitted responsibility and agreed to issue a decree regulating guidelines for access to abortion for rape victims.

H. U.N. Spécial Rapporteur Reports

49. Finally, comments made by the U.N. Special Rapporteurs are also illuminating. For instance, a 2019 report by the U.N. Special Rapporteur on violence against women, its causes and consequences unequivocally recommended that States must:

Repeal laws which criminalize abortion in all circumstances, remove punitive measures for women who undergo abortion, and **at the very**

⁸⁰ *ibid.*, para 37.

⁸¹ *P. and S. v. Poland*, 57375/08 HEJUD [2012] ECHR 1853 (30 October 2012).

minimum, legalize abortion in cases of sexual assault, rape, incest, and when the continued pregnancy endangers the mental and physical health of the woman or the life of the woman, and provide access to safe, quality post-abortion care⁸² (bold added)

I. Summary of international and regional legal landscape

50. Accordingly, it is clear from the above survey of the international and regional legal landscape that a state party's restrictions on a woman or girl's access to abortion services in circumstances following rape are inconsistent with:

- a. Malawi's express obligation under Article 14 of the Maputo Protocol to take "*all appropriate measures*" to authorize medical abortions in the case of rape;
- b. the Human Rights Committee's interpretation of the right to life under Article 6 of the ICCPR, which encompasses the right to "*enjoy a life with dignity*", as requiring a mother to carry a pregnancy to term following rape would "*cause the pregnant woman or girl substantial pain or suffering*";
- c. the right to be free from cruel, degrading and inhuman treatment pursuant to Article 7 of the ICCPR, as further emphasized by criticisms levelled by the CAT Committee of abortion bans without a rape exception;
- d. the right to be free from discrimination in accessing sexual and reproductive health services, as noted by the ICESCR Committee (in respect of Article 12 of ICESCR) and as noted by the CEDAW Committee (in respect of Article 12 of CEDAW), given that forcing a mother to carry a pregnancy to term following rape leads to "*severe physical and mental anguish, constituting gender-based violence*".

51. Moreover, as a state party to both the CRC and the ACRWC, Malawi is encouraged to ensure that safe abortion services are provided to adolescents, which includes decriminalizing abortion in all circumstances, and removing barriers to its access.

⁸² UN General Assembly report of the Special Rapporteur on violence against women, its causes and consequences, 'A human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence' (2019) UN Doc A/74/137, para 81(q).

VI. COMPARATIVE JURISPRUDENCE

52. It is clear that the legal position in Malawi is anomalous amongst the regional and international stage. The Cause therefore provides an opportunity to the Court to consider an appropriate interpretation of the GEA and the Penal Code – in particular the exception regarding “*preservation of the life of the mother*” -- consistently with that regional and international jurisprudence. In this final section, the brief considers how other national courts have interpreted provisions similar to the exception in the Penal Code, and how legislation has developed within the region.
53. The Penal Code was introduced in 1930 during the British colonial period. As a result, many of its provisions, including those concerning abortion, are reflective of English statutes in force at the time, in particular: Sections 58 & 59 of the Offences Against the Persons Act 1861 which render abortion a criminal offence; and Section 1 of the Infant Life (Preservation) Act 1929 which provides an exception, “*for the purpose only of preserving the life of the mother*”.⁸³
54. The same is true for a number of African countries which were former British colonies and had continued to adopt English legislation as in force from the late 1800s to early 1900s. Accordingly, many African countries pre-independence took their cue from the English courts when interpreting domestic penal provisions.
55. Of relevance in this regard is the English case of *R v Bourne* [1939] 1 K.B. 687. The case concerned prosecution of a surgeon who had performed an abortion for a 14-year-old girl who was pregnant as a result of rape. In his statement and direction to the jury, Judge McNaughten considered the meaning of the words ‘preserving the life of the mother’ and the distinction between danger to life and danger to health. The judge commented that “*I have found it difficult*

⁸³ In England, abortion remains a criminal offence under the Offences Against the Persons Act 1861, however broad exceptions are provided under the Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990) which legalizes abortion if it is performed by a registered medical practitioner, authorised by two doctors acting in good faith, on one or more of the following grounds: (a) the pregnancy has not exceeded its twenty-fourth week and continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman or any existing children; (b) termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; (c) continuance of the pregnancy would involve risk to the life of the pregnant woman; or (d) there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

*to understand what the discussion really meant, since life depends upon health, and it may be that health is so gravely impaired that death results.”*⁸⁴

56. He went on to note that the words ‘preserving the life of the mother’,

ought to be construed in a reasonable sense, and if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor...is operating for the purpose of preserving the life of the mother.⁸⁵

57. Applying this to the circumstances of the case, the judge directed the jury, to

consider the evidence about the effect of rape, especially on a child...no doubt you will think it is only common sense that a girl who for nine months has to carry in her body the reminder of the dreadful scene and then go through the pangs of childbirth must suffer great mental anguish.⁸⁶

58. The jury, following the judge’s direction, acquitted the surgeon finding that the prosecution had failed to prove beyond reasonable doubt that the surgeon had not performed the abortion in good faith for the purpose of preserving the victim’s life.

59. *R v Bourne* has subsequently been followed and upheld in several African jurisdictions having been affirmed in the cases of *R v Edgal, Idike and Ojugwu* (1938) WACA 133 heard in the West African Court of Appeal (now defunct) and *Mehar Singh Bansel v R* (1959) EALR 813 heard in the East African Court of Appeal (now defunct).

60. *R v Bourne* continues to be applied post-independence, as evidenced by the Zambian case of *The People v Gulshan, Smith and Finlayson* (1971) High Court of Zambia (Criminal) HP 11/1971. In that case, three doctors were charged with unlawfully procuring an abortion contrary to Section 151 of the Zambia Penal Code. Section 151 of the Zambia Penal Code

⁸⁴ *R v Bourne* [1939] 1 K.B. 687, 692.

⁸⁵ *R v Bourne* [1939] 1 K.B. 687, 694.

⁸⁶ *ibid.*

Mirrors Section 149 of the Penal Code, which in turn mirrors Section 58 of the Offences Against the Person Act 1861. In their defence, the doctors submitted that they had performed the abortion at the woman's request on the basis that she was not mentally in a position to accept the pregnancy and carry it to term. The trial judge followed the reasoning in *R v Bourne*. Acquitting the doctors, the judge said:

Abortion is lawful where it is done in good faith and with reasonable grounds and adequate knowledge to save the life and prevent grave permanent injury to the physical or mental health of the mother.⁸⁷

61. In light of the above, it is artificial to consider interpretation of the Penal Code in isolation from its wider context. Even in instances where there is no express exception under statute for victims of rape to procure an abortion, regional courts have consistently interpreted provisions to include considerations of mental health, which are particularly acute in instances of rape, when determining whether an abortion is performed to preserve the life of the mother.
62. In any event, since the 1960s, countries which had adopted colonial provisions concerning abortion have followed a trend of subsequently implementing new statutes to permit express exceptions in the case of rape or injury to the mother's mental health, recognising the damaging effects on victims to carry a child to term and in alignment with international consensus that any abortion ban should include exceptions for cases of rape and incest. By way of example:
 - a. Following the decision in the *People v Gulshan*, the Zambian Parliament enacted the Termination of Pregnancy Act of 1972, which explicitly permits abortions in cases where it is determined by three medical practitioners that there is a risk of injury to the physical or mental health of the pregnant woman or, as determined by one medical practitioner where they are of the opinion that the termination is immediately necessary to save the life of or prevent grave and permanent injury to the physical or mental health of the pregnant woman (Section 3 of the Termination of Pregnancy Act 1972).
 - b. Similarly, the Kenya Penal Code (as amended) adopts the same provisions as the Malawi and Zambia Penal Codes criminalizing abortion except in instances of preservation of the mother's life (Articles 158-160, 228 and 240).The 2010

⁸⁷ *The People v Gulshan, Smith and Finlayson* (1971) High Court of Zambia (Criminal) HP 11/1971.

Constitution of Kenya specifically enshrine a right to abortion in instances where “*the life or health of the mother is in danger*”. The provision was tested in the Kenyan High Courts in the 2019 case of *FIDA Kenya and Others v. Attorney General and Others* in which the High Court emphasized the right to health includes complete physical, mental, and social wellbeing and that victims of sexual violence in Kenya have the constitutional right to abortion.

- c. The same is true in South Africa where, pre-1975, South African legislation carved an exception for abortion only in relation to preservation of a mother’s life. This exception was then broadened in the Abortion and Sterilisation Act 1975 (“**1975 Act**”), as subsequently amended by the Choice on Termination of Pregnancy Act 1996, which expressly permitted abortions in instances of rape and incest as well as in cases of severe fatal deformity and where the woman is mentally incompetent.

VII. CONCLUSION

63. Given that approximately 47% of the Malawi’s total population is women of reproductive age (between 15 and 49 years old), and that adolescent girls and young women comprise 18% of the Malawi population,⁸⁸ it is imperative that the State takes seriously the protection of women and girls, including their ability to exercise reproductive freedom without restriction.
64. Malawi’s criminalization of abortion with a narrow and unclear exception only to preserve the life of the mother remains out of step with human rights jurisprudence on access to safe abortion, in particular its failure to make express exception for cases of sexual assault, rape, incest and to recognize, and take steps towards ensuring, the special protection required of adolescent girls.
65. The Cause accordingly provides a significant opportunity for this Court to provide clarity and interpret the provisions of the GEA (in light of the exception in the Penal Code) in accordance with Malawi’s international and regional human rights obligations, to recognize that the

⁸⁸ Defined as girls and women between the ages of 15-24, as of 2018. See Health Policy Plus, ‘Adolescent Girls and Young Women in Malawi: National – and District- Level Factsheets’ (September 2019) < http://www.healthpolicyplus.com/ns/pubs/15338-15615_HPPlusMalawiAGYWBooklet.pdf > accessed on 5 April 2024.

“preservation of the life of the mother” must be construed broadly to encompass the need to provide access to abortion services to, at the least, victims of rape including to adolescent girls, in recognition of the severe mental and physical suffering that would be endured through forced continuation of pregnancy in those circumstances.

66. As this brief has explained:

- a. There is broad consensus amongst regional and international human rights bodies that at a minimum any abortion bans should include an exception for pregnancy as a result of rape (in particular as expressly set out in the Maputo Protocol), and that to force a woman or girl to continue pregnancy in those circumstances violates States’ obligations to eliminate discrimination and amounts to cruel and inhuman and degrading treatment;
- b. The sexual and reproductive rights of adolescent girls have been recognized in the CRC and the ACRWC, and findings of the Human Rights Committee in individual cases specifically takes into account the vulnerable position of minor girls, particularly those who are victims of rape; and
- c. The *“preservation of the mother’s life”* exception to the abortion ban in Malawi’s Penal Code, a remnant of colonial legal architecture, has been interpreted broadly in English legal jurisprudence, and adopted by other post-colonial African states, to include situations where the pregnancy has resulted from sexual assault, rape, incest which would prejudice the woman’s mental health.

Dated 19th day of NOVEMBER 2024.

Respectfully submitted,



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