

**Prosecution V NTIBAJYINAMA Esther, CASE NO RPAA 0078/15/CS  
Supreme Court of Rwanda**

**Amicus Curiae submitted by  
Women's Link Worldwide**

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## I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

Women's Link Worldwide (hereinafter "WLW") is grateful for the leave it has been granted by the Supreme Court of Rwanda to be enjoined in these proceedings as an amicus curiae or "friend of the court".

WLW is an international non-governmental organization with over fifteen years of experience working to uphold women's and girls' rights through the domestic implementation of international human rights obligations. WLW has expertise in international and regional human rights law as evidenced by our Gender Justice Observatory<sup>1</sup>, publications, amicus briefs and expert testimonies accepted by, and litigation before international, regional, and domestic courts, as well as human rights bodies. Given our focus areas, including women's access to justice, reproductive rights, and gender-based discrimination, we believe our expertise will be of great use to this Honourable Court in its determination of the legal issues in this case.

Our close examination of case law from around the world repeatedly demonstrates the critical role the utilization of a gender perspective and/or analysis has in assuring the application of law free from discrimination. Even in matters of criminal law, examining facts of cases and legal standards with a focus on gender in order to fully understand the particular impact protecting or failing to protect women's and girls' rights has on their lives, is essential to aid a court towards satisfactorily discharging its duty to serve justice in accordance with the principles of equality and non-discrimination; principles which enjoy the status of *jus cogens* and are aptly reflected in the Constitution of Rwanda. Through examining the role that gender plays in issues related to access to health and access to justice, with an emphasis on the right to a fair trial, these Submissions will demonstrate that a State's failure to respect, protect and fulfil women's and girls' human rights can result in widespread, structural discrimination of the most vulnerable women and girls. The result of the State's failure to respect, protect and ensure access to women's and girls' rights not only results in devastating health outcomes for the most vulnerable of the population, but ultimately punishes them with imprisonment for eventualities resultant from limited and dangerous options. This Honourable Court is in a privileged position to review the present case in order to assess the existence of potential violations of the right to health and the right to a fair trial, and to remedy such violations by ordering a new hearing or by making any other orders found appropriate and in accordance with Rwandan procedural laws.

In these Amicus Submissions, we shall rely on provisions contained in international and regional human rights instruments that are binding on Rwanda and directly connected to rights protected under the Rwandan Constitution. We include decisions of international and regional human rights bodies that interpret and apply obligations of State parties. The Submissions will

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<sup>1</sup> Women's Link's Gender Justice Observatory can be accessed here: [www.womenslinkworldwide.org/en/gender-justice-observatory](http://www.womenslinkworldwide.org/en/gender-justice-observatory).

also highlight comparative jurisprudence in the form of national case law from countries with legal systems similar to that of Rwanda.

The Constitution of Rwanda clearly states the binding nature of international and regional human rights instruments, stating “international treaties and agreements which have been duly ratified or approved have the force of law as national legislation in accordance with the hierarchy of laws”.<sup>2</sup> International treaties and agreements ratified by Rwanda are listed third, immediately following the Constitution and Organic Laws of the country<sup>3</sup>. Therefore, it is mandatory to apply provisions from international bodies as well as the African System of Human Rights in this matter. In the case of instruments and reports from regional human rights bodies that do not belong to the African System and jurisprudence from national courts other than Rwanda’s, we aim to present this Court with emblematic cases that have addressed legal issues similar to those presented in this case. With their persuasive force, we hope these cases can offer interpretative guidance to this Honourable Court. Given the Constitutional imperative to implement international treaties and agreements ratified by Rwanda, as well as the country’s role as a global leader in women’s rights, we strongly believe the legal standards and jurisprudence of the international and regional human rights systems should inform the Court’s approach to this case.

In the submissions, Section I begins by laying out the relationship between criminalisation of certain acts related to reproductive functions and health and, the State’s failure to guarantee the right to health; especially to vulnerable women and girls. We then analyse the right to reproductive health and its connections to the rights to life. Furthermore, we examine the special obligation States have to protect women and girls facing multiple and intersecting forms of discrimination, which includes eliminating gender stereotypes. In Section II, we outline Rwanda’s obligations to protect the right to a fair trial and due process. The section covers access to the rights to due process, legal aid and legal assistance free from discrimination, the right to ample time to prepare and mount one’s defence and, the right not to be compelled to testify against oneself. The amicus submissions conclude with assessing the proportionality of life imprisonment and consideration of mitigating circumstances as elements of the right to fair trial.

In keeping with the “friend of the court” procedures developed in the cases *Prosecution v. MUKAMANA Nkusi Agnes and MUKAKIBIBI Saidati*<sup>4</sup> and *Green Party v. Government of Rwanda*<sup>5</sup>, we will refrain from delving heavily into factual or evidentiary matters and will take a neutral stance vis-à-vis the positions of the Appellant, the Republic (as represented by the National Public Prosecution Authority (“NPPA”)), or any other amici or interested party.

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<sup>2</sup> Constitution of Rwanda, art. 168 [2015].

<sup>3</sup> Constitution of Rwanda, art. 95 [2015].

<sup>4</sup> *Prosecution v. MUKAMANA Nkusi Agnes and MUKAKIBIBI Saidati*, Case no RPA 0061/11/CS, Rwanda Law Report, Vol. 3, No. 14, pg. 24.

<sup>5</sup> *Green Party v. Government of Rwanda*, Case no RS/SPEC/0002/15/CS, Rwanda Law Report, Vol. 1, pg. 7.

We respectfully submit analysis of the case law, legal standards and reports below, for this Honourable Court's consideration in deciding the case at hand. We trust that the present intervention provides the Court with new information and hope that it adds value to the Court's considerations of issues in the present case.

**II. CRIMINALIZATION OF VULNERABLE WOMEN AND GIRLS FOR NOT HAVING ACCESS TO COMPREHENSIVE SEXUAL AND REPRODUCTIVE HEALTH SERVICES IS CONTRARY TO HUMAN RIGHTS STANDARDS AND THE RIGHT TO GOOD HEALTH UNDER THE CONSTITUTION OF RWANDA.**

**A. Relationship between women's and girls' access to the right to health and criminal proceedings related to sexual and reproductive matters.**

In this section, we explain the important role women's and girls' access to the right to health plays in criminal proceedings related to sexual and reproductive matters, particularly those cases involving women and girls living in rural areas with few economic resources. In legal regimes that limit access to certain reproductive health services, such as contraception, reproductive health information and education, as well as abortion, women and girls with access to ample economic resources can usually overcome existing barriers to access comprehensive reproductive health services; including *inter alia*, reproductive health and sexuality information, contraception, safe and legal abortion, and maternal health services. This affords women and girls who have resources with greater access to good health care, as well as a higher level of control over their fertility and the ability to make personal decisions about pregnancy—rights guaranteed by law.<sup>6</sup> On the contrary, poor women often cannot overcome barriers to access essential health services and suffer the consequences of restricted access to the same, resulting in less control over their fertility and more difficulty exercising their rights to good health care and control over the number and spacing of births.<sup>7</sup> Consequently, poor women, already struggling with limited access to resources, are left to grapple with the consequences of unintended pregnancies alone.

Roughly 37% of births in Rwanda are unplanned; one study reports the amount as almost half.<sup>8</sup> This percentage applies across the country's five provinces and is virtually the same in both urban and rural areas. Though abortion in Rwanda is allowed under limited circumstances, legal

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<sup>6</sup> Constitution of Rwanda, art. 21 [2015]; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa "Maputo Protocol," General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) at para. 23-24 (May 2014) available at [www.achpr.org/files/instruments/general-comments-rights-women/achpr\\_instr\\_general\\_comment2\\_rights\\_of\\_women\\_in\\_africa\\_eng.pdf](http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf).

<sup>7</sup> UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo*, U.N. Doc. A/HRC/17/26/Add.2, (2011) at para. 66 available at [www2.ohchr.org/english/issues/women/rapporteur/docs/A.HRC.17.26.Add.2\\_en.pdf](http://www2.ohchr.org/english/issues/women/rapporteur/docs/A.HRC.17.26.Add.2_en.pdf).

<sup>8</sup> Basinga, Paulin, Ann M. Moore, Susheela Singh, Lisa Remez, Francine Birungi, and Laetitia Nyirazinyoye, *Unintended Pregnancy and Induced Abortion in Rwanda*, Guttmacher Institute (May 2013) at pg. 16 available at [www.guttmacher.org/sites/default/files/report\\_pdf/unintended-pregnancy-rwanda.pdf](http://www.guttmacher.org/sites/default/files/report_pdf/unintended-pregnancy-rwanda.pdf).

and practical obstacles severely obstruct women's access to a safe and legal procedure.<sup>9</sup> As a result, many women, especially poor women, put their lives at risk to endure unsafe clandestine abortions as a way of dealing with unintended pregnancies.<sup>10</sup> Unsafe abortion leads to preventable maternal mortality.<sup>11</sup> An estimated 300 to 400 Rwandan women die each year from complications related to unsafe abortion.<sup>12</sup> As a result of having less access to resources, a higher number of poor women resort to unsafe procedures where they are more likely to suffer complications and die.<sup>13</sup>

The connection between lack of access to sexual and reproductive health services and incarceration of women becomes clear in recognizing how legal enforcement of these abortion laws are used against women and girls. Evidence such as injuries sustained in a botched abortion or failure to seek medical treatment while giving birth are used against women and girls in criminal abortion<sup>14</sup> and aggravated homicide proceedings – also referred to as infanticide in certain jurisdictions. Examples of cases exist around the world of prosecuting women and girls for obstetric emergencies such as premature labour, rupture of the placenta or other similar conditions. This is particularly true for women and girls who endure such emergencies in rural areas outside of the context of a hospital.

In El Salvador, a woman was sentenced to 30 years in prison for aggravated homicide, after suffering an obstetric emergency where her pregnancy resulted in a stillbirth. Though the autopsy performed was inconclusive, the woman spent 11 years in prison until a court commuted her sentence in December of 2017, explaining “there are powerful reasons based on justice, equity, and legal concepts that justify favoring her with the grace of commutation.”<sup>15</sup> The Inter-American Commission on Human Rights (“IACHR”) has expressed concern about the situation in El Salvador, where “at least 26 women remain in prison after having suffered

<sup>9</sup> CEDAW Committee, *Concluding Observations: Rwanda*, para. 38(a), U.N. Doc. CEDAW/C/RWA/CO/7-9 (2017) available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fRWA%2fCO%2f7-9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fRWA%2fCO%2f7-9&Lang=en).

<sup>10</sup> Kane, G. (2015). *When abortion is a crime: Rwanda*. Chapel Hill, NC: IPAS, pg. 15 available at [www.ipas.org/en/Resources/Ipas%20Publications/When-abortion-is-a-crime--Rwanda.aspx](http://www.ipas.org/en/Resources/Ipas%20Publications/When-abortion-is-a-crime--Rwanda.aspx); CEDAW Committee, *General Recommendation No. 33 on women's access to justice*, para. 49, U.N. Doc. CEDAW/C/GC/33 (July 2015) [hereinafter “CEDAW Committee, *General Recommendation No. 33*”] available at [tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_33\\_7767\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf).

<sup>11</sup> CEDAW Committee, *Concluding Observations: Rwanda*, para. 38(a), U.N. Doc. CEDAW/C/RWA/CO/7-9 (2017) available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fRWA%2fCO%2f7-9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fRWA%2fCO%2f7-9&Lang=en).

<sup>12</sup> Basinga, Paulin, Ann M. Moore, Susheela Singh, Lisa Remez, Francine Birungi, and Laetitia Nyirazinyoye, *Unintended Pregnancy and Induced Abortion in Rwanda*, Guttmacher Institute (May 2013) at pg. 4 available at [www.guttmacher.org/sites/default/files/report\\_pdf/unintended-pregnancy-rwanda.pdf](http://www.guttmacher.org/sites/default/files/report_pdf/unintended-pregnancy-rwanda.pdf).

<sup>13</sup> Human Rights Committee, *Concluding Observations: Argentina*, para. 14, U.N. Doc. CCPR/CO/70/ARG (2010). See also Center for Reproductive Rights (2008). “Abortion and Human Rights: Government Duties to Ease Restrictions and Ensure Access to Safe Services,” available at [www.reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB\\_abortion\\_hr\\_revised\\_3.09\\_WEB.PDF](http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF)

<sup>14</sup> Kane, G. (2015). *When abortion is a crime: Rwanda*. Chapel Hill, NC: IPAS, pg. 15 available at [www.ipas.org/en/Resources/Ipas%20Publications/When-abortion-is-a-crime--Rwanda.aspx](http://www.ipas.org/en/Resources/Ipas%20Publications/When-abortion-is-a-crime--Rwanda.aspx); CEDAW Committee, *General Recommendation No. 33 on women's access to justice*, para. 49, U.N. Doc. CEDAW/C/GC/33 (July 2015) available at [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_33\\_7767\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf).

<sup>15</sup> “Woman Wrongfully Imprisoned After Obstetric Emergency Is Denied Freedom,” Center for Reproductive Rights (Dec. 13, 2017) available at [www.reproductiverights.org/press-room/woman-wrongfully-imprisoned-after-obstetric-emergency-is-denied-freedom](http://www.reproductiverights.org/press-room/woman-wrongfully-imprisoned-after-obstetric-emergency-is-denied-freedom).

obstetric complications” which the IACHR recognizes as a direct result of the total criminalization of abortion in the country.<sup>16</sup> The IACHR has called on El Salvador “to carefully review the convictions in each of these cases”.<sup>17</sup>

The CEDAW Committee has likewise expressed concern about the situation in Rwanda, where “an alarming number of women are serving prison sentences for abortion-related offences, many of whom were arrested when seeking emergency health care following abortion complications.”<sup>18</sup> The Committee called on Rwanda to “pardon women who are currently serving a prison sentence for abortion-related offences.”<sup>19</sup>

An ongoing research on female prisoners in Rwanda confirms the significant relationship between women’s reproductive health and female incarceration.<sup>20</sup> Based on information from the Rwanda Correctional Services Headquarters (“RCS”), the National Public Prosecution Authority, and interviews at prisons of NYARUGENGE, NYAGATARE and NYAMAGABE, the research indicates that as of June 30, 2017, 67 of the women in prison were charged with or convicted of abortion and 277 of the women were charged or convicted of infanticide. These numbers account for more than 10% of the overall population of women incarcerated in Rwanda in 2017 and, according to internal figures, the numbers have been rising each year.<sup>21</sup> For abortion, there was a percentage increase of 11.65% for the 2015 – 2016 period and of 15.65% in 2016 – 2017. For infanticide, the percentage increase was 10.6% in 2015 – 2016 and 19.17% in 2016 – 2017. The rate of conviction for women accused of committing these offenses has also been increasing for the past three years.<sup>22</sup>

A close reading of the cases included in the report demonstrates clear patterns of the same debilitating circumstances these women experienced before seeking abortions or committing infanticide. Due to their marginalised position in society, they were faced with “a funnel of narrowing choices”.<sup>23</sup> The women in prison share the following characteristics and experiences:

- **Young:** the average age is 27 years, and 9 women were between 17-19 years of age.
- **Low-education:** 25 women identified as having “no education”, and from the rest the majority of women have different levels of *primary education*. The lack of access to education of these women has put them in a precarious, vulnerable situation.

<sup>16</sup> IACHR Urges El Salvador to End the Total Criminalization of Abortion. Press release. March 7, 2018. Available at [www.oas.org/en/iachr/media\\_center/PReleases/2018/042.asp](http://www.oas.org/en/iachr/media_center/PReleases/2018/042.asp)

<sup>17</sup> IACHR Urges El Salvador to End the Total Criminalization of Abortion. Press release. March 7, 2018. Available at [www.oas.org/en/iachr/media\\_center/PReleases/2018/042.asp](http://www.oas.org/en/iachr/media_center/PReleases/2018/042.asp)

<sup>18</sup> CEDAW Committee, *Concluding Observations: Rwanda*, para. 38(b), U.N. Doc. CEDAW/C/RWA/CO/7-9 (2017) available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fRWA%2fCO%2f7-9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fRWA%2fCO%2f7-9&Lang=en).

<sup>19</sup> *Ibid*, at para. 39.

<sup>20</sup> Unpublished research, on file with authors.

<sup>21</sup> According to the RCS database, there were 3,065 women prisoners in Rwanda as of June 30, 2017.

<sup>22</sup> Unpublished research, on file with authors.

<sup>23</sup> Alicia Ely Yamin, *Power, Suffering and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter*. Philadelphia: University of Pennsylvania Press, 2015.

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- **Unemployment/Underemployment:** Many women were either house helps or farmers. There were 2 teachers, about 12 students and one secretary working in an NGO. The rest were either unemployed or working in unstable jobs like selling vegetables, pottery, *etcetera*.

The life stories of the women in prison demonstrate a clear pattern. Long before their convictions of abortion and infanticide, they were marginalized by poverty, lack of information and resources. These women did not have access to contraception or sexual health education and, as a result, could not access adequate health services or exercise control over their reproductive lives. The women experienced unwanted pregnancies and again, were not able to access vital reproductive health care services to give them options and resources to manage their pregnancies.

Women gave diverse reasons to explain why their pregnancies were unwanted (in most cases several reasons were present):

- the potential father denied the pregnancy and offered no help;
- the pregnancy was the **result of rape**;
- they were already living in **poverty**;
- they were afraid of **losing access to education** or their **employment**; and,
- single motherhood and motherhood outside of marriage being stigmatised in Rwanda.

Consequently, these women were left alone without any support as they had no assurance that if they did become single mothers they would have the necessary social and economic support for themselves and their children. The atmosphere of fear of rejection and social stigma also meant that women who did have family could not rely on them. Importantly, most women did not have lawyers assisting them with their cases, leading to a restricted access to justice. This particular issue will be addressed in section III below.

We invite the Court to keep this context in mind as we examine the State's international and constitutional obligations of guaranteeing the right to health to women and girls.

**B. Rwanda has committed to ensuring access to comprehensive sexual and reproductive health services to women and girls in vulnerable situations in its Constitution and under International Law, including the Maputo Protocol.**

This section outlines Rwanda's obligation to protect women and girls' right to health, specifically with respect to sexual and reproductive health and mental health, and details how these rights relate to the right to life. As the Human Rights Committee explains, it must be "understood that



for women [sexual and reproductive] rights are sometimes of a different tenor than for men..."<sup>24</sup> We articulate below legal standards vital to ensuring that the rights of women and girls with diverse needs across different contexts are protected, particularly regarding those women facing multiple forms of discrimination.

### 1. The right to reproductive health and its connections to the right to life.

The Constitution of Rwanda protects the right of all Rwandans to 'good health' under its Human Rights and Freedoms Chapter.<sup>25</sup> The scope and content of the 'good health' clause must be interpreted in line with international and regional human rights standards on the right to health, the right to life and, the right to equality and freedom from discrimination that apply to Rwanda. Likewise, regional and national jurisprudence from regions that share similar challenges in the realization of the right to health can be useful for the interpretation of the right to good health.

The right to health, as interpreted by the International Covenant on Economic, Social and Cultural Rights which Rwanda acceded to on April 16, 1975, provides women and girls with the right to enjoy the highest standard of health<sup>26</sup> and comprehensive reproductive care.<sup>27</sup> Health is a fundamental human right "indispensable for the exercise of other human rights"<sup>28</sup> including the rights to life, human dignity, non-discrimination, equality, the prohibition against torture, the rights to housing, work, education, privacy or access to information.<sup>29</sup> Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to "living a life in dignity".<sup>30</sup> Importantly, health is defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."<sup>31</sup> The right extends not only to timely and appropriate health care but also to the underlying determinants of health, which include "access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health."<sup>32</sup>

The African Charter on Human and Peoples' Rights ratified by Rwanda on July 15, 1983 (hereinafter "the Banjul Charter"), provides that "[e]very individual shall have the right to enjoy

<sup>24</sup> Human Rights Committee, *L.M.R. v. Argentina*, Communication No. 1608/2007, para. 3.6, U.N. Doc. CCPR/C/101/D/1608/2007 (2011) available at [www.escr-net.org/sites/default/files/Decision.pdf](http://www.escr-net.org/sites/default/files/Decision.pdf).

<sup>25</sup> Constitution of Rwanda, art. 21 [2015].

<sup>26</sup> U.N. Committee on the Economic, Social, and Cultural Rights ("ESCR Committee"), *General Comment No. 14: The Right to the Highest Attainable Standards of Health (Art. 12)*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter "ESCR Committee, *General Comment No. 14*"] at para. 8, available at [www.refworld.org/pdfid/4538838d0.pdf](http://www.refworld.org/pdfid/4538838d0.pdf).

<sup>27</sup> ESCR Committee, *General Comment No. 14*, para. 1; ESCR Committee, *General Comment No. 22 on the Right to Sexual and Reproductive Health (Art. 12)*, U.N. Doc. E/C.12/GC/11 (2 May 2016) [hereinafter "ESCR Committee, *General Comment No. 22*"], para 1 available at

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdlmnsJZVQfQeiF41Tob4CvIjeTiAP6sGFQktiae1vlbbOaekmaOwDOWsUe7N8Tlm%2BP3HJPzxiHySkUoHMAvD%2Fpyfcp3Ylzz>.

<sup>28</sup> ESCR Committee, *General Comment No. 14*, para. 1.

<sup>29</sup> ESCR Committee, *General Comment No. 14*, para. 3.

<sup>30</sup> ESCR Committee, *General Comment No. 14*, para. 1.

<sup>31</sup> ESCR Committee, *General Comment No. 14*, para. 4.

<sup>32</sup> ESCR Committee, *General Comment No. 14*, para. 11.

the best attainable state of physical and mental health.”<sup>33</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter “the Maputo Protocol”), protects health and reproductive rights, including access to adequate, affordable and accessible health services<sup>34</sup> (discussed further herein-below). These reproductive health services include access to information, education and conduct of communication programmes targeted at women, especially those in rural areas.<sup>35</sup> The right to health also encompasses access to pre-natal, delivery and post-natal health and nutritional services for women during pregnancy; and access to medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the woman or the life of the woman or the foetus.<sup>36</sup>

As mentioned, the right to health includes essential elements: availability, accessibility, acceptability and quality.<sup>37</sup> Availability requires ensuring public health and health-care facilities, goods and services, as well as programmes, in sufficient quantity to protect health and the underlying determinants of health.<sup>38</sup> This also requires availability of trained medical and professional personnel.<sup>39</sup> Accessibility requires that health facilities, goods and services be accessible to everyone ensuring non-discrimination.<sup>40</sup>

Accessibility also includes physical accessibility, within safe physical reach for all sections of the population, especially vulnerable or marginalized groups; affordability, ensuring poorer households are not disproportionately burdened with health expenses as compared to richer households; and protecting the right to access to information.<sup>41</sup>

Though health is regulated under progressive realization, allowing for its recognition in conjunction with available resources, the obligation to guarantee access to health services without discrimination is an immediate and legally enforceable obligation.<sup>42</sup> States have an obligation to guarantee universal and equitable access to affordable, acceptable and quality sexual and reproductive health services, goods and facilities,<sup>43</sup> in particular for women and disadvantaged and marginalized groups.<sup>44</sup> The right imposes obligations on the State to ensure

<sup>33</sup> Banjul Charter, art. 16 available at [www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf).

<sup>34</sup> Maputo Protocol, art. 14 available at [www.achpr.org/instruments/women-protocol/#14](http://www.achpr.org/instruments/women-protocol/#14).

<sup>35</sup> Maputo Protocol, art. 14 available at [www.achpr.org/instruments/women-protocol/#14](http://www.achpr.org/instruments/women-protocol/#14).

<sup>36</sup> Maputo Protocol, art. 14 available at [www.achpr.org/instruments/women-protocol/#14](http://www.achpr.org/instruments/women-protocol/#14).

<sup>37</sup> ESCR Committee, *General Comment No. 14*, para. 12.

<sup>38</sup> ESCR Committee, *General Comment No. 14*, para. 12(a).

<sup>39</sup> ESCR Committee, *General Comment No. 14*, para. 12(a).

<sup>40</sup> ESCR Committee, *General Comment No. 14*, para. 12(b); U.N. Committee on the Elimination of all forms of Discrimination against Women (“CEDAW Committee”), *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev. 1 [hereinafter “CEDAW Committee, *General Recommendation No. 24*”], at para. 2, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/4738&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/4738&Lang=en).

<sup>41</sup> ESCR Committee, *General Comment No. 14*, para. 12(b).

<sup>42</sup> ESCR Committee, *General Comment No. 14*, paras. 1 and 30.

<sup>43</sup> ESCR Committee *General Comment No. 14*, para. 12.

<sup>44</sup> ESCR Committee, *General Comment No. 14*, para. 9; ESCR Committee, *General Comment No. 22*, para. 49(c); See also Inter-Am. Comm (IACHR), *Access to Information on Reproductive Health From a Human Rights Perspective*, at paras. 85-86, OEA/Ser.L/V/II. Doc. 61/11 (November 22, 2011), available at [www.oas.org/en/iachr/docs/annual/2012/women\\_access\\_information.pdf](http://www.oas.org/en/iachr/docs/annual/2012/women_access_information.pdf); *Paulina del Carmen Ramirez Jacinto v. Mexico*, Friendly Settlement, Case 161/02, Inter-Am. Comm'n H.R., Report No. 21/07 (March 9, 2007) available at [www.cidh.oas.org/annualrep/2007eng/Mexico161.02eng.htm](http://www.cidh.oas.org/annualrep/2007eng/Mexico161.02eng.htm) (recognizing that false or biased information about

“unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health.”<sup>45</sup>

The right to sexual and reproductive health is an integral part of the right to health.<sup>46</sup> This right ensures people have the “capability to reproduce and the freedom to decide if, when and how often to do so.”<sup>47</sup> The CEDAW Committee explains that access to health care, including reproductive care, is a basic tenant of the Convention.<sup>48</sup> States must also provide women with “appropriate services” which include free antenatal services and adequate nutrition during pregnancy and lactation.<sup>49</sup>

Ensuring a “Continuum of Quality Care (CQC) across a woman’s lifecycle –from preconception to pregnancy to post-partum or post-abortion to menopause– and across various locations – home, community and health facilities– is important to reduce adolescent, maternal, new-born and child mortality and morbidity and improve women’s reproductive health.”<sup>50</sup> This means that abortion is one of the many reproductive health needs that a woman has throughout her life and that sexual and reproductive rights encompasses all of these needs, including safe motherhood.<sup>51</sup>

Unfortunately, women around the world often do not have access to adequate reproductive health care and services.<sup>52</sup> Reasons for lack of access include “inappropriate or poor-quality reproductive health information and services and discriminatory social practices; negative attitudes towards women and girls; and the limited power many women and girls have over their sexual and reproductive lives.”<sup>53</sup> Women in Rwanda encounter similar poor quality services and stigma as observed by the CEDAW Committee in 2017, which found insufficient access to modern forms of contraception, high rates of maternal mortality, and unhygienic hospitals far distances apart with an insufficient number of skilled medical personnel.<sup>54</sup> The Committee recommended the State “improve the quality, availability and accessibility of medical assistance throughout its territory” and “[p]rovide education on sexual and reproductive health and rights,

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sexual and reproductive matters not only violates the right to information, but may violate other rights such as the rights to health, personal integrity, privacy, and the right to be free from violence and discrimination).

<sup>45</sup> ESCR Committee, *General Comment No. 22*, para. 5.

<sup>46</sup> International Covenant on Economic, Social and Cultural Rights (“ICESCR”), art. 12; ESCR Committee *General Comment No. 14*, para. 12.

<sup>47</sup> *Ibid*; See also Maputo Protocol, General Comment No. 2, *supra* note 6, paras. 23-24.

<sup>48</sup> CEDAW Committee, *General Recommendation No. 24*, para. 1.

<sup>49</sup> Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46, U.N.T.S. 13 (*entered into force* Sept. 3, 1981) [hereinafter CEDAW], art. 12(2), available at <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>.

<sup>50</sup> *Rights Based Continuum of Quality Care for Women’s Reproductive Health in South Asia*, Women’s Health and Rights Advocacy Partnership – South Asia (WHRAP-SA), available at [www.who.int/woman\\_child\\_accountability/ierg/reports/29\\_wharp\\_printready.pdf](http://www.who.int/woman_child_accountability/ierg/reports/29_wharp_printready.pdf).

<sup>51</sup> Inter-American Court of Human Rights, *Case of Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica* (28 November 2012) (Preliminary objections, merits, reparations and costs), available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_257\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf).

<sup>52</sup> UN Population Fund (“UNFPA”), Report of the International Conference on Population and Development (18 October 1994), A/COMF.171/13, para. 7.3, available at <http://www.un.org/popin/icpd/conference/offeng/poa.html>.

<sup>53</sup> *Ibid*.

<sup>54</sup> CEDAW Committee, *Concluding Observations: Rwanda*, U.N. Doc. CEDAW/C/RWA/CO/7-9 (2017), para. 38.

as well as adequate access to affordable, modern methods of contraception, including emergency contraception, to all women and girls...<sup>55</sup>

## 2. The right to health and its connection to the right to life

The right to life has strong connections with the right to health,<sup>56</sup> in part because a dignified life that meets the standards of a life that is worth living –living well and without humiliation— requires a healthy body and a healthy environment that does not pose structural risks to the life and health of those living around. The right to health is a fundamental part of human rights and of the understanding of a life in dignity.<sup>57</sup>

According to international human rights treaties to which Rwanda is a party, the right to life provides a broad range of entitlements beyond the right simply to be free from arbitrary deprivation of life.<sup>58</sup> The right to life requires the State to guarantee the conditions of existence of human beings from the material, cultural, social and spiritual perspective and ensures access to the conditions that guarantee a dignified existence.<sup>59</sup>

Following the standards developed by the High Courts of Latin America<sup>60</sup>, the right to life implies three interrelated dimensions: (1) the autonomy or opportunity to build a life-plan and determine its characteristics, (2) access to certain material conditions of existence, living well and (3) the intangibility of non-property assets, physical and moral integrity, living without humiliation.<sup>61</sup>

<sup>55</sup> *Ibid.* para. 39.

<sup>56</sup> ESCR Committee, *General Comment No. 14*, para. 3.

<sup>57</sup> ESCR Committee, *General Comment No. 14*, para. 1. Also see, African Commission on Human Rights (“ACHR”), *Communication 323/06: Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, para. 261: “The right to health operates directly or indirectly as a prerequisite to all other human rights recognized by the African Charter. This principle was substantiated by the African Commission in *Purohit and Moore v The Gambia* where it stated that, “The enjoyment of the right to health is crucial to the realization of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind.” available at [www.achpr.org/files/sessions/10th-ecocommunications/323.06/achpreos10\\_232\\_06\\_eng.pdf](http://www.achpr.org/files/sessions/10th-ecocommunications/323.06/achpreos10_232_06_eng.pdf).

<sup>58</sup> International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, ratified by Rwanda on 16 Apr 1975 [hereinafter “ICCPR”], art. 6(1), available at <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter “UDHR”], art. 3, available at [www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf); Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006), ratified by Rwanda on 15 Dec 2008 [hereinafter “CRPD”], art. 10, available at [www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx).

<sup>59</sup> Inter-American Court of Human Rights (1999), *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala*, Merits, Inter-American Court (ser. C) No. 63, para. 144, available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_63\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf); *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment of 17 June 2005, para. 162, available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_125\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf); European Court of Human Rights (“ECtHR”), *Zdzisław Nitecki v Poland*, Application No. 65653/01, para. 1, available at <http://hudoc.echr.coe.int/eng?i=001-22339>.

<sup>60</sup> Corte de Apelaciones de Valdivia (Chile). Rol N° 103-2009, de 14 de mayo de 2009. Corte de Apelaciones de Temuco. Rol N° 724-2013, de 27 marzo de 2013; Corte Constitucional de Colombia. Sentencias N.º T-881 y N.º T-220 de 2004 y Tribunal Constitucional de Chile: Sentencia 3515 de 28 de agosto de 2017.

<sup>61</sup> Constitutional Court of Colombia (2007), Rulings N.º T-725 and N.º T-579.

**3. Rwanda has a special obligation to protect women and girls facing multiple and intersecting forms of discrimination, including eliminating gender stereotypes**

States must ensure that women have access to rights free from discrimination and have a positive obligation to guarantee these rights to women and girls who face multiple and intersecting forms of discrimination.<sup>62</sup> The Constitution of Rwanda protects rights to equality and non-discrimination on the basis of, *inter alia*, gender, sex, ethnic origin, family or ancestry, clan, skin colour or race, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability.<sup>63</sup> International and regional human rights standards further require the State to combat poverty, gender inequality and stereotypes to ensure that women and girls enjoy their rights free from discrimination.

In the African Commission Communication 323/06, *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, the Commission states that “[t]he right to health operates directly or indirectly as a prerequisite to all other human rights recognized by the African Charter”<sup>64</sup> and that “...States have a legal obligation to protect the right to health of its citizens...”<sup>65</sup> “without discrimination of any kind.”<sup>66</sup>

Failing to provide health care services that only women require, for example, services related to pregnancy, is a form of discrimination.<sup>67</sup> The CEDAW Committee explains that States must ensure that health-care system provides services to “prevent, detect and treat illnesses specific to women” in order to eliminate discrimination.<sup>68</sup> Article 14 of the CEDAW Convention specifically provides for the State obligation in the context of rural women, stating they must also have “access to adequate health care facilities.”<sup>69</sup>

The Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples’ Rights and the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights emphasized in a joint statement a deep concern for “reports of women who...experience institutional abuse and discrimination by health service providers as a result of public policies and laws or on grounds of social and economic status...” and called on States to end this form of discrimination against women in accessing health services.<sup>70</sup>

<sup>62</sup> CEDAW *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, U.N. Doc. CEDAW/C/GC/28 at para. 18, available at [www.refworld.org/docid/4d467ea72.html](http://www.refworld.org/docid/4d467ea72.html).

<sup>63</sup> Constitution of Rwanda, art. 16 [2015].

<sup>64</sup> ACHR, Communication 323/06, *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, *supra* note 66, para 261.

<sup>65</sup> *Ibid*, para 264.

<sup>66</sup> *Ibid*, para 261.

<sup>67</sup> Maputo Protocol, General Comment No. 2.

<sup>68</sup> CEDAW Committee, *General Recommendation No. 24*, para. 1.

<sup>69</sup> CEDAW, art. 14.

<sup>70</sup> Joint Statement by the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples’ Rights, available at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16490&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16490&LangID=E).

Unavailability or inaccessibility of healthcare services, including reproductive health services, especially for those who cannot afford the same, is a form of discrimination and can lead to negative pregnancy outcomes which contribute to elevated maternal and infant mortality rates. State obligations contained in the instruments discussed above clearly articulate the State's duty to provide healthcare to women who are poor, have little resources and possibly living in rural areas. Therefore, failure to meet these obligations is a form of structural discrimination which contributes to negative pregnancy outcomes that violate women's right to life, dignity and health, and for which women are punished in the case of criminalization of certain acts – such as those related to infant mortality.

State obligations impose a higher standard for women and girls who face multiple and intersecting forms of discrimination. Intersectionality is a concept that seeks to make visible “the complexities of difference and the multiple axes and sites of discrimination” that women and girls encounter.<sup>71</sup> The UN Special Rapporteur on violence against women, its causes and consequences has used the concept to explain the way in which certain circumstances impact certain groups of women's and girls' rights. For example, poor and/or rural women experience difficulties in obtaining an education. The resulting illiteracy isolates women and generally increases their vulnerability to violence. The poverty resulting from a lack of educational opportunities also increases the likelihood that a woman will experience violence. In pregnancy, the risk of maternal mortality and morbidity “is significantly altered by factors such as quality, affordable and accessible maternal health care.”<sup>72</sup>

In 2010, the CEDAW Committee recognized intersectionality as the following:

*“The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.”<sup>73</sup>*

Turning to recognition of the concept by a regional body, although the American Convention on Human Rights (“ACHR”) does not explicitly reference intersectionality, the Inter-American Court of Human Rights (“IACtHR”) has recently started to employ an intersectional analysis in its

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<sup>71</sup> Siobhan Curran, *Intersectionality and Human Rights Law: An Examination of the Coercive Sterilisations of Romani Women*, 16 Equal Rts. Rev. 132, 134 (2016).

<sup>72</sup> UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, U.N. Doc. A/HRC/17/26 (2 May 2011), para. 77, available at [www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-26.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A-HRC-17-26.pdf).

<sup>73</sup> CEDAW Committee, General Recommendation No. 28, para. 18.

decisions regarding discrimination against women based on multiple factors that contribute to marginalization.<sup>74</sup>

In 2015, the IACtHR explicitly used the concept of intersectionality to analyze discrimination for the first time in *Gonzales Lluy et al. v. Ecuador*.<sup>75</sup> As a young girl, Talía Gonzales was negligently infected with HIV during a blood transfusion and was subsequently expelled from a public school based on a purported risk of infecting other students. In finding that Talía suffered discrimination based on her status as (a) an HIV-positive individual, (b) a child, (c) a female, and (d) a person living in poverty,<sup>76</sup> the Court noted that “in Talía’s case, numerous factors of vulnerability and risk of discrimination intersected that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination Talía experienced was caused not only by numerous factors, but also arose from a specific form of discrimination that resulted from the intersection of those factors; in other words, if one of those factors had not existed, the discrimination would have been different.”<sup>77</sup> For example, Talía’s poverty impacted her access to quality health care, which led to her HIV infection, and both poverty and her HIV-positive status negatively influenced her access to education. The Court concluded, “Talía’s case illustrates that HIV-related stigmatization does not affect everyone in the same way and that the impact is more severe on members of vulnerable groups.”<sup>78</sup>

Guaranteeing the right to health requires addressing social inequalities which affect “underlying determinants of sexual and reproductive health, including access to safe and potable water, adequate sanitation, adequate food and nutrition, adequate housing, safe and healthy working conditions and environment, health-related education and information, and effective protection from all forms of violence, torture and discrimination and other human rights violations that have a negative impact on the right to sexual and reproductive health.”<sup>79</sup>

The CEDAW Committee recently highlighted examples of social inequalities that make women vulnerable in Rwanda, thereby jeopardizing underlying determinants of sexual and reproductive health. The Committee recognized that women in non-formal unions, including women married under customary law or in polygamous unions, “lack legal protection, as the law recognizes only civil monogamous marriages between women and men.”<sup>80</sup> The Committee specifically notes “women in non-formal relationships have no entitlements to a share of their partner’s assets, including land” and, as such, recommended that Rwanda “ensure legal protection of the economic rights of women in non-formal unions.”<sup>81</sup> Such legal protection, especially for single

<sup>74</sup> Lorena Sosa, *Inter-American case law on femicide: Obscuring intersections* 35:2 Neth. Quarterly Hum. Rts. 85, 90 (2017).

<sup>75</sup> IACtHR, *Gonzales Lluy v. Ecuador*, Series C no. 298 (Judgment of 1 September 2015) (Preliminary objections, merits, reparations and costs), available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_298\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_298_ing.pdf).

<sup>76</sup> *Ibid*, para. 291.

<sup>77</sup> *Ibid*, para. 290.

<sup>78</sup> *Ibid*.

<sup>79</sup> ESCR Committee, *General Comment No. 22*, at para. 7.

<sup>80</sup> CEDAW Committee, *Concluding Observations: Rwanda*, U.N. Doc. CEDAW/C/RWA/CO/7-9 (2017), para. 50.

<sup>81</sup> *Ibid*, para. 51.

women who are abandoned by partners in a non-formal union, is absolutely essential towards addressing the socio-economic impact, which attends following abandonment. For instance, in the case of a woman who is single and pregnant, and has no other family, social or financial support, she remains extremely vulnerable to risks to her, the unborn child's and the infant's, once born, life and health, owing to inability to access necessary health services.

The CEDAW Committee also voiced concern over lack of rural women's awareness of their rights in the face of "discriminatory customs, patriarchal attitudes, stereotypes" in Rwanda, explaining that this results in a "fear of stigmatization that hinders them from claiming their rights."<sup>82</sup> The Committee noted that "a high number of rural women continue to be employed in unpaid or low-paid, informal or hazardous sectors" and that "many women, including female heads of households, are particularly affected by poverty and illiteracy."<sup>83</sup>

In the present case, NTIBAJYINAMA ESTHER explained that, as a result of her pregnancy, she lost her job and the man who impregnated her chose to abandon her, accounting for the loss of all of her economic support. She explained during the hearing of the appeal how she went to the hospital to give birth where she was instructed by the doctors to buy the prescribed drugs she needed in order to give birth. She also explained how she left the hospital and went home because she did not have money to pay for the drugs. When she got home, she delivered the baby but failed to cut the umbilical cord to complete the birth process so the baby died and she threw it in the toilet.

In using the rationale of the CEDAW Committee and all other above mentioned international and regional instruments, the Honourable Court could consider whether the Appellant's socio-economic background and prevailing circumstances, geographic location and mental status, contributed to her inability to access health services at the time of labour, posing a risk to her health and the health of the foetus, hence resulting in a negative outcome as evidenced by the death of the Appellant's child following birth in undesirable and unmanned circumstances. The standards set out in this section address the necessity of considering the impact of reproductive rights restrictions and reproductive health services constraints in cases of Infanticide and to assess the potential connections between these limitations, unwanted pregnancies and the final outcome of Infanticide in the ruling.

### **III. RIGHT TO A FAIR TRIAL AND RIGHT TO DUE PROCESS WITHOUT DISCRIMINATION**

This section outlines States' obligations to protect the right to due process and the right to a fair trial free from discrimination, as essential elements of human rights protection. The CEDAW Committee has stated, "women should be able to rely on a justice system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased

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<sup>82</sup> *Ibid*, para. 42(b).

<sup>83</sup> *Ibid*, paras. 42(c) and (d).



assumptions”.<sup>84</sup> Therefore, we articulate below standards that relate to the diverse elements of the right to a fair trial, including the right to legal assistance, to adequate time to prepare a defence, and not to be compelled to testify against oneself. We also include jurisprudence that shows the ways in which regional human rights courts have approached issues that are strongly connected to life imprisonment such as the assessment of the proportionality of life imprisonment as a criminal sanction and, the consideration of mitigating circumstances, including mental insanity.

#### **A. Right to Due Process free from Discrimination**

The right to equality before the court and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.<sup>85</sup> The right to access to justice for women is considered to be essential to the realization of all the rights protected under the CEDAW Convention. It is a fundamental element of the rule of law and good governance, together with the independence, impartiality, integrity and credibility of the judiciary, the fight against impunity and corruption, and the equal participation of women in the judiciary and other law implementation mechanisms.<sup>86</sup>

The Constitution of the Republic of Rwanda of 2003 (revised in 2015) protects the right to due process of law (article 29) as follows:

*Everyone has the right to due process of law, which includes the right:*

- 1°. to be informed of the nature and cause of charges and the right to defence and legal representation;*
- 2°. to be presumed innocent until proved guilty by a competent Court;*
- 3°. to appear before a competent Court;*
- (...)*

Similarly, the International Covenant on Civil and Political Rights (ICCPR) establishes:

*‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance*

<sup>84</sup> CEDAW Committee, *General Recommendation No. 33*, para. 28.

<sup>85</sup> UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32 [hereinafter “HRC General Comment No. 32”], para. 2, available at [www.refworld.org/docid/478b2b2f2.html](http://www.refworld.org/docid/478b2b2f2.html).

<sup>86</sup> CEDAW Committee, *General Recommendation No. 33*, para. 1.

*assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (...) (g) Not to be compelled to testify against himself or to confess guilt.’<sup>87</sup>*

Regionally, the Banjul Charter protects the rights to a fair trial and to due process (article 7) as follows: <sup>88</sup>

*1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.*

Finally, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa have developed the essential elements of a fair hearing.<sup>89</sup> These include respect for the inherent dignity of the human person, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused; adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence; and an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings.<sup>90</sup>

### **1. Right to Due Process includes access to legal assistance without discrimination**

Article 14 of the ICCPR contains guarantees that States parties must respect, regardless of their legal traditions and domestic law, the rights of persons charged with a criminal offence.<sup>91</sup> The availability or absence of legal assistance often determines if a person can participate in relevant proceedings in a meaningful way, and as such is an integral component to due process. Article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings, but States are encouraged to provide free legal assistance in all cases for individuals who do not have sufficient

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<sup>87</sup> ICCPR, art. 14(2).

<sup>88</sup> Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986. Ratified by Rwanda on 15 July 1983.

<sup>89</sup> *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, proclaimed by the African Commission on Human and Peoples’ Rights (“ACHPR”) in 2003, DOC/OS(XXX)247, available at [www.achpr.org/instruments/principles-guidelines-right-fair-trial/](http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/).

<sup>90</sup> *Ibid*, “A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS”.

<sup>91</sup> HRC *General Comment No. 32*, para. 4.

means to pay. In some cases, for example when high penalties are at stake, they may even be obligated to do so.<sup>92</sup>

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa establish that the accused or a party to a civil case has a right to have legal assistance in any case where the interest of justice so requires, free of charge if he or she does not have sufficient means to pay.<sup>93</sup> In criminal matters, the interest of justice is to be determined by considering the seriousness of the offence and the severity of the sentence.<sup>94</sup> The interest of justice always requires legal assistance for an accused in any capital case, including during an appeal, executive clemency, commutation of sentence, amnesty or pardon.

The African Court on Human and People's Rights ("ACTHPR") has addressed the right to legal assistance in its jurisprudence and has stated that, although the Charter does not explicitly provide for this right, "free legal aid is a right implicit in the right to defence enshrined under Article 7(1)(c) of the Charter."<sup>95</sup> Similar to the Principles and Guidelines described above, the Court identified "two cumulative conditions required for an accused person to be eligible for the right of legal assistance: indigence and the interests of justice."<sup>96</sup> In assessing these conditions, "the Court considers several factors, including (i) the seriousness of the crime, (ii) the severity of the potential sentence; (iii) the complexity of the case; (iv) the social and personal situation of the defendant and, in cases of appeal, the substance of the appeal (whether it contains a contention that requires legal knowledge or skill), and the nature of the "entirety of the proceedings", for example, whether there are considerable disagreements on points of law or fact in the judgments of lower courts."<sup>97</sup>

Likewise, in *Christopher Jonas v. United Republic of Tanzania* the Court held that "an indigent individual under prosecution for a criminal offence has the special right to free legal assistance where the offence is serious and punishment prescribed by law severe".<sup>98</sup> The Court continued, "in the instant case, the Applicant being in the same situation as described above [indigent and prosecuted for a serious offence], the Court holds that the Respondent should have offered him, *proprio motu* and free of charge, the services of a lawyer throughout the judicial procedure. Having failed to do so, the Respondent violated Article 7(1)(c) of the Charter."<sup>99</sup>

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<sup>92</sup> *Ibid*, para. 10.

<sup>93</sup> *Ibid*, "A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS".

<sup>94</sup> *Ibid*, "H. LEGAL AID AND LEGAL ASSISTANCE".

<sup>95</sup> *Alex Thomas v. The United Republic of Tanzania*, App. No. 005/2013, available at [https://lawyersofafrica.org/wp-content/uploads/2015/11/Application\\_005-2013-Alex\\_Thomas\\_v.\\_United\\_Republic\\_of\\_Tanzania\\_Judgment.pdf](https://lawyersofafrica.org/wp-content/uploads/2015/11/Application_005-2013-Alex_Thomas_v._United_Republic_of_Tanzania_Judgment.pdf); *Kennedy Owino Onyachi and Others v. The United Republic of Tanzania*, App. No. 003/2015, para. 104.

<sup>96</sup> *Kennedy Owino Onyachi and Others v. The United Republic of Tanzania*, para. 104.

<sup>97</sup> *Kennedy Owino Onyachi and Others v. The United Republic of Tanzania*, para. 105.

<sup>98</sup> *Christopher Jonas v. United Republic of Tanzania*, App. No. 011/2015, para. 77, available at <http://en.african-court.org/images/Cases/Judgment/011-2015-Christopher%20Jonas%20v.%20United%20Republic%20of%20Tanzania-Judgment-28%20September%202017.pdf>.

<sup>99</sup> *Christopher Jonas v. United Republic of Tanzania*, para. 78.

The Court in *Owino Onyachi and Others v Tanzania* found the crime of armed robbery to be serious and a 30-year sentence to prison to be “severe with grave repercussions on the right to liberty of the Applicants”.<sup>100</sup> The Court also observed, “as long as the conditions which would warrant legal assistance exist, free legal assistance should be made available in all trial and appellate proceedings.”<sup>101</sup>

Regarding women’s interactions with the justice system in Rwanda, the CEDAW Committee has expressed concern about women’s right to access justice in the country.<sup>102</sup> In its 2017 Concluding Observations to Rwanda it expressed concern “about the absence of specific legal aid schemes for women that would take into consideration their disproportionate lack of economic independence and exposure to sociocultural barriers in access to justice (...). The Committee also notes with concern that many women are not aware of their rights and how to claim them in court.”<sup>103</sup>

Consequently, it has recommended the State to (a) Strengthen systems of legal aid and public defence that are accessible, sustainable and responsive to the needs of women and ensure that such services are provided in a timely, continuous and effective manner at all stages of the judicial or quasi-judicial proceedings; and to (b) Remove remaining barriers, including economic and sociocultural barriers, to women’s access to justice by providing legal aid and ensure that fees for issuing documents and filing complaints, as well as court costs, are reduced for women with low incomes and waived for women living in poverty.<sup>104</sup>

A crucial element in guaranteeing that justice systems are economically accessible to women according to CEDAW’s General Recommendation No. 33 on women’s access to justice is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law.<sup>105</sup> The Committee affirms, “a crucial element in guaranteeing that justice systems are economically accessible to women is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law” and has thus called States Parties to remove economic barriers to justice by providing legal aid and ensure that fees for issuing and filing documents, as well as court costs, are reduced for women with low incomes and waived for women living in poverty.<sup>106</sup>

States parties have an obligation, under articles 2 and 15 of the Convention, to ensure that women have access to the protection and remedies offered through criminal law, and that they are not exposed to discrimination within the context of those mechanisms, either as victims or

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<sup>100</sup> *Kennedy Owino Onyachi and Others v. The United Republic of Tanzania*, para. 109.

<sup>101</sup> *Kennedy Owino Onyachi and Others v. The United Republic of Tanzania*, para. 106.

<sup>102</sup> CEDAW Committee, *Concluding Observations: Rwanda*, U.N. Doc. CEDAW/C/RWA/CO/7-9 (2017), paras. 12-13.

<sup>103</sup> *Ibid*, para. 12.

<sup>104</sup> *Ibid*, para. 13.

<sup>105</sup> CEDAW Committee, *General Recommendation No. 33*, para. 36.

<sup>106</sup> *Ibid*, paras. 17(a) and 36.

as perpetrators of criminal acts.<sup>107</sup> The Committee has also highlighted the fact that women suffer from discrimination in criminal cases owing to one or more of the following: a) a lack of gender-sensitive non-custodial alternatives to detention, b) a failure to meet the specific needs of women in detention, and c) an absence of gender-sensitive monitoring and independent review mechanisms.<sup>108</sup>

In practice, the Committee has observed a number of obstacles and restrictions that impede women from realizing their right to access to justice on a basis of equality. The obstacles occur in a “**structural context of discrimination and inequality**” as a result of factors including “gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women.”<sup>109</sup> The Committee recognizes that these obstacles serve as “persistent violations of women’s human rights.”<sup>110</sup>

The CEDAW Committee has observed that “the lack of access to high-quality, gender-competent legal advice, including legal aid, as well as the often-noted deficiencies in the quality of justice systems (e.g. gender-insensitive judgements or decisions owing to a lack of training, delays and excessive length of proceedings, corruption) all prevent women from gaining access to justice.”<sup>111</sup>

In the case at hand, NTIBAJINAMA ESTHER was sued by the prosecution for the crime of infanticide provided and punished by Article 143 of Organic Law No. 01/2012 OL of 02/05/2012 Instituting the Penal Code. Following her trial in case No. RP0231/014/TGI/NYG, in which she pleaded not guilty but was not provided with legal representation, either during her interrogation by the Police and the Prosecution or during the trial itself, the Intermediate Court of Nyagatare convicted her of infanticide and sentenced her to life imprisonment. She contested the judgement and sentence and appealed against the decision at the High Court chamber of Rwamagana in case no. RPA 0001/HC/RWG. She again had no legal representation during the hearing of the appeal, despite the serious nature of the criminal charge and sentence imposed.

The High Court was of the view that she did not properly plead guilty to the crime or express remorse as it is required in Article 77 of Rwanda’s Penal Code. The Court, therefore, concluded that the punishment of life imprisonment given by the Intermediate Court was proper and should be upheld.

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<sup>107</sup> *Ibid*, para. 47.

<sup>108</sup> See communication No. 23/2009, *Abramova v. Belarus*, views adopted on 25 July 2011, and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (“the Bangkok Rules”), adopted by the General Assembly in its resolution 65/229, available at [www.unodc.org/documents/justice-and-prison-reform/Bangkok\\_Rules\\_ENG\\_22032015.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf).

<sup>109</sup> CEDAW Committee, *General Recommendation No. 33*, para. 3.

<sup>110</sup> *Ibid*, para. 3.

<sup>111</sup> *Ibid*, para. 13.

In view of the above, this Honourable Court is in a position to review the judicial proceedings followed in the case to assess whether the elements of the right to a fair trial have been observed and to verify that the proceedings were in compliance with due process rights and with the State's obligation to protect women and girls facing multiple and intersecting forms of discrimination, including eliminating gender stereotypes. Whenever the components of the right to a fair trial have not been observed, the upper courts can offer a range of measures according to their legal systems as provided for in their procedural laws.

## 2. Right to have adequate time for the preparation of the defence

The ICCPR also provides that all accused of a criminal charge must have adequate time and facilities for the preparation of their defence and the right to defend themselves in person or through legal counsel of their own choosing and to be informed of this right. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.<sup>112</sup> In this regard, the Human Rights Committee (HRC), which is the body of independent experts that monitors implementation of the ICCPR by its State parties, has referred to two types of defence which are not mutually exclusive.

Importantly, the HRC has made it clear that the right to defend oneself without a lawyer is not absolute. The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or **facing a grave charge but being unable to act in their own interests.**<sup>113</sup>

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa clearly establish the right of the accused to have adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case.<sup>114</sup> Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence. The accused has a right to facilities which assist or may assist the accused in the preparation of his or her defence, including the right to communicate with defence counsel and the right to materials necessary to the preparation of a defence.

In the present case, this Honourable Court should address itself as to whether such right was respected and accorded as provided for and mandated by law.

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<sup>112</sup> HRC *General Comment No. 32*, para. 32.

<sup>113</sup> HRC *General Comment No. 32*, para. 37.

<sup>114</sup> *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, "N. PROVISIONS APPLICABLE TO PROCEEDINGS RELATING TO CRIMINAL CHARGES".

### 3. The right not to be compelled to testify against oneself

The right not to be compelled to testify against oneself or to confess guilt is a safeguard to be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.<sup>115</sup> The jurisprudence of the HRC has interpreted that this must be understood “*in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt*”.<sup>116</sup> The Committee considers implicit in this principle that the prosecution prove the confession was made without duress.<sup>117</sup>

The right of appeal has been declared of particular importance in cases that imply a severe punishment such as death penalty cases. A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of article 14, paragraph 3(d), but article 14, paragraph 5, as in such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court.<sup>118</sup> This applies to cases where other severe punishments are at stake such as life imprisonment.<sup>119</sup>

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa prohibit taking undue advantage of the situation of a detained or imprisoned person for the purpose of compelling her to confess, to incriminate herself or to testify against any other person.<sup>120</sup> This shall include the right to information and to make an informed decision as to whether pledge guilty or innocent.<sup>121</sup>

#### B. Assessing the Proportionality of Life Imprisonment as a Criminal Sanction and the consideration of Mitigating Circumstances as elements of the Right to a Fair Trial

##### 1. Assessing the Proportionality of Life Imprisonment as a Criminal Sanction

The Penal Code of Rwanda establishes that, in determining a penalty, judges should take into account factors such as the gravity of the offence in accordance with the offender’s motives;

<sup>115</sup> HRC General Comment No. 32, par. 41.

<sup>116</sup> *Singarasa v. Sri Lanka*, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (2004), para. 7.4, available at <http://hrlibrary.umn.edu/undocs/html/1033-2001.html>.

<sup>117</sup> *Ibid.*

<sup>118</sup> HRC General Comment No. 32, para. 51.

<sup>119</sup> IACtHR, *Mendoza and others v. Argentina Case*, Judgment of 14 May 14<sup>th</sup> 2013, paras. 173-174, referring to Cases of *Harkins and Edwards v. United Kingdom* (No. 9146/07 and No. 32650/07), Judgment of 17 January 2012, para. 132. IACtHR, *Mendoza and Others Case* available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_260\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_260_ing.pdf) and ECtHR, *Harkins and Edwards Cases* available at [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-108599\"\]}](https://hudoc.echr.coe.int/eng#{\).

<sup>120</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, “N. PROVISIONS APPLICABLE TO PROCEEDINGS RELATING TO CRIMINAL CHARGE”.

<sup>121</sup> IACtHR, *Barreto Leiva Vs. Venezuela Case*, Judgement of 17 November 2009, para. 46, available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_206\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_206_ing.pdf).

history and background; circumstances surrounding the commission of the act; and individual circumstances.<sup>122</sup>

When it comes to severe sanctions such as life imprisonment, that has been said to destroy human dignity in as much as it reduces “a prisoner to a number behind the walls of a gaol waiting only for death to set him[/her] free”,<sup>123</sup> and to be one of the main sanctions that are of concern from the point of view of international human rights law, together with corporal punishment and the death penalty,<sup>124</sup> a thorough assessment of proportionality must be carried out.

In South Africa, under the Criminal Law Amendment Act, or the minimum sentences legislation (MSL)<sup>125</sup>, a court is required to impose a life sentence on an accused for committing one or more of the scheduled offences,<sup>126</sup> unless there are “substantial and compelling circumstances”.<sup>127</sup> The Supreme Court of Appeal of South Africa interpreted the scope of these ‘substantial and compelling circumstances’ in *S v Malgas* as follows:

*“when a court embarks on the journey of trying to establish whether such circumstances exist, it weighs the mitigating factors in the light of the aggravating factors and where the former outweighs the latter, it is very likely that the court will conclude that substantial and compelling circumstances do exist. It is also vital to note that in an attempt to establish whether substantial and compelling circumstances exist, courts look at the personal circumstances of the accused, the likely implications of his imprisonment to his dependants, and most importantly at the nature and circumstances under which the crime was committed.”*<sup>128</sup>

International instruments on imprisonment and human rights suggest that the deprivation of liberty may only be justified if accompanied by review and assessment procedures that operate within commonly accepted judicial standards.<sup>129</sup> According to the jurisprudence of the European Court of Human Rights (“ECtHR”), ‘life imprisonment as a form of punishment for particularly serious offences remains compatible with the Convention’. However, the imposition of a life sentence on an adult offender may raise an issue under Article 3 of the Convention

<sup>122</sup> Organic Law No. 01/2012 OL of 02/05/2012 Instituting the Penal Code [hereinafter “*Penal Code of Rwanda*”], art. 71.

<sup>123</sup> Levy J, Namibia High Court, *S v Tjijo* 4 September 1991 (NM), unreported – but reproduced substantially in *S v Tcoeb* (2001) AHRLR 158 (NaSC 1996), previously reported as 1996 1 SACR 390 (NmS), para. 16. Referenced in Esther Gumboh, “*The penalty of life imprisonment under international criminal law*”, (2011) 11 African Human Rights Law Journal, p. 76, available at [www.ahrli.up.ac.za/images/ahrli/2011/ahrli\\_vol11\\_no1\\_2011\\_esther\\_gumboh.pdf](http://www.ahrli.up.ac.za/images/ahrli/2011/ahrli_vol11_no1_2011_esther_gumboh.pdf)

<sup>124</sup> “Corporal punishment, the death penalty, and **life imprisonment** are the main sanctions that are of concern from the point of view of international human rights law”, IACTHR, *Mendoza and others v. Argentina Case*, paras. 173 and 174 referring to Cases of *Harkins and Edwards v. United Kingdom* (No. 9146/07 and No. 32650/07), Judgment of 17 January 2012, para. 132.

<sup>125</sup> Criminal Law (Sentencing) Amendment Act No. 38 of 2007. Government Gazette. Republic of South Africa, 31 December 2007. Available at [www.justice.gov.za/legislation/acts/2007-038.pdf](http://www.justice.gov.za/legislation/acts/2007-038.pdf)

<sup>126</sup> Murder and rape, in the circumstances laid out in South Africa’s legislative provisions.

<sup>127</sup> Jamil Ddamulira Mujuzi, “*Life imprisonment in South Africa: yesterday, today, and tomorrow*”, SACJ \* (2009) 1, available at [http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/2341/Mujuzi\\_Life\\_2009.pdf?sequence=1](http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/2341/Mujuzi_Life_2009.pdf?sequence=1).

<sup>128</sup> *S v Malgas*, (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001), available at [www.saflii.org/za/cases/ZASCA/2001/30.pdf](http://www.saflii.org/za/cases/ZASCA/2001/30.pdf).

<sup>129</sup> “*Life imprisonment*”, UN Office at Vienna, Crime Prevention and Criminal Justice Branch (1994), available at [www.penalreform.org/wp-content/uploads/2013/06/UNODC-1994-Lifers.pdf](http://www.penalreform.org/wp-content/uploads/2013/06/UNODC-1994-Lifers.pdf).



(prohibition of torture) on account of its irreducible character.<sup>130</sup> In *Vinter and Others* (cited above), the Court drew the following conclusion:<sup>131</sup>

*“119. ... [T]he Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. (...)*

*121. It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.*

*122. (...) where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.”*

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa establish that ‘punishments constituting a deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.’<sup>132</sup> And the IACtHR has expressed its position in this matter in its judgement *Mendoza and others v. Argentina* where it considered that, under certain circumstances, life imprisonment can amount to torture or to cruel, inhuman or degrading treatment or punishment. In this ruling, the Court affirmed:

*“This Court has established that torture and cruel, inhuman or degrading treatment or punishment are strictly prohibited by international human rights law.”<sup>133</sup>*

*[...] The Court has also indicated that criminal sanctions are an expression of the punitive power of the State and “entail impairment, withdrawal or alteration of the rights of the individual, as a result of unlawful conduct.”<sup>134</sup>*

*[...] Corporal punishment, the death penalty, and **life imprisonment** are the main sanctions that are of concern from the point of view of international human rights law.*

<sup>130</sup> *Kafkaris v. Cyprus* [GC], no. 21906/04, § 97, ECtHR 2008, available at <http://hudoc.echr.coe.int/eng?i=001-85019>.

<sup>131</sup> *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, § 105, ECHR 2013, available at <http://hudoc.echr.coe.int/eng?i=001-122664>.

<sup>132</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, “N. PROVISIONS APPLICABLE TO PROCEEDINGS RELATING TO CRIMINAL CHARGE”.

<sup>133</sup> IACtHR, *Case of Cantoral Benavides v. Peru*, Judgment of 18 August 2000, para. 95, available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_69\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_69_ing.pdf); *Case of Fleury et al. v. Haiti*, Judgment of November 23, 2011, para. 70, available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_236\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_236_ing.pdf).

<sup>134</sup> IACtHR. *Case of Baena Ricardo et al. v. Panama*, Judgment of 2 February 2001, para. 106, available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_72\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_72_ing.pdf); also see, *Case of the Miguel Castro Castro Prison v. Peru*. Judgment of November 25, 2006, para. 314, available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_160\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf).

*Therefore, this area refers not only to the means of punishment, but also to the proportionality of the punishment, as indicated in this judgment. Therefore, punishments considered radically disproportionate, such as those that can be described as atrocious fall within the sphere of application of the articles that contain the prohibition of torture and cruel, inhuman and degrading treatment".<sup>135</sup>*

## 2. Consideration of Mitigating Circumstances

The Penal Code of Rwanda provides for the reduction of penalties when certain mitigating circumstances exist in the case. These mitigating circumstances include the guilty plea from the accused before the commencement of prosecution, expressing remorse and offering repairing the damage caused as much as expected; the accused reporting him/herself to a competent Court before or during the pre-trial proceedings; a guilty plea expressed by the accused at the outset of the trial in the first instance; or when the offence has minor consequences.<sup>136</sup>

As for the possibility of finding mental disorders as grounds for excluding criminal responsibility, the Criminal Code provides for the insanity of the accused during the commission of the offence as a reason for excluding criminal liability.<sup>137</sup> In order for this provision to be used as a defence by the accused, there is a need to conduct a mental health assessment that can back up such an allegation. This should be included as part of the right to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence provided for in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa previously mentioned. As a consequence of a **mental health assessment** having been carried out, if a person shows "signs of insanity" a judge may, at the request of the Public Prosecution, order that person be admitted to a neuropsychiatric facility.<sup>138</sup>

Women's mental health can suffer alterations during pregnancy and post-partum. In accordance with the principles of the right to health, women and girls must be provided available, accessible, acceptable and quality mental health care during pregnancy free from discrimination.<sup>139</sup> Early screening and identification of mental health issues such as depression and anxiety are critical to guaranteeing women's and girls' health during pregnancy. States have a positive obligation to guarantee that resources, including personnel with special training, for such screenings are available at maternity hospitals.<sup>140</sup> Screenings and treatment are particularly important as "[u]p to 4% of mothers with untreated postpartum psychosis will commit infanticide."<sup>141</sup> Screening

<sup>135</sup> IACtHR, *Mendoza and others v. Argentina Case*, paras. 173 and 174 referring to ECtHR, *Harkins and Edwards Cases*, para. 132.

<sup>136</sup> Penal Code of Rwanda, art. 77 [2012].

<sup>137</sup> *Ibid*, art. 101.

<sup>138</sup> *Ibid*, art. 102.

<sup>139</sup> ESCR Committee, *General Comment No. 14*, para. 12(a) and *General Comment No. 22*, paras. 12-13.

<sup>140</sup> ESCR Committee, *General Comment No. 14*, para. 12(a) and *General Comment No. 22*, paras. 12-13.

<sup>141</sup> S. Hatters Friedman, P.J. Resnick, *Child murder by mothers: patterns and prevention* (Oct. 2007), pg. 139; Kaplan H, Sadock BParry BL: Postpartum psychiatric syndromes, in *Comprehensive Textbook of Psychiatry* (ed 6, vol 1), edited by Kaplan H, Sadock B. Philadelphia: Williams & Wilkins, 1995, pp 1059-66.

needs to be made available and accessible for free for all women<sup>142</sup> in order to prevent pregnancy-related mental illnesses including post-partum depression from escalating. Untreated depression during pregnancy increases the risk for postpartum depression, which has been shown to have negative effects on maternal–infant attachment.<sup>143</sup>

Women and girls who suffer from multiple and intersecting forms of discrimination are particularly vulnerable to exacerbated effects on and risks to mental health during pregnancy. Issues such as poverty, extreme stress, exposure to violence and a low level of social support exacerbate the likelihood that women will suffer mental health problems during pregnancy.<sup>144</sup> Depression and anxiety are the most common mental health disorders in pregnancy and often occur simultaneously.<sup>145</sup> Studies have linked antenatal depression and anxiety with poor antenatal care.<sup>146</sup>

A recent study of common perinatal mental disorders of women receiving medical care in Eastern Rwanda confirms many of these assertions in a local context. The study found that good socioeconomic standing and high levels of education can serve as a protective factor for women against mood and anxiety disorders leading up to pregnancy.<sup>147</sup> As such, women with no education appeared more likely to suffer from perinatal depression than those with an advanced level of education.<sup>148</sup> It also showed a link between a women's relationship status and her risk to mental health disorders, stating "respondents reporting a strong relationship with husband were found to be less likely to have perinatal anxiety and perinatal depression."<sup>149</sup> Importantly, the study also found a statistically significant relationship between unplanned pregnancies and increased perinatal mental disorders.<sup>150</sup>

As discussed, State parties have important positive obligations to provide women and girls with access to essential mental health resources during pregnancy. Safeguarding access to mental health resources is all the more critical to women's and girls' safety as well as the public's as findings suggest "the judicial process of penalising a woman who kills her baby or conceals the dead body has no effect on subsequent offenders".<sup>151</sup>

In the case before the Honourable Court, the Prosecution accepted NTIBAJYINAMA ESTHER's apology but refused the request of her Attorney provided in Article 78 of the Penal Code of

<sup>142</sup> ESCR Committee, *General Comment No. 14*, para. 12(a) and *General Comment No. 22*, paras 12-17.

<sup>143</sup> S. Hatters Friedman, P.J. Resnick, *Child murder by mothers: patterns and prevention*. Op. Cit.

<sup>144</sup> World Health Organization, "Maternal mental health," available at [www.who.int/mental\\_health/maternal-child/maternal\\_mental\\_health/en/](http://www.who.int/mental_health/maternal-child/maternal_mental_health/en/).

<sup>145</sup> S. Redinger *et al*, "First trimester antenatal depression and anxiety: prevalence and associated factors in an urban population in Soweto, South Africa", *Journal of Developmental Origins of Health and Disease* (2018), 9(1), pp. 30–40.

<sup>146</sup> *Ibid*.

<sup>147</sup> Umuziga, Marie Providence, University of the Western Cape, *Assessment of Common Perinatal Mental Disorders in a Selected District Hospital of The Eastern Province in Rwanda* (2014), at pp. 67-68, available at <http://hdl.handle.net/11394/4283>.

<sup>148</sup> *Ibid*, p. 68.

<sup>149</sup> *Ibid*, p. 68.

<sup>150</sup> *Ibid*, p. 69.

<sup>151</sup> Meyer CL, Oberman M., "Mothers who kill their children: understanding the acts of moms from Susan Smith to the "Prom Mom"", New York, New York University Press (2001); Lee ACW *et al*, "Neonaticide, newborn abandonment, and denial of pregnancy—newborn victimisation associated with unwanted motherhood", *Hong Kong Med J*, Vol 12 No 1, February (2006), pg. 63.

Rwanda relating to reduction of the penalty in case of mitigating circumstances. In addition to that, when she was explaining the reasons for her appeal in the High Court Chamber of Rwamagana, she said that she had pleaded guilty and that she never had the intention. However, she claimed to have suffered from a mental condition for sometime in her life (the words she used, if literally translated, mean “a snake was licking the inside of my head”).

In application of the above-mentioned standards, this Honourable Court can take the opportunity to assess the mental health of NTIBAJYINAMA ESTHER for the purposes of determining the mitigating circumstances of the sentence she received or to even exclude her responsibility and/or culpability in the crime.

#### **IV. CONCLUSION**

In light of the above submissions, WLW encourages the Court to consider the particular role gender discrimination plays in the criminalization of women and girls as a consequence of the Rwanda’s failure to guarantee their access to the right to health. Specifically, women and girls who are poor and living in rural areas have less access to acceptable and quality health services, less control over their fertility and disproportionately suffer the consequences of laws that criminalize the outcomes of pregnancy.

Rwanda must provide comprehensive sexual and reproductive health services under the right to health. The unavailability or inaccessibility of reproductive health services, especially for those who cannot afford the same, is a form of discrimination and can lead to negative outcomes related to pregnancy. Furthermore, Rwanda has a special obligation to protect women and girls facing multiple and intersecting forms of discrimination, including eliminating gender stereotypes.

The right to access legal assistance is a critical part of the right to due process, which is to be accessed free of discrimination, and must be observed in criminal matters. Legal aid/assistance should be provided when defendants do not have the means to pay for representation, and to serve the interests of justice. This is especially where defendants face long jail sentences, such as life in prison. It is also important to recognize the obstacles that impede women and girls from realizing their right to access to justice as a result of gender stereotyping, discriminatory laws, and a failure to ensure that judicial mechanisms are accessible to all women, to name but a few. All accused of a criminal act must have adequate time and the ability to prepare their defence. In addition, a defendant and/or accused person has the right not to be compelled to testify against oneself and that the prosecution must be able to prove that a confession was not extracted and/or obtained out of duress.

In addition, in determining a penalty, judges should take into account the individual circumstances, motive and background of the accused, as well as consider the circumstances surrounding the commission of the act.

Finally, courts should consider mitigating circumstances during sentencing, such as the existence of mental health challenges that the accused is or may be facing. As mental health problems can either reduce penalties or exclude individuals from criminal responsibility, it is critical that they be considered. Women's mental health can suffer alterations during pregnancy and post-partum, with anxiety and depression being the two most common problems. Social factors such as little access to resources and social support can also exacerbate mental health issues during pregnancy.

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