NGO Joint Supplemental Report on the Government of Malawi's
First Report on the Implementation of the
International Covenant on Economic, Social and Cultural Rights

---

Submitted to the
UN Committee on Economic, Social and Cultural Rights
for consideration in the Consideration of State Reports
during the 76th Session (18-19 September 2024)

by:

International Human Rights Center
Loyola Law School, Los Angeles

919 Albany Street
90015, Los Angeles, CA, USA

Contact: Prof. Cesare Romano
cesare.romano@lls.edu

Science for Democracy

Rue Ducale 41,
1000 Bruxelles, Belgium

Contact: Dr. Laura Convertino
laura.errans@gmail.com

and

Young Women's Consortium

P.O. Box
31489. Lilongwe 3
Umodzi Park. Chilembwe Road

Contact: Chimwemwe Mlombwa
chimz.m@gmail.com

Nyale Institute

P.O. Box 30860
Chichiri,
Blantyre 3, Malawi

Contact: Dr. Godfrey Kangaude
kangaude2013@lawnet.ucla.edu

PURPOSE OF THIS SUPPLEMENTAL REPORT

(1) The purpose of this supplemental report is to assist the Committee on Economic, Social and Cultural Rights (the Committee) in the consideration of state reports during the 76th Session (9-27 September 2024), leading to the discussion of the Government of Malawi's initial report on the implementation of the Covenant on Economic, Social and Cultural Rights ("CESCR" or "Covenant"). Malawi acceded to the Covenant on 22 December 1993.[1]

(2) This report focuses on access to abortion care in Malawi, which come under the purview of the Covenant (Articles 3, 10, 12 and 15), and addresses the government of Malawi's Replies to the List of Issues in relation to its initial report of 5 April 2024.[2]

(3) The provisions of Malawi's Penal Code criminalizing abortion conflict with the duties Malawi has under the treaties it has ratified, including the Covenant. This Committee, among other human rights treaty bodies, have provided standards and recommendations to ensure sexual and reproductive health and rights are protected and promoted within states, and Malawi should be encouraged to use this information to guide improvements to its laws and policies.

(4) In 2013, Malawi's Parliament enacted the *Gender Equality Act* (GEA), which specifically provides for the right to adequate sexual and reproductive health of girls and women.[3] While we commend Malawi for passing the GEA, if the state is to honor the protections and commitments of its own Act and also align with its international human rights obligations, it must provide abortion as of right.

(5) Malawi's first periodic report, submitted in April 2022, did not acknowledge that its maternal mortality rate is higher than most countries, or the impact its abortion laws have on this rate.[4] At the same time, Malawi did state

[1] International Covenant on Economic, Social and Cultural Rights, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4 [accessed 19 July 2024].
[2] CESCR, *Replies of Malawi to the list of issues in relation to its initial report,* 5 April 2024, E/C.12/MWI/RQ/1.
[3] Malawi Gender Equality Act, Chapter 25.06 (Commenced on 1 Apr. 2014), https://www.malawilii.org/akn/mw/act/2013/3/eng%402014-12-31 [accessed 24 June 2024].
[4] CESCR Committee, *Initial report submitted by Malawi under articles 16 and 17 of the Covenant, due in 1996*, CESCR/E/C.12/MWI/1, 2022, para. 17 & 129.

that it intends to reduce the maternal mortality rate by 20%.[5] Although the report brought attention to the need to ensure gender equality in health services and sexual and reproductive health rights, it did not mention abortion or post-abortion care.[6]

(6) This Committee asked the government of Malawi in the list of issues to "outline the impact of measures taken to increase access to basic services in the area of sexual and reproductive health… [and] provide information on any development regarding decriminalization of abortion."[7] In response, Malawi provided information about the current legal status of abortion and the hurdles to decriminalize abortion. This report will address each response from the government and fill in gaps of what was not included in the government's replies to the list of issues but are important to include in the conversation.

ABOUT THE AUTHORS OF THIS REPORT AND SOURCES

(7) This report has been prepared by Megan Mars, JD 2023 of Science for Democracy, Cailin Ruff, JD 2024, and Stavroula Kyriazis, JD 2024, of the International Human Rights Center of Loyola Law School, Los Angeles, under the supervision of Professor Cesare Romano, and in collaboration with Chimwemwe Mlombwa, of the Young Women's Consortium (YOWCO) and Dr. Godfrey Kangaude, of Nyale Institute for Sexual and Reproductive Health Governance (Nyale Institute).

(8) The International Human Rights Center of Loyola Law School, Los Angeles is committed to achieving the full exercise of human rights by all persons and seeks to maximize the use of international and regional political, judicial, and quasi-judicial bodies through litigation, advocacy, and capacity-building.[8] Loyola Law School, Los Angeles is the school of law of Loyola Marymount University, a Jesuit university.

(9) Science for Democracy is a Brussels-based NGO that promotes the right to science as a structural component of liberal democracies through dialogue between the scientific community and decision-makers all over the world.[9]

(10) YOWCO is a young feminist movement committed to advocating for reproductive justice of young women in Malawi led by young women in Malawi.

(11) Nyale Institute is a non-governmental organization in Malawi dedicated to advancing sexual and reproductive justice.

---

[5] *Id.* at para. 132.; The Ministry of Health Malawi has acknowledged that women and girls terminate unwanted pregnancies through unsafe abortions which contributes to 18% of the high maternal mortality rate, which is one of the highest in the regions. Malawi Ministry of Health, *Standards and Guidelines for Comprehensive Abortion Care* (2020); Women and girls who want an abortion often to turn to unsafe abortions due to fear of criminalization. WLSA and Georgetown Law, *Through Her Eyes: The Harms of Abortion Criminalization and the Need for Reform*, p. 6-7, https://www.law.georgetown.edu/wp-content/uploads/2020/10/Through-Her-Eyes-The-Harms-of-Abortion-Criminalisation-and-the-Need-for-Reform.pdf [accessed 28 June 2024].

[6] CESCR Committee, *Initial report submitted by Malawi under articles 16 and 17 of the Covenant*, *supra* note 4.

[7] CESCR, *List of issues in relation to the initial report of Malawi, 22 March 2023, E/C.12/MWI/Q/1,* para. 24.

[8] https://www.lls.edu/academics/centers/internationalhumanrightscenter/ [last accessed 17 June 2024].

[9] https://sciencefordemocracy.org/ [last accessed 17 June 2024].

OUR OBSERVATIONS ON MALAWI'S REPLIES TO THE LIST OF ISSUES

I. While Malawi claims progress in sexual and reproductive health, it does not provide data to substantiate its claim

(12) In paragraph 95 of the Replies to the List of Issues, Malawi asserts that "[e]fforts to improve sexual and reproductive health in Malawi have led to significant benefits. These include lower maternal mortality rates… and increased contraceptive use."[10] While we appreciate the government's explicit interest in the broader aspects of reproductive health and that it recognizes these issues as important,we find Malawi's answer excessively vague.

(13) First, Malawi does not provide any data to quantify the "significant benefits" deriving from the unspecified "[e]fforts to improve sexual and reproductive health in Malawi". Unfortunately, statistics on abortion in Malawi are outdated and scarce, and the information available suggests that Malawi's situation remains sadly dire. The most comprehensive survey available provided by the Guttmacher Institute, dates back to 2017 and reported 141,000 abortions in 2015.[11] That is a rate of 38 abortions per 1,000 women of reproductive age, indicating that abortion is common in Malawi. Moreover, because abortion is criminalized, many more procedures go underreported.

(14) Because abortion in Malawi is still a crime, many procedures are performed secretly by untrained practitioners and in unsafe conditions, causing excessive and unnecessary maternal mortality and morbidity.[12] The direct correlation between restrictive abortion laws and high rates of maternal mortality and morbidity cannot be overlooked.[13] Regretfully, in Malawi, there is evidence of unsafe abortions in 27% of abortion-related maternal deaths.[14] Importantly, it is very likely that the number of abortions and abortion-related deaths reflected in available data is higher than the actual number of induced abortions due to cultural stygma and criminalization.[15] Of the women who died following abortion/miscarriage complications, 35.1% died of infection (septic abortion/miscarriage).[16] Infection is the leading cause of maternal death in Malawi.[17] Complications from abortions persist and should be acknowledged and addressed by the government.

(15) The Sustainable Development Goal (SDG) target 3 aims to reduce maternal mortality to 70 per 100,000 live births by 2030.[18] The latest data available in Malawi is from 2020, at which time the rate was 381 per 100,000 live

---

[10] CESCR, *Replies of Malawi to the list of issues in relation to its initial report, supra* note 2 at para. 95.
[11] Guttmacher Institute, *Clandestine and Unsafe Abortion Common in Malawi*, News Release (April 4, 2017), https://www.guttmacher.org/news-release/2017/clandestine-and-unsafe-abortion-common-malawi [accessed 24 July 2024].
[12] *Id.*
[13] WHO, *Abortion,* 17 May 2024, https://www.who.int/news-room/fact-sheets/detail/abortion [last accessed 24 July 2024].
[14] Jennifer Riches, Ministry of Health of Malawi, Report on the Confidential Enquiry into Maternal Deaths in Malawi (Aug. 2020-Dec. 2022), 2023, p. xiii, https://www.mdmalawi.net/_files/ugd/313ce3_8b1fd3b75adf42cbb7ca149e6a431995.pdf?index=true [last accessed 24 July 2024].
[15] *Id.* at p. xiii & 47.
[16] *Id.* at p. 30-31.
[17] *Id.* at p. 30.
[18] The Global Goals, *3: Good Health and Well-being*, https://www.globalgoals.org/goals/3-good-health-and-well-being/ [last accessed 10 June 2024].

births.[19] Malawi has still a long way to go.

II. Abortion in Malawi remains a crime

(16) As it will be recalled, Malawi's Penal Code criminalizes abortion under Section 149, 150 & 151.

§ 149: "*Any person who, with intent to procure a miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, shall be guilty of a felony and shall be liable to imprisonment for fourteen years*."[20]

§ 150: "*Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, shall be guilty of a felony, and shall be liable to imprisonment for seven years*."[21]

§ 151: "*Any person who unlawfully supplies to or procures for any person any thing whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, shall be guilty of a felony and shall be liable to imprisonment for three years."*[22]

(17) Section 243 provides for a defense to a charge under Sections 149-151 but only in very limited circumstances, namely when it is performed *"in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case*."[23]

(18) In paragraph 99 of the Replies to the List of Issues, the government of Malawi declared: "Decriminalizing abortion entirely requires citizen consensus on amending the law."[24] We beg to differ. Decriminalizing abortion requires political will on the part of the government and legislature. They are the law makers. It does not require citizen consensus, a national referendum, or modifying the constitution. It requires politicians who are committed to the idea of the rule of law and want to ensure Malawi's legal framework is both internally consistent and in line with international human righst standards.

(19) First, Malawi's legal framework is internally inconsistent regarding abortion. On the one hand, the Penal Code criminalizes it. On the other, hand, the (*Gender Equality Act (GEA)* provides abortion access as a right,[25] and the Standards and Guidelines for Comprehensive Abortion Care 2020[26] purportedly intend to create a clear and safe framework within which abortion can be carried out. Section 19 (1) of the GEA guarantees the right to adequate

[19] UNFPA, World Population Dashboard: Malawi, https://www.unfpa.org/data/world-population/MW [last accessed 18 July 2024].
[20] Malawi Penal Code Chapter 7:01, Art. 149 Attempts to procure abortion, Chapter VX Offences against morality, https://www.malawilii.org/akn/mw/act/1929/22/eng%402014-12-31 [accessed 28 June 2024].
[21] *Id.* at Art. 150 The like by woman with child.
[22] *Id.* at Art. 151 Supplying drugs or instruments to procure abortion.
[23] *Id.* at Art. 243 Surgical Operation.
[24] CESCR, *Replies of Malawi to the list of issues in relation to its initial report, supra* note 2 at para. 99.
[25] Gender Equality Act §19(1).
[26] Malawi Ministry of Health, *Standards and Guidelines for Comprehensive Abortion Care (2020).*

sexual and reproductive health, including related services such as safe and legal abortion care.[27] Section 19 (2) provides every person the right to decide whether or not to have children and requires healthcare workers to provide the information necessary to be able to choose whether to have sexual and reproductive health procedures and services.[28]

(20) Second, Malawi's criminalization of abortion is inconsistent with its obligations under the Covenant, and in particular articles 12, 15.1.b and 3, as interpreted by this Committee. Article 12 of the CESCR recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[29] Article 15.1.b recognizes "the right of everyone to enjoy the benefits of scientific progress and its applications."[30] Deterring women from seeking abortions that would be medically safe when performed legally, under safe conditions, is a denial of the enjoyment of the scientific progress in the field of reproductive health.

(21) The right to health includes a right to sexual health. In General Comment 22, this Committee noted that access to reproductive health must not be denied or limited by the State through laws criminalizing reproductive health services.[31] In the concluding observations on Bolivia's third periodic report, this Committee addressed the criminalization of abortion by acknowledging the regretful "persistence of unsafe abortions due to the criminalization of abortion and the obstacles women face in obtaining access to safe abortions…"[32] This Committee urged Bolivia to "ensure that women who seek abortions are not held criminally responsible…" and recognized that criminal legislation that prohibits abortion is incompatible with "women's rights, including the right to life and to physical and mental health."[33]

(22) In the concluding observations on Panama's third periodic report, this Committee again highlighted the connection between criminalization of abortion and unsafe abortions and asked the state to "revise the current prohibition" and specifically acknowledged the misalignment with the right to health and the right to life and dignity that abortion restrictions produce.[34]

(23) This Committee acknowledged that the denial of abortion services often leads to higher maternal mortality and morbidity and recognized the role that unsafe abortion plays in contributing to these medical conditions.[35] When abortion is restricted and/or vaguely regulated, women risk their physical health.[36] Understandably, most women will resort to less safe abortion methods from unskilled providers, traditional healers

[27] Gender Equality Act §19(1).
[28] Gender Equality Act §§19(2) & 20(1)(d).
[29] CESCR, Art. 12.
[30] CESCR, Art. 15.1.b.
[31] CESCR, *General Comment No. 22: on the right to sexual and reproductive health* (Art. 12), para. 38, 40, E/C.12/GC/22 (2 May 2016).
[32] CESCR, *Concluding observations on the third periodic report of the Plurinational State of Bolivia*, E/C.12/BOL/CO/3, 5 Nov. 2021, para. 54-55.
[33] *Id.* at para. 55(a).
[34] CESCR, *Concluding observations on the third periodic report of Panama*, E/C.12/PAN/CO/3, 31 March 2023, para. 48-49.
[35] CESCR, *General Comment No. 22: on the right to sexual and reproductive health* (Art. 12), *supra* note 31, para. 10 & 28.
[36] Bearak J et al., *Unintended pregnancy and abortion by income, region, and the legal status of abortion: estimates from a comprehensive model for 1990–2019*, Lancet Global Health, 2020, 8(9):e1152–e1161, https://doi.org/10.1016/S2214-109X(20)30315-6 [last accessed 21 June 2024].

or self-induced approaches, often based on the advice of friends and family.[37] Traditional methods include herbal concoctions and inserting sharp objects into the uterus.[38] When not causing death, these methods can lead to permanent infertility and trauma to internal organs.[39] Criminalization of abortion also deters women from seeking medical treatment following an unsafe abortion.[40] An estimated 22% of women do not treat their complications, which threatens their life, well-being and the potential to have children in the future.[41]

(24) Criminalization of abortion affects also women's mental health.[42] International human rights law protects mental health as much as physical health. The World Health Organization (WHO) defines sexual health as "a state of physical, emotional, *mental* and social well-being in relation to sexuality."[43]

(25) Criminalization of abortion directly contributes to abortion stigma which can be detrimental to women's mental health.[44] As the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health recognized in a 2011 report,"[i]n some cases, women have committed suicide because of accumulated pressures and stigma related to abortion."[45] A recent incident in Malawi involves a young girl who attempted suicide because she was raped and was refused access to abortion.[46]

(26) Criminalization of abortion discriminates against women. Article 3 of the Covenant requires States parties to ensure "the equal right of men and women to the enjoyment of all economic, social and cultural rights."[47] Criminalization of abortion particularly impacts women by perpetuating stigma surrounding abortion care and women who seek abortions while simultaneously depriving them of their privacy, autonomy and decision-making. UN treaty bodies have repeatedly affirmed that ensuring access to abortion in accordance with human rights standards is part of the State obligation to eliminate discrimination against women and to ensure women's rights to

---

[37] WLSA and Georgetown Law, *Through Her Eyes: The Harms of Abortion Criminalization and the Need for Reform*, p. 6 & 10, https://www.law.georgetown.edu/wp-content/uploads/2020/10/Through-Her-Eyes-The-Harms-of-Abortion-Criminalisation-and-the-Need-for-Reform.pdf [accessed 28 June 2024].

[38] Rutgers, *Jenipher's story, Malawi*, https://rutgers.international/stories/jeniphers-story-malawi/ [last accessed 31 July 2024]; WLSA and Georgetown Law, *Through Her Eyes: The Harms of Abortion Criminalization and the Need for Reform, supra* note 37 at p. 10.

[39] WLSA and Georgetown Law, *Through Her Eyes: The Harms of Abortion Criminalization and the Need for Reform*, *supra* note 37 at p. 10.

[40] Jennifer Draganchuk, Stellah Ashley Lungu, Tulsi Patel & Mtisunge Chang'ombe, *Clandestine abortion resulting in uterine perforation and a retained foreign body led to generalized peritonitis: a case report from Lilongwe, Malawi*, AJOG Glob. Rep., 23 Feb. 2024, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10994963/ [last accessed 25 July 2024].

[41] Effie Chipeta PhD & Patani Mhango MSc, *Exploring the experience of sexually assaulted young women and girls who sought sexual and reproductive health services*, Options Consultancy Services Limited (UK aid funded Women's Intergated Sexual Health (WISH) programme), p. 5.

[42] U.N. General Assembly, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/66/254, 3 Aug. 2011, para. 36.

[43] World Health Organization, *Sexual Health definition*, (WHO, 2006a) (emphasis added), https://www.who.int/teams/sexual-and-reproductive-health-and-research-(srh)/areas-of-work/sexual-health [accessed 29 June 2024]; *See also*, CESCR, *General Comment No. 22*, *supra* note 33 at para. 5-6.

[44] U.N. General Assembly, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, *supra* note 42.

[45] U.N. General Assembly, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, *supra* note 42.

[46] Interview with abortion rights advocate in Malawi, May 2024.

[47] CESCR, Article 3.

health as well as other fundamental human rights.[48]

(27) This Committee has recognized that criminalization or restrictive abortion laws "undermine autonomy" and impedes the full enjoyment of the right to sexual and reproductive health.[49] The right to equality in the highest standard of healthcare and the right to non-discrimination in access to healthcare services related to sexual and reproductive health and family planning are both implicated when abortion is restricted.[50] As the Working Group on the issue of discrimination against women in law and in practice stated, these rights "require specific protection."[51]

(28) Women without economic resources and young girls are most likely to be affected by criminal restrictions on abortions and thus, more likely to suffer the consequences of seeking clandestine abortions.[52] The adolescent birth rate in Malawi is 135.6 per 1,000 women 15-19 years of age.[53] According to Guttmacher, there is a one in 29 chance that a 15-year-old girl in Malawi will eventually die from a pregnancy-related condition.[54]

(29) Young women have the same right to access abortion as mature women. The Committee on the Rights of the Child has reaffirmed that minors should have access to sexual and reproductive health services, including safe abortion.[55] As this honorable Committee noted in General Comment 22, barriers to accessing sexual and reproductive health should be removed and states must guarantee "girls access to safe abortion services" to prevent unsafe abortions.[56] The protection of a minor's bodily autonomy is crucial for the protection of the minor's rights to health.

(30) Pregnancy poses higher risks to young girls' health and life than pregnancy in adulthood.[57] Unfortunately, Malawi's Standards and Guidelines for Comprehensive Abortion Care 2020 do not recognize this reality and no explicit protections or guidance for young girls exist.

(31) In sum, we ask this Committee to remain consistent with its position on abortion and to invite Malawi to decriminalize abortion. If decriminalizing abortion is politically excessively arduous, the government, which has the task to prosecute violations of the criminal code, can either decide not to prosecute or rule out the possibility of imprisonment.[58]

---

[48] OHCHR, *Information Series on Sexual and Reproductive Health and Rights* (updated 2020), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf [accessed 27 June 2024].

[49] CESCR, *General Comment No. 22: on the right to sexual and reproductive health* (Art. 12), *supra* note 31 at para. 34 & 40.

[50] United Nations Human Rights Special Procedures: Working Group on the issue of discrimination against women in law and practice, *Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends*, October 2017.

[51] United Nations Human Rights Special Procedures: Working Group on the issue of discrimination against women in law and practice, *Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends*, October 2017.

[52] WHO, *Abortion, supra* note 13.

[53] WHO, *World Health Statistics 2023: Monitoring health for the SDGs*, p. 94.

[54] Guttmacher, *Clandestine and Unsafe Abortion Common in Malawi*, *supra* note 11.

[55] Committee on the Rights of the Child, *General Comment No. 4 (2003) on Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, para. 27, CRC/GC/2003/4, 1 July 2003,; Malawi ratified the Convention on the Right of the Child on January 2, 1991.

[56] CESCR, *General Comment No. 22*, *supra* note 31 at para. 28.

[57] Effie Chipeta PhD & Patani Mhango MSc, *Exploring the experience of sexually assaulted young women and girls who sought sexual and reproductive health services*, *supra* note 41 at p. 6.

III. The circumstances in which abortion is not a crime remain excessively narrow and ill-defined.

(32) If Malawi insists in not decriminalizing abortion, it certainly can better define the narrow circumstances in which it can be carried out and must ensure all healthcare providers and the population is aware of them. Under Section 243 of the Penal Code, an abortion is not a criminal act when it is performed *"in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case*."[59]

(33) First, "good faith" standards are a barrier to abortion care because such a vague standard can have a chilling effect on health providers willing to perform the procedure and women willing to seek them out. Access to abortion is a key component of reducing maternal mortality and morbidity and ensuring women's health.[60] Thus, good faith standards in abortion laws are incompatible with the obligations under the Covenant with respect to Article 12.

(34) As we pointed out in our original parallel report, in many cases, the only guidance health providers have when determining whether an abortion is legal under the exception is to use "clinical judgement of what is life-threatening for a particular woman."[61] They are required to make that determination in good faith, but good faith is an exceedingly vague standard, particularly when one risks stiff criminal sanctions. Unsurprisingly, for fear of being proven wrong, *ex post*, in court, health providers refuse to provide an abortion.[62] That pushes many women in Malawi to undergo unsafe abortions without professional assistance.[63]

(35) Second, Malawi's Penal Code fails to include important exceptions, including pregnancy following rape, incest and defilement. Unfortunately, UNICEF reports that sexual violence against minors is not uncommon in Malawi.[64] In Malawi, 33-38% of women between the ages of 15 and 49 have experienced sexual violence.[65]

---

[58] CESCR, *Replies of Malawi to the list of issues in relation to its initial report, supra* note 2 at para. 99.
[59] Malawi Penal Code Chapter 7:01, Art. 243 Surgical Operation, *supra* note 20.
[60] Human Rights Watch, *Q&A: Access to Abortion is a Human Right*, 24 June 2022, https://www.hrw.org/news/2022/06/24/qa-access-abortion-human-right [last accessed 21 June 2024].
[61] Malawi Ministry of Health, *Standards and Guidelines for Post Abortion Care*, *supra* note 26 at Section 1.2.; Under the Malawi's Ministry of Health *Standards and Guidelines for Post Abortion Care*, in Malawi health providers are instructed to perform safe abortion care in case of obstetric and gynecological conditions, heart and vascular diseases, kidney diseases, cancers, blood diseases, and other conditions.
[62] Emily Jackson, et al., *A strategic assessment of unsafe abortion in Malawi*, Reproductive Health Matters, 19(37):133–143, 136, 2011, https://pubmed.ncbi.nlm.nih.gov/21555094/ [accessed 27 June 2024].
[63] "Unsafe abortion, performed by an unlicensed medical provider, in unhygienic conditions, or both, can result in serious medical complications, including death." Brooke A. Levandowski, Linda Kalilani-Phiri, Fannie Kachale, Paschal Awah, Godfrey Kangaude, Chisale Mhango, *Investigating social consequences of unwanted pregnancy and unsafe abortion in Malawi: The role of stigma*, Int. J. of Gynecological Obstetrics, 118 Supplement 2 (2012), https://pubmed.ncbi.nlm.nih.gov/22920622/ [accessed 17 May 2024].
[64] UNICEF Malawi, *Protecting children from violence is everyone's responsibility*, https://www.unicef.org/malawi/protecting-children-violence-everyones-responsibility [accessed 28 June 2024]; *See also*, *Malawi 2021 Human Rights Report*, United States Department of State Bureau of Democracy, Human Rights and Labor (2021) https://www.state.gov/wp-content/uploads/2022/02/313615_MALAWI-2021-HUMAN-RIGHTS-REPORT.pdf [accessed 29 May 2024].
[65] Spotlight Initiative, *Ending Violence against women and girls in Malawi*, 13 fig. 2, 2020, https://www.unicef.org/malawi/sites/unicef.org.malawi/files/2020-07/Spotlight_Ending_Violence_Against_Women_andGirls_v2_15062020_WEB_0.pdf [accessed 29 May 2024]; *See*, Charles

(36) When young girls become pregnant because of sexual assault, they face a myriad of health risks, including eclampsia, puerperal endometritis, systemic infections, unsafe abortion, maternal mortality, and mental health challenges, including depression and suicidal ideations.[66] In addition to health risks, there are also social consequences that young girls face by not having access to abortion including dropping out of school and being abandoned by family and friends.[67] In Malawi, there is a range of understanding among adolescent girls about how or where to get an abortion, especially when the pregnancy is the result of rape, and many girls do not know what steps to take.[68]

(37)The Human Rights Committee has stated that limiting access to abortion for women who have been raped or sexually abused violates their right to life and further, this Committee has repeatedly recommended states include rape and incest as exceptions in abortion laws.[69]

(38) This Committee expressed concerned about the lack of exceptions available to women in Guatemala when seeking abortions.[70] Women can only seek legal, therapeutic abortions for the purpose of protecting the mother's life, a similar restriction to the abortion code in Malawi.[71] This Committee recommended that Guatemala "take the legislative and administrative measures necessary to prevent maternal mortality and morbidity…"[72] Malawi should be compelled to do the same, especially recognizing the unique risks that young girls face as well as survivors of rape, incest or defilement.

IV. The 2021 High Court Ruling is a step forward but not sufficient.

(39) In Paragraph 98 of the replies to the List of Issues, Malawi called the Committee's attention to the fact that in 2021 a High Court ruling in *CM v. The Hospital Director of Queen Elizabeth Central Hospital & The Minister of Health* upheld the exception to crminlaization of abortion contained in Section 243 of the Penal Code, "requiring women seeking an abortion to consult a doctor and explain the threat to their life or health",[73] and that the Court emphasized that "safeguarding mental and physical health is part of preserving life."[74]

Pensulo, *Malawian Protesters Demand Tougher Penalties for Rape*, Thomas Reuters Foundation, 16 November 2020, https://news.trust.org/item/20201116165739-y9xew#:~:text=About%2038%25%20of%20Malawian%20women,according%20to%20the%20United%20Nations [accessed 29 May 2024].

[66] Effie Chipeta PhD & Patani Mhango MSc, *Exploring the experience of sexually assaulted young women and girls who sought sexual and reproductive health services*, *supra* note 41 at p. 5 & 10; Ahinkorah BO, Seidu, A, Appiah, F et al, *Effects of sexual violence on planned, mistimed and unwanted pregnancies among women of reproductive age in sub-Saharan Africa: A multi-country analysis of demographic health surveys*, 2020, https://www.sciencedirect.com/science/article/pii/S235282732030238X [last accessed 13 July 2024].

[67] Effie Chipeta PhD & Patani Mhango MSc, *Exploring the experience of sexually assaulted young women and girls who sought sexual and reproductive health services*, *supra* note 41 at p. 9.

[68] *Id.* at p. 9.

[69] Human Rights Committee, *General Comment No. 36: The Right to Life (Art. 6),* CCPR/C/GC/36, 3 Sept. 2019, at para. 8; CESCR Committee, *Concluding Observations: Bahrain*, E/C.12/BHR/CO/1, 2022, para. 44-45.

[70] CESCR, *Concluding observations on the fourth periodic report of Guatemala*, E/C.12/GTM/CO/4, 11 Nov. 2022, para. 46-47.

[71] *Id.*

[72] *Id.* at para. 47.

[73] CESCR, *Replies of Malawi to the list of issues in relation to its initial report, supra* note 2 at para. 98.

[74] *Id.*

(40) We applaud the High Court's inclusion of mental and physical health within the preservation of life exception to the abortion law and positively note the Giovernment of Malawi's welcoming of this decision. However, Malawi's health providers and the public remain unaware of the High Court ruling. Healthcare providers continue to not have clear instruction as to when they can legally perform abortions. The 2021 High Court ruling can improve the sitiuation only as long as it is widely shared.

(41) Because Malawi continues criminalizing abortion and lacks a comprehensive legal framework clearly enabling it, healthcare providers end up having to interpret the Penal Code on their own. Understandably, they end up reading the law conservatively for fear of prosecution.[75]

(42) Also, the public remains woefully uninformed about the process to obtain approval for an abortion. This information is critical to ensure abortion is accessible. As this stand, pregnant women and girls must convince healthcare providers that their pregnancy is a risk to their health and/or life and expressly request an abortion within the exception. Ultimately, the healthcare provider will decide whether to grant the request.[76] Conscentious objection by the healthcare provider cannot be challenged.

(43) This Committee recommended to Bolivia "that good quality sexual and reproductive health information… are made available for all women and adolescent girls…"[77] Malawi should be pressed to do the same. The Committee should request Malawi to ensure the population is adequately informed about the 2021 High Court ruling. Failure to amend the Penal Code to expressly include physical and mental health or, at the very least, share the information with the public, results in a lack of a clear regulatory framework and undermines women seeking abortions because health providers and women must navigate unclear exceptions and provisions. This can have a chilling effect on both receiving and seeking care.

(44) As this Committee explained in General Comment 25, the right to "benefit" from science includes "the right of having scientific knowledge disseminated" and the duty of States to "form critical and responsible citizens who are able to participate fully in a democratic society."[78] The Committee also indicated that "States have to ensure the appropriate training of doctors and other medical personnel."[79]

(45) Arguably, Article 15 of the Covenant requires that information about abortion care and instances in which abortion is legal be provided to the general population, not just to healthcare providers.[80] If women are to enjoy the benefits of scientific research,[81] they need to know under what conditions they can seek a safe and legal abortion.

---

[75] WLSA and Georgetown Law, *Through Her Eyes: The Harms of Abortion Criminalization and the Need for Reform*, *supra* note 37 at p. 23.

[76] Center for Reproductive Rights, *CM v. The Hospital Director of Queen Elizabeth Central Hospital & the Minister of* Health, 28 June 2021, https://reproductiverights.org/case/cm-v-the-hospital-director-of-queen-elizabeth-central-hospital-the-minister-of-health-high-court-of-malawi/#:~:text=High%20Court%20of%20Malawi%20Clarifies%20Law%20on%20Abortion&text=2021)%20On%20June%2015%202021,statutory%20protections%20for%20legal%20abortion [last accessed 25 June 2024].

[77] CESCR, *Concluding observations on the third periodic report of the Plurinational State of Bolivia*, *supra* note 32 at para. 55(a).

[78] CESCR, *General Comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2) , (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/25, 30 April 2020, para 8.

[79] *Id.* at para. 26.

[80] *Id.* at para 8.

(46) One danger of failing to disseminate information about the 2021 High Court ruling is that women and girls can face delays in receiving care due to misunderstandings of the legal exception and lack of information about their legal rights. This impacts the realization of women's rights under the Covenant and puts their health and autonomy at risk.

(47) Too many women resort to unsafe abortions when they are not aware that a legal abortion is available to them or if healthcare providers deny them abortion care.

RECOMMENDATIONS

(48) We respectfully recommend this Honorable Committee include at least one of the following recommendations in the Concluding Observations it will prepare for Malawi.

1. Repeal Articles 149, 150 & 151 of the Penal Code.

2. While the government works to achieve the goal of decriminalizing abortion:

i) amend Article 243 of the Penal Code to explicitly include rape, incest, and defilement.

ii) Establish a moratorium of prosecutions for violations of Articles 149, 150 & 151 of the Penal Code or rule out imprisonment for violations.

iii) Disseminate widely clear information on the circumstances under which abortion can lawfully take place, including the recent 2021 High Court ruling.

iv) Provide comprehensive counseling services to pregnant girls who are sexually assaulted, including mental health services and information about abortion services.

[81] *Id.*