

August 31, 2015

Committee on Economic, Social and Cultural Rights (CESCR)
Office of the High Commissioners for Human Rights
Geneva, Switzerland

RE: Supplementary information on Kenya scheduled for review by the CESCR during its 56 Pre-Sessional Working Group session 12 - 16 October 2015.

Dear Committee Members:

This shadow letter is intended to complement the periodic report submitted by the State of Kenya for your consideration during the 56 Pre-Sessional Working Group of the CESCR. Ipas Africa Alliance is a nongovernmental organization (NGO) which is based in Kenya and works continentally to increase women's ability to exercise their sexual and reproductive rights and to reduce deaths and injuries from unsafe abortion. Ipas believes that every woman has the right to the highest attainable standard of health, to safe reproductive choices, and to high-quality health care. This letter is intended to provide the Committee with an independent report on maternal mortality and unsafe abortion in Kenya, particularly under Article 12 of the Covenant on Economic, Social, and Cultural Rights (the Covenant).

Under the Covenant, the government of Kenya has a responsibility to take measures to reduce maternal mortality and increase access to health care services for women. Specifically, **article 12** protects the right to the highest attainable standard of physical and mental health for all people, including women's ability to obtain necessary reproductive health care services that include safe, legal abortion care. In **General Comment 14**, the Committee specifies that States must implement measures to "(i)mprove child and maternal health, sexual and reproductive health care services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as resources necessary to act on that information."¹

This Committee has underlined in this General Comment the need for State parties to provide a full range of high-quality and affordable health care, including sexual and reproductive health services; the Committee has also emphasized States' obligation to reduce women's health risks and lower maternal mortality rates, including by removing all barriers to women's access to health services, education and information, including in the area of sexual and reproductive health.² In

¹ Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (22nd Sess., 2000), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 90, par. 14, U.N. Doc. HRI/GEN/1/Rev.5 (2001).

² *Id.*

General Comment 14, the Committee has also elaborated on principles of non-discrimination on the basis of gender, and equal treatment with respect to the right to health.³

In several Concluding Observations, this Committee has expressed deep concern over the relationship between high rates of maternal mortality and illegal, unsafe abortions.⁴ The Committee has made recommendations to States that they increase education on reproductive and sexual health, as well as implement programs to increase access to family planning services and contraception.⁵

This Committee has previously expressed concern to the government of Kenya about the high number of unsafe clandestine abortions and recommended that the State party ensure affordable access for everyone, including adolescents, to comprehensive family planning services, contraceptives and safe abortion services and to decriminalize abortion in certain situations, including rape and incest⁶. In 2011, the Committee on the Elimination of Discrimination against Women expressed concern that illegal abortion remains one of the leading causes of the high maternal mortality rate in Kenya and that the restrictive abortion law further leads women to seek unsafe and clandestine abortions⁷. CEDAW was further concerned at the number of deaths resulting from unsafe abortions and expressed regret that maternal health policies do not pay sufficient attention to complications arising from unsafe abortion. CEDAW recommended that Kenya provide women access to good-quality services for the management of complications arising from unsafe abortions and consider reviewing the law relating to abortion with a view to removing punitive provisions imposed on women who undergo abortion, in line with CEDAW's general recommendation No. 24, and the Beijing Declaration and Platform for Action⁸.

In its current report to this Committee, the government has reported on its progress dealing with the reproductive health rights of women, particularly following the revision of the Constitution such that abortion may be allowed under certain limited and regulated circumstances (Article 26 (4)). We wish to supplement the government's report by commenting on the positive steps that the government of Kenya has taken by adopting a Constitution allowing for legal abortion and to

³ *Id.* at par. 18.

⁴ *See e.g.*, **Cameroon**, 08/12/99, U.N. Doc. E/C.12/1/Add.40, par. 25; **Mauritius**, 31/05/94, U.N. Doc. E/C.12/1994/8, par. 15; **Mexico**, 08/12/99, U.N. Doc. E/C.12/1/Add.41, par. 29; **Nepal**, 24/09/2001, U.N. Doc. E/C.12/1/Add.66, par. 32.

⁵ *See, e.g.*, **Bolivia**, 21/05/2001, U.N. Doc. E/C.12/1/Add.60, par. 43; **Mexico**, 08/12/99, U.N. Doc. E/C.12/1/Add.41, par. 43; **Nepal**, 24/09/2001, U.N. Doc. E/C.12/1/Add.66, pars. 33, 55; **Poland**, 16/06/98, U.N. Doc. E/C.12/1/Add.26, par. 12.

⁶ CESCR, *Concluding comments of the Committee on Economic, Social and Cultural Rights: Kenya*, par. 37, Dec 2008.

⁷ CEDAW, *Concluding comments of the Committee on the Elimination of Discrimination Against Women: Kenya*, par. 37, April 2011.

⁸ *Id.*

identify areas where the government should take further measures to fulfill women's right to health under the Covenant.

The Legal Framework for Abortion

The Constitution adopted in 2010 in Kenya provides for legal abortion where there is need for emergency medical treatment, to save the life or health of the woman, or when permitted by any other written law. Despite the fact that the Constitution allows for legal abortion in these circumstances, the government has not taken positive measures to develop clinical and policy standards and guidelines that would allow women to access the abortion care to which they are entitled. Additionally, abortion continues to be criminalized under the penal code that makes the provision of abortion services a felony and liable to imprisonment for up to fourteen years. Moreover, recent cases have shown gross misinterpretation of the Penal Code and the Kenya Constitution, where health care providers have been charged and convicted for murder and consequently sentenced to the death penalty.⁹

Barriers to full implementation of the law mean that women are unable to access safe, legal abortion care. Without access to safe abortion, women in Kenya risk their health and lives by resorting to unsafe abortion. There are 465,000 induced abortions in Kenya every year, nearly all of them clandestine and unsafe.¹⁰ The abortion rate is 48 abortions per 1,000 women of reproductive age (15-49 years), which is higher than many other countries in Africa. Additionally, 120,000 women are treated for complications of unsafe abortion; for women aged 19 or younger who came to a health facility for post-abortion care, 45% experienced severe complications.¹¹

We urge this Committee to remind the government of its obligation under the Covenant to make health services more readily available to women in the country and to remove barriers that keep women from accessing lifesaving health services, including safe, legal abortion services.

Barriers to Safe Abortion in Kenya

The barriers to safe services in Kenya are a direct result of non-implementation of the national laws and policies as enshrined in the Constitution and regional and international human rights standards. These barriers include:

⁹ See R vs. Jackson Namunya Tali, High Court Criminal Case No. 75 of 2009, Judgement delivered on September 25th 2014 and R vs. John Nyamu & 2 other Criminal Case 81 of 2004.

¹⁰ Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study (Nairobi, Kenya: African Population and Health Research Center, Ministry of Health, Kenya, Ipas, and Guttmacher Institute 2013).

¹¹ Incidence and Complications of Unsafe Abortion in Kenya (APHRC 2013).

1. Withdrawal of National Standards and Guidelines on Provision of Safe Abortion

A lack of standards and guidelines for health care providers on how and when to provide safe abortion care is a significant barrier to effective implementation of the Constitution. The Ministry of Health withdrew the safe abortion guidelines published in 2012 and the government has banned government healthcare providers from receiving training on the provision of safe abortion care. This action has caused a great deal of confusion about the legal status of abortion and how and when it may be administered, as well as a chilling effect on delivery of legal abortion services.

The withdrawal of the standards and guidelines and the ban on government healthcare workers from receiving safe abortion training has also led to an even sharper demarcation between women of means and women who are poor, rural, or otherwise dependent on government-provided healthcare; safe abortions can be obtained in private clinics but remain out of reach to the majority of women. In General Comment 14, this Committee has been clear on the obligation of States to fulfill the right to “a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health,”¹² also noting that States are under an obligation to abstain from “imposing discriminatory practices related to women’s health status and needs.”¹³

We request the Committee to urge the government to reinstate and disseminate clear standards and guidelines on the legal provision of safe abortion services so that all women, regardless of age, socioeconomic status or geographical location, can receive the healthcare to which they are entitled.

2. Knowledge about the legal status of abortion in Kenya

Research undertaken by Ipas Africa Alliance on abortion knowledge, attitudes, and care-seeking behavior among women seeking abortion services in public health facilities revealed that even several years after the promulgation of a Constitution that allowed for legal abortion in some circumstances, women still did not know or understand their rights in this regard. Almost one in three women who sought comprehensive abortion care were unaware that safe abortion could be performed legally in Kenya under certain circumstances.¹⁴

¹² Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)* (22nd Sess., 2000), in *Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies*, at 90, par. 8, U.N. Doc. HRI/GEN/1/Rev.5 (2001).

¹³ *Id.* at par. 34

¹⁴ Ipas. Client Exit Interviews show that in Kenya, women need clear, accurate information about abortion care. Chapel Hill, NC: Ipas, 2014. Fulltext/CEIKFSE14.pdf.

We urge this Committee to request that the State clarify the legal indications for abortion not only to healthcare providers but also to the women they serve, as part of the broader spectrum of reproductive health services available to women.

3. Continued Criminalization of Abortion:

Chapter 63 of the Laws of Kenya, the Penal Code, under sections 157 and 158 continues to criminalize abortion by providing that the provision of abortion services is a felony, punishable by up to 14 years imprisonment. A woman who seeks abortion services can be found guilty of a felony, punishable by up to 7 years imprisonment.

These Penal Code provisions lead to incorrect and overly restrictive interpretations on the rights of women seeking safe, legal abortion care. These provisions create a blanket criminalization of abortion as they are a remnant of the previously restrictive regime. These provisions also contravene the Constitution of Kenya, 2010.

We urge this Committee to request that the State amend the Penal Code to be in line with the Constitution of Kenya as well as the provisions of this Covenant.

4. Structural and Institutional Abortion Stigma

A recent study done in February 2013 by Ipas Africa Alliance on institutional and structural abortion stigma in health care centers in Bungoma, Busia, Kericho, Transzoia, Nandi and Kisumu counties of Kenya revealed that the lack of implementation by the State of policies, protocols and procedures that regulate abortion services continues to contribute to increased levels of stigma by health care providers.¹⁵ These providers regularly turn away women seeking comprehensive abortion care. The failure to decriminalize abortion adds to this stigma related to abortion. The highly stigmatized topic of abortion therefore continues to be subject to great opposition at all levels in Kenya (at the individual, community, institutional and structural levels, including in the political and religious sectors). Abortion stigma therefore, has led to the dissociation of communities and service providers from the true needs and rights of women related to comprehensive and legal abortion care.

¹⁵ Brief; An Investigation of the Institutional and Structural Abortion Stigma in Health Care Settings in Transzoia, Bungoma, Busia, Nandi, Kericho & Kisumu Counties in Kenya. Ipas Africa Alliance, 2013.

We request this Committee pose the following questions to the State of Kenya during the 56 Pre-Sessional Working Group of the CESCR:

1. What is being done to ensure that safe, legal abortion is accessible to women, especially poor and young women, and that health care providers receive training on providing comprehensive abortion care services?
2. What steps is the Kenya government taking to amend Sections 157 and 158 of the Penal Code to align them with the Constitution and international human rights standards on access to safe abortion?
3. What further steps will the State take to ensure that maternal mortality due to unsafe abortion is reduced?
4. What measures will be taken to reduce ignorance of the abortion law and stigmatization of abortion? What is being done to ensure that health care personnel and other stakeholders are aware of the abortion law?
5. How will the State ensure that young women and poor women do not experience additional barriers in accessing reproductive health services, including family planning services and safe abortion care?

While the rights guaranteed under the Covenant are not yet a full reality for all women in Kenya, we hope that the CESCR will recognize the measures taken by the Government of Kenya to ensure women's access to health care services under article 12 of the Covenant. We also wish to acknowledge the gaps that still exist between the government's action and its duties under the treaty. We hope that this information is useful during the Committee's review of the Kenya government's compliance with the Covenant.

Very Sincerely,



Erick Yegon, Acting Director
Ipas Africa Alliance
