

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 133 OF 2011
IN THE MATTER OF THE CONVENTION ON THE RIGHTS OF THE CHILD
AND
IN THE MATTER OF ARTICLES 2, 10, 20, 22, 23, 27, 28, 29, 43 & 259(1)
OF THE CONSTITUTION OF KENYA AND
AND
IN THE MATTER OF SECTIONS 8 (1), (3) OF THE SEXUAL OFFENCES ACT
AND
IN THE MATTER OF SECTIONS 4 AND 7 OF THE CHILDREN ACT
AND
IN THE MATTER OF EDUCATION ACT CAP. 211.

WJ.....1ST PETITIONER

LN.....2ND PETITIONER

(MINORS SUING THROUGH JULIA KABURU MWANGI AND SUSAN CHESANG METTO)

-VERSUS-

STARIKOH HENRY AMKOA.....1ST RESPONDENT

JAMHURI PRIMARY SCHOOL.....2ND RESPONDENT

THE TEACHERS SERVICE COMMISSION.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

CENTER FOR REPRODUCTIVE RIGHTSAMICUS CURIAE

Pursuant to an order issued by Honorable Judge Mumbi Ngugi on the 29th February 2012 in respect of an application filed on the 29th February 2012 under certificate of urgency seeking for the Center for Reproductive Rights to be admitted as amicus curiae.

INTEREST OF THE CENTER FOR REPRODUCTIVE RIGHTS:

1. The Center for Reproductive Rights (the Center) is an international non-profit legal advocacy organization dedicated to defending and promoting women's reproductive rights as fundamental rights that all governments are legally obligated to protect, respect and fulfill. The Center's headquarters are based in New York with regional offices in Kenya and Colombia. The Kenya office is based at Laiboni Centre on Lenana Road in Nairobi. The Center has worked on reproductive rights issues in Kenya for over 13 years, including conducting a survey of laws and policies which impact reproductive health and documenting human rights violations in the provision of reproductive health care.
2. The Center has worked on issues of adolescent sexual and reproductive rights in Africa, Latin America, Europe and the United States of America. The Center has prepared briefing papers titled *Adolescents Need Safe and Legal Abortion* and *The Human Right to Information on Sexual and Reproductive Health*.
3. The Center submitted a shadow letter in respect to Kenya, in collaboration with FIDA-Kenya, dated 11th January 2011 to the *Committee on the Elimination of Discrimination against Women (CEDAW Committee)*; Part II of the letter discussed sexual violence in schools and highlighted how the failure to address and rectify these violations of rights has been characterized as a form of violence by omission, which increases the victim's vulnerability to violence.¹ While the abuses often rise to the level of criminal conduct, the repercussion felt by the offending teacher is usually administrative, such as interdiction, suspension² or a transfer.³ Inadequate administrative follow-up often results in the offending teacher's reinstatement leading to continued abuse of schoolchildren, while poor investigations and prosecutions lead to a less than ten percent conviction rate of cases which go to court.⁴
4. The Center also submitted a shadow letter dated October 15th, 2010 in respect of Ecuador, to the *United Nations Committee against Torture*. The letter highlighted the systemic problem of sexual violence against girls in Ecuadorean schools and the impact of limited or no access to sexual and reproductive healthcare services for adolescent survivors of such violence.
5. The Petition filed herein raises various Constitutional issues that are pertinent to the sexual and reproductive rights of adolescent girls in Kenya and the responsibility that the State owes its citizenry both in private and public schools.

¹ Fatuma Chege, Education and Empowerment of Girls against Gender-based Violence, 10 J. OF INT'L COOP. IN EDUC. No.1 53, 61 (2006).

² KENYA ALLIANCE FOR ADVANCEMENT OF CHILDREN, ET. AL., STATE VIOLENCE IN KENYA: AN ALTERNATIVE REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 104 (2005).

³ Daniel Wesangula, New School Guidelines to Protect Students Against Sex Pest Teachers, DAILY NATION, May 1, 2010, available at <http://allafrica.com/stories/201005030679.html>.

⁴ *Id.*

SUMMARY OF THE KEY ISSUES IN THE BRIEF:

6. The Teachers Service Commission (TSC) through its TSC/CIRCULAR NO: 3/2010 stated its concern with the increased cases of violence (physical, psychological, and sexual) against students and recognized that these types of violence violate students' human rights wherever they occur—whether in teachers' homes, educational institutions, communities or places of care.⁵ The circular lays down certain actions that head teachers, TSC employees, agents, or teachers, and schools in general should take to deal with cases of sexual abuse. The circular prohibits sending pupils to teachers' houses for any reason whatsoever,⁶ and states that no teacher shall induce, coerce, threaten or intimidate a pupil/student in any way, particularly in regard to their academic performance, in order to have sexual relations with that pupil.⁷ Any teacher, TSC employee or TSC agent who fails to report a case of sexual abuse, actual or alleged, shall face disciplinary action.⁸ The TSC circular clearly applies to both public and private schools in Kenya.⁹

7. The Circular further indicates that school rules must include specific provisions aimed at protecting pupils/students from sexual abuse, including adequate measures for reporting and responding to abuses and providing any other form of support for pupils/students affected by sexual abuse within the school which would protect them from stigma and embarrassment.¹⁰

8. However, the circular does not expound on the kind of disciplinary action that must be taken against a teacher, TSC employee and or agent who commits sexual abuse against a student. It is therefore possible that the disciplinary action will vary even when a similar offence has been committed.

9. In addition, the TSC circular does not clearly provide for accountability mechanisms to monitor compliance with its directives in private schools. Further, despite private schools being duly required to register under the Education Act,¹¹ there is no provision in that Act for continuous monitoring of private schools in all aspects, including sexual violence occurring within the private schools. Yet, international standards impose an affirmative obligation on the state to take steps to prevent and protect individuals from violations of fundamental human rights by non-state actors, to investigate such violations, prosecute and punish violators and provide just and effective remedies for victims. As such, ensuring accountability for violence committed by teachers against students in schools is an issue that should not be left only to the TSC; rather, the government also has a clear obligation to act to protect students in both private and public schools.

10. The Sexual Offences Act of 2006 provided legislation for sexual violence crimes in Kenya. Section 8(1) states that a person committing an act which causes penetration with a child is guilty of defilement.¹² The prescribed punishment is that a person who commits an offence of defilement with a child aged

⁵ TSC/CIRCULAR NO: 3/2010.

⁶ TSC/ CIRCULAR NO: 3/2010 at 1.

⁷ TSC/ CIRCULAR NO: 3/2010 at 3.

⁸ TSC/ CIRCULAR NO: 3/2010 at 4.

⁹ TSC/ CIRCULAR NO: 3/2010 at 1.

¹⁰ TSC/ CIRCULAR NO: 3/2010 at 8

¹¹ Education Act Cap 211 Laws of Kenya.

¹² Sexual Offences Act of 2006.

eleven years or less shall upon conviction be sentenced to imprisonment for life, a person who commits an offence of defilement with a child between twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years, and a person who commits an offence of defilement with a child between sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.¹³

11. The Sexual Offences Act only deals with the criminal aspect of the violence and once the offender is in prison, the psychological and financial assistance that the survivor of the offence requires is not taken into account. As such, the Act does not adequately heed Article 39 of the Convention on the Rights of the Child (CRC), which requires party states to make provision for rehabilitation of children who are victims of sexual abuse. There is inadequate focus on this beyond a mention of provision to be made for treatment orders for victims of sexual offences.¹⁴

12. The Sexual Offences Act also provides under section 46(1) that the Minister shall –“prepare a national policy framework to guide the implementation, and administration of this Act in order to secure acceptable and uniform treatment of all sexual related offences including treatment and care of victims of sexual offences.”¹⁵

13. In the research report published by FIDA-Kenya titled *Implementation of the Sexual Offences Act*, it was noted that “every survivor support system should have an outreach programme in the areas that have the highest prevalence of violence. The outreach programme should include safe havens where female and male survivors can get emergency help, safety and security before referral to higher service facilities. The outreach programme should include a community education and sensitization programme to stop violence, support survivors, address the needs of perpetrators and generally create a culture of zero tolerance to violence.”¹⁶ Such programmes are still lacking in many parts of the country.

PART I

A. SCOPE OF SEXUAL VIOLENCE IN KENYAN SCHOOLS

14. Sexual violence is pervasive in schools. A recent study by the Centre for the Study of Adolescence found that at least one in twenty boys in high school reported coercing girls into sex; the same number of boys reported having made a girl pregnant.¹⁷ Sexual abuse perpetrated by teachers against female students is also not uncommon in Kenyan schools.¹⁸ A 2009 report by the TSC and the Centre for Rights Education and Awareness estimated that 12,660 girls were sexually abused by their teachers in Kenya between 2003 and 2007.¹⁹ These numbers may be underestimates given the report’s finding that “90 per cent of sexual abuses cases never reached the TSC.”²⁰ According to press reports, the limited reporting

¹³ *Id.*

¹⁴ Federation of Women Lawyers-Kenya, *Implementation of the Sexual Offences Act* (2010) p.16.

¹⁵ Sexual Offences Act of 2006.

¹⁶ Federation of Women Lawyers-Kenya, *Implementation of the Sexual Offences Act* (2010) p. 30.

¹⁷ Joy Wanja, Teenage Sex Study Shock for Parents, Daily Nation, Oct. 13, 2009.

¹⁸ Samuel Siringi, Shocking Details of Sex Abuse in Schools, Daily Nation, Nov. 1, 2009 available at <http://allafrica.com/stories/200911020402.html> (last visited Feb. 8, 2010).

¹⁹ *Id.*

²⁰ *Id.*

and accountability for these abuses stems from the intimidation of survivors of sexual violence by education officials and offenders, the stigma surrounding sexual abuse, and the practice of paying the student's parents monetary compensation and of "offenders offer[ing] to marry the girls."²¹

15. The survey, which captured data between 2003 and 2007, said that some teachers were serial sexual offenders and molested girls from one school to another because when caught they were simply transferred and no action was taken against them.²²

16. The report found that only 633 teachers were charged with sexual abuse in the five years covered by the study, but that was only the tip of the iceberg — most cases went unreported. Records at the TSC were not clear on the number of school girls abused.²³

17. Data collected from the survey showed that majority of TSC staff perceived sexual abuse in schools as pervasive. One officer said: "*Hiyo kitu imekuwa too much lakini report hazifiki TSC* (sexual abuse of school girls is rampant but the reports do not get to TSC)."²⁴

18. The report also faults the TSC over the punishment given to guilty teachers — they are dismissed and removed from the register irrespective of whether they molested one or 10 girls. As a result, "[t]eachers charged with multiple molestations . . . get the same punishment as those with a single one."²⁵ Failure to report the cases to the TSC was attributed to collusion between teaching staff and education officials who often resorted to cover-ups. In some cases, education officials and the offenders intimidated victims. Parents were also ignorant of TSC disciplinary procedures, and sometimes preferred to hush up the abuse for fear that their daughters would be stigmatized.²⁶

19. A 2009 Kenyatta University study of more than 1,200 girls in 70 schools across 10 Kenyan districts found that when girls were impregnated by teachers, 45 per cent of teachers suffered minor consequences, typically either a demotion or a transfer to another school, an estimated 30 per cent of teachers faced no consequences, while 25 per cent of teachers were sacked. On the other hand, an estimated 76 per cent of girls impregnated by their teachers dropped out of school, with many others getting married, procuring abortions and even committing suicide; only 1 per cent of those who left were able to rejoin school. While the study found that 22 per cent of teachers who impregnated girls were arrested, government and NGO officials say convictions for teachers who abuse children are rare, mainly due to the fact that unless a girl is pregnant, sexual abuse is difficult to prove. In addition, stigma means many families would rather keep the abuse under wraps and teachers often pay families to keep the cases out of court.²⁷

20. According to Patricia Nyamolo, coordinator of Positive Mentors, a local NGO providing life skills to young girls, "Head teachers rarely report abuse of children, either because they are the culprits or are

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ IRIN News, Analysis: Sex Abuse in Kenyan Schools, May 30 2011, available at <http://www.irinnews.org/Report.aspx?ReportID=92845>.

acting to protect the image of the school.... Many schools in Kenya are also sponsored by religious institutions who would normally want to keep such cases under wraps.”²⁸

B. CONSEQUENCES OF SEXUAL VIOLENCE IN SCHOOLS

21. Pervasive gender inequalities mean that girls especially face numerous violations of their sexual and reproductive health and rights, including sexual initiation before they are physically or emotionally ready.²⁹ Girls who live in extreme poverty, among marginalized populations, without family support, or in situations of conflict and displacement are particularly vulnerable to coerced sexual encounters and abuse.³⁰

22. Sexual violence against girls in the educational setting is an issue of great concern, particularly when that violence is perpetrated by teachers or administrators who abuse their position of authority to intimidate and instill fear in the very persons they are responsible for protecting and whose lives they are responsible for enriching. The consequences are often devastating. Survivors of sexual violence may experience unwanted pregnancies or contract sexually transmitted infections, particularly if sexual and reproductive healthcare services and information are not available, accessible and of good quality. Sexual violence is also linked to poor school performance,³¹ high drop-out rates,³² and psychological trauma.³³ The abuse itself causes negative physical, emotional, and developmental consequences that affect girls’ academic performance or keep them away from school altogether. The inability to complete their education hinders their future employment and life prospects and further compounds the physical and mental suffering they endure due to the violence.³⁴

23. In Ecuador, this unfortunate reality is borne out in the case of *Paola Guzmán v. Ecuador*, currently pending before the Inter-American Commission on Human Rights,³⁵ where the consequences of the State’s failure to prevent sexual violence in schools were fatal. For two years, Paola Guzmán was sexually harassed and systematically raped by the vice-principal of her school, who offered to provide her with academic assistance on the condition that she engaged in sexual intercourse with him. At age sixteen, she became pregnant as a result of this abuse. The vice-principal solicited a school doctor to

²⁸ *Id.*

²⁹ Shireen J. Jejeebhoy, Iqbal Shah and Shyam Thapa. 2005. *Sex Without Consent: Young People in Developing Countries*. New York and London: Zed Books.

³⁰ Shireen J. Jejeebhoy and Sarah Bott. 2003. *Non-consensual sexual experiences of young people: A review of evidence from developing countries*. New Delhi: Population Council, available at www.popcouncil/pdfs/wp/seasia/seawp16.pdf.

³¹ See NAN STEIN, CLASSROOMS AND COURTROOMS: FACING SEXUAL HARASSMENT IN K-12 SCHOOLS 25-26 (1999) [hereinafter STEIN]; see also MICHELE A. PALUDI & RICHARD BARICKMAN, SEXUAL HARASSMENT, WORK AND EDUCATION: A RESOURCE MANUAL FOR PREVENTION 120 (1998) [hereinafter PALUDI & BARICKMAN] (results from studies show that sexual harassment of girls affects their feelings toward and performance in school negatively).

³² *Id.*

³³ See AMNESTY INTERNATIONAL, SAFE SCHOOLS: EVERY GIRL’S RIGHT 46 (2008), available at <http://www.amnesty.org/en/library/asset/ACT77/001/2008/en/c3fb8b67-db24-11dc-b4a6-0fa73a85cd41/act770012008eng.pdf> [hereinafter SAFE SCHOOLS].

³⁴ See STEIN at 25-26; see also PALUDI & BARICKMAN at 119-120.

³⁵ The factual allegations are taken from the admissibility report No. 76/08 of Apr. 20, 2009 by the Center for Reproductive Rights (CRR) in the matter of CIDH, Caso 12.678, Paola del Rosario Guzmán Albarracín y familia v. Ecuador, submitted to the Inter-American Commission on Human Rights by CRR and the Centro Ecuatoriano Para la Promoción y Acción de la Mujer-Guayaquil (CEPAM-GUAYAQUIL).

perform an abortion, but the doctor made this conditional on Paola agreeing to have sexual relations with him, too. Ultimately, Paola ingested white phosphorus to commit suicide, and died in December 2002.

24. According to Amnesty International, national plans to address school-related violence against girls should include many elements, namely: “guidelines for schools, compulsory training for teachers and students, the designation of a government official responsible for preventing and investigating incidents of violence and adequate public funding to address the problem.”³⁶

PART II

A. IMPORTANCE OF ACCESS TO REPRODUCTIVE AND SEXUAL HEALTHCARE SERVICES FOR SURVIVORS OF SEXUAL VIOLENCE

25. Access to sexual and reproductive healthcare information and services is essential to protect the health of survivors of sexual violence, including preventing unwanted pregnancies. Forced and early sexual activity can also have severe health implications for adolescents and girls,³⁷ including “fistula, pelvic inflammatory disease and other gynecological disorders,”³⁸ sexually transmitted infections, including HIV/AIDS, sexual dysfunction, chronic pelvic pain and gastrointestinal disorders.³⁹ The trauma caused by the experience of sexual violence may only be multiplied when a survivor is unable to access the healthcare services needed to protect her health and life.

26. The World Health Organization’s Guidelines for the Medico-Legal Care for Victims of Sexual Violence identify access to comprehensive, gender-sensitive health services as essential for survivors of sexual violence to “cope with the physical and mental health consequences of their experience and to aid their recovery from an extremely distressing and traumatic event.”⁴⁰ These services include pregnancy testing, pregnancy prevention (including access to emergency contraception), access to abortion services where legal, STI testing and/or prophylaxis, treatment of injuries and psychosocial counseling.⁴¹

27. Access to emergency contraception is particularly important for survivors of sexual violence as an unwanted pregnancy may serve to reinforce the trauma of the violation itself and/or have additional consequences for the woman’s life and health.⁴² Emergency contraception can be given up to 120 hours after sexual assault. The Kenyan government’s National Guidelines on Management of Sexual Violence in Kenya -2nd Edition of 2009 specify that after sexual assault emergency contraception should be given to all females with secondary sexual characteristics or who have started menstruation and should be available 24 hours a day.⁴³

³⁶See SAFE SCHOOLS at 46.

³⁷See U.N. General Assembly, In-Depth study on all forms of violence against women: In-depth study of the Secretary General, (61st Sess.), paras. 159-163, U.N. Doc. A/61/122/Add.1 (2006).

³⁸See SAFE SCHOOLS at 46.

³⁹ *Id.* at 18 (citing J. MIRSKY: BEYOND VICTIMS AND VILLAINS: ADDRESSING SEXUAL VIOLENCE IN THE EDUCATION SECTOR 27-29 (PANOS: 2003), available at <http://www.panos.org.uk/?lid=250>).

⁴⁰ WORLD HEALTH ORGANIZATION, GUIDELINES FOR MEDICO-LEGAL CARE OF VICTIMS OF SEXUAL VIOLENCE 2 (2003), available at <http://whqlibdoc.who.int/publications/2004/924154628X.pdf>.

⁴¹ *Id.*

⁴² See World Health Organization (WHO), Levonorgestrel for Emergency Contraception (Fact Sheet) (Mar. 2005), available at http://www.cecinfo.org/what/pdf/WHO_EC_factsheet_English.pdf.

⁴³ National Guidelines on Management of Sexual Violence in Kenya (2nd Edition, 2009) at page 12.

28. The guidelines further state that emergency contraception (EC) should be readily available at all times including beyond working hours (i.e. in casualty), and free of charge in all Government Health Institutions where women and/or girls are likely to present after being raped or defiled.⁴⁴ In addition, a follow up pregnancy test at six weeks should be offered to all women who return for follow up, regardless of whether they took emergency contraception after the rape or not. If they present with a pregnancy, which they feel is as a consequence of the rape, they should be informed that in Kenya, termination of pregnancy may be allowed after rape (Sexual Offences Act, 2006). If the woman or girl decides to opt for termination, she should be treated with compassion, and referred appropriately.⁴⁵

29. In spite of the importance of emergency contraception, survivors of sexual violence can encounter significant barriers to access. Private healthcare facilities may not always carry emergency contraception. Catholic facilities and those under the Christian Health Association of Kenya do not provide emergency contraception, although some of these facilities treat victims of sexual violence.⁴⁶

30. Sexual violence survivors must also have access to reproductive healthcare services to screen for and treat sexually transmitted infections (STIs) and HIV/AIDS as well as to address any other reproductive health issues that may arise as a result of the violence. Biologically, women are more vulnerable to HIV transmission than men, and their vulnerability significantly increases in cases of sexual violence where there is likely to be tearing of vaginal tissues and condoms might not be used.⁴⁷ For these reasons, the administration of post-exposure prophylaxis (PEP) to minimize the chance of HIV transmission as well as counseling, screening and treatment of HIV/AIDS and STIs are important parts of any medical protocol for sexual violence survivors.

31. Lack of knowledge about HIV transmission, coupled with the stigma associated with sexual abuse and/or STIs, can make survivors of sexual violence less willing to seek critical reproductive healthcare, thus further jeopardizing their lives and violating their human rights.⁴⁸

⁴⁴ *Id.*

⁴⁵ *Id.* at page 13.

⁴⁶ Center for Reproductive Rights and Federation of Women Lawyers – Kenya, *Failure to Deliver: Violations of Women's Human Rights in Kenyan Health Facilities* 23 (2007) (Interview with Joseph M. Oyongo, Quality Assurance Officer – Christian Health Association of Kenya, Nov. 20, 2006; Interview with Margaret Ogola, National Executive Secretary, and other members of the Catholic Secretariat – Kenya Episcopal Conference, Nairobi, Apr. 10, 2007); interview with Dr. Ayisi, National Executive Secretary, Kenya Episcopal Conference, Catholic Secretariat, Nairobi, Aug. 13, 2009.

⁴⁷ See PAN-AMERICAN HEALTH ORGANIZATION/WORLD HEALTH ORGANIZATION, THE UNGASS, GENDER AND WOMEN'S VULNERABILITY TO HIV/AIDS IN LATIN AMERICA AND THE CARIBBEAN (WOMEN, HEALTH AND DEVELOPMENT PROGRAM), 8-9 (Dec. 2002), available at <http://www.paho.org/English/ad/ge/GenderandHIV-revised0904.pdf>.

⁴⁸ See SAFE SCHOOLS at 14.

B. DENIAL OF REPRODUCTIVE HEALTHCARE SERVICES TO SEXUAL VIOLENCE SURVIVORS AS A VIOLATION OF FUNDAMENTAL HUMAN RIGHTS

32. Adolescents often have limited access to appropriate reproductive and sexual healthcare, particularly in cases of rape and other forms of sexual violence and abuse. This situation has significant consequences for adolescents' lives and health. In the case of sexual violence survivors, the lack of access to essential sexual and reproductive healthcare can itself constitute a form of torture and cruel and inhuman treatment. Access to comprehensive sexual and reproductive healthcare is an essential part of respecting, protecting and fulfilling a range of internationally-protected human rights.⁴⁹

33. The Constitution under Article 28 also provides that "Every person has inherent dignity and the right to have that dignity respected and protected."⁵⁰ Article 43(1)(a) of the Constitution provides that "Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care" while Article 43(1)(b) states that "A person shall not be denied emergency treatment."⁵¹ And Article 26 (4) provides that "Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or permitted by any other written law."⁵² The Constitution therefore permits access to abortion where there is a risk to the woman's health—and forcing a child or adolescent to carry a pregnancy to term in cases of rape or incest should be and has been understood as posing a risk to her physical and mental health.

34. International human rights bodies have recognized that, for survivors of sexual violence and abuse, the denial of the full range of healthcare services can have particularly devastating consequences. International human rights bodies have also recognized that access to emergency contraception (EC) is vital to preventing unwanted pregnancies after rape or other forms of sexual abuse. In its recent concluding observations to Egypt, for example, the CEDAW Committee, which oversees compliance with the Convention on All Forms of Discrimination against Women expressed concern that EC was not generally provided⁵³ and recommended that the Ministry of Health promote and raise awareness of EC among women of all ages, "highlighting their benefits in protection against unwanted pregnancies in cases of rape."⁵⁴

⁴⁹ See e.g., Committee on the Elimination of Discrimination against Women, General Recommendation 24: Women and Health, (20th Sess.) paras. 29 & 31, U.N. Doc. A/54/38 (1999) (noting that a national plan to promote women's health must include universal access for all women to a full range of high-quality and affordable healthcare, including sexual and reproductive health services and recommending that States remove all barriers to women's access to health services, education and information); see also Committee on Economic, Social and Cultural Rights, 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, U.N. Doc. HRI/GEN/1/Rev.5 (2001) (underscoring the need for states parties to provide the full range of high-quality and affordable healthcare, including sexual and reproductive services, such as family planning and recommends that States remove all barriers to women's access to health services, education, and information, including in the area of sexual and reproductive health).

⁵⁰ The Constitution of Kenya, Art. 28.

⁵¹ The Constitution of Kenya, Art. 43(1)(a-b).

⁵² The Constitution of Kenya, Art. 26(4).

⁵³ Committee on the Elimination of Discrimination against Women, Concluding Observations: Egypt, (45th Sess.) para. 39, U.N. Doc. CEDAW/C/EGY/CO/7 (2010).

⁵⁴ *Id.* para. 40.

35. In cases where EC fails to prevent unwanted pregnancy or when women and girls cannot access it, they may require access to safe and legal abortion. Yet in countries with restrictive abortion laws, survivors may be denied legal abortions with grave consequences for their lives and physical and mental health. The Committee against Torture which oversees compliance with the Convention against Torture, for example, has expressed concern that survivors of rape or incest may be forced to carry pregnancies that are the direct result of gender violence, stating that: “For the woman in question [survivors of gender violence unable to access legal abortion], this situation entails constant exposure to the violation committed against her and causes serious traumatic stress and a risk of long-lasting psychological problems such as anxiety and depression...(art. 16).”⁵⁵

36. In the case *K.L. v. Peru*, the Human Rights Committee, which oversees state compliance with the International Covenant on Civil and Political Rights (ICCPR), found that the denial of an abortion that endangers a woman’s physical and mental health can be deemed a violation of her right to be free from cruel, inhuman or degrading treatment, as recognized by the ICCPR.⁵⁶ Additionally, the U.N. Special Rapporteur on Violence against Women has stated that “acts deliberately restraining women” from having an abortion constitute violence against women.⁵⁷ This Committee has recommended that States undertake various measures to address the harms caused by restrictive abortion laws for survivors of sexual violence. These recommendations include reviewing restrictive legislation on abortion and considering the possibility of providing exceptions to allow therapeutic abortions or abortions in cases where the pregnancy has resulted from rape or incest.⁵⁸

37. In the case of *L.C. v. Peru*, the CEDAW Committee ruled that Peru must amend its law to allow women to obtain an abortion in cases of rape and sexual assault; establish a mechanism to ensure the availability of those abortion services; and guarantee access to abortion services when a woman’s life or health is in danger.⁵⁹

PART III

THE KENYAN GOVERNMENT HAS AN OBLIGATION TO PREVENT AND REDRESS SEXUAL VIOLENCE IN BOTH PUBLIC AND PRIVATE EDUCATIONAL INSTITUTIONS

38. It is imperative for the Kenyan government to take appropriate measures to prevent sexual violence against girls in schools and provide appropriate services to survivors of sexual violence in both public and private educational settings.

⁵⁵ Committee against Torture, Concluding Observations: Nicaragua, (42nd Sess.) para. 16, U.N. Doc. CAT/C/NIC/CO/1 (2009).

⁵⁶ *K.L. v. Peru*, Comm. No. 1153/2003, Judgment of 24 Oct. 2005, U.N. Doc. CCPR/C/85/D/1153/2003.

⁵⁷ UN Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences: Addendum: Policies and practices that impact women’s reproductive rights and contribute to, cause or constitute violence against women, (55th Sess.) para. 57, UN Doc E/CN.4/1999/68/Add.4, (21 Jan. 1999).

⁵⁸ Committee against Torture, Concluding Observations: El Salvador, (43rd Sess.) para. 23, U.N. Doc. CAT/C/SLV/CO/2 (2009).

⁵⁹ *L.C. v. Peru*, Comm. No 22/2009, Judgement of 18 June. 2009, CEDAW/C/50/D/22/2009.

39. Under Article 53(1)(d) of the Constitution of Kenya, “Every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitive labour.”⁶⁰

40. In its 2011 review of Kenya’s compliance with the CEDAW Convention, the CEDAW Committee noted that sexual violence in schools was a barrier to girls’ right to education and called on the government to “[s]trengthen awareness-raising and training of school officials and students, sensitization of children through the media and the establishment of reporting and accountability mechanisms to ensure that perpetrators of all sexual offences against schoolgirls are prosecuted” and “[e]nforce a zero tolerance policy with respect to sexual abuse and harassment in schools and ensure that perpetrators are punished appropriately.”⁶¹

41. Article 19 of the Convention on the Rights of the Child provides that “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”⁶² Article 24 provides that “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. States Parties shall pursue full implementation of this right”⁶³

42. Article 16 of the African Charter on the Rights and Welfare of the Child calls on states to “take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.”⁶⁴

43. The obligation to protect and redress applies in both public and private settings. For example, the CEDAW Committee notes “that articles 2, 5, 11, 12 and 16 of the Convention require the States parties to act to protect women against violence of any kind occurring within the family, at the work place or in any other area of social life.”⁶⁵ The CEDAW Committee indicated that the due diligence standard is a general principle of international law, stating “[u]nder general international law and specific human rights

⁶⁰ The Constitution of Kenya (2010), art. 53(1)(d).

⁶¹ Committee on the Elimination of Discrimination against Women, Concluding Observations: Kenya, (48th Sess.) para. 32, U.N. Doc. CEDAW/C/KEN/CO/7 (2011).

⁶² Convention on the Rights of the Child, art. 19, *adopted* Nov. 20, 1989, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, UN Doc. A/44/49 (1989), *reprinted in* 28 I.L.M. 1448 (*entered into force* Sept. 2, 1990).

⁶³ *Id.* at art. 24.

⁶⁴ African Charter on the Rights and Welfare of the Child, (*adopted* July 1990) OAU Doc. CAB/LEG/24.9/49 (*entered into force* Nov. 29, 1999).

⁶⁵ CEDAW, *General Comment No. 12: Violence against Women*, A/44/38 (1989).

covenants, States may ... be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.”⁶⁶

44. In particular, the Committee draws attention to Articles 2(e), 2(f) and 5, noting that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) explicitly imposes on the state an obligation to take “all appropriate measures” to prevent acts of discrimination by non-state actors, including social and cultural practices that constitute discrimination against women.

45. The CEDAW Committee relied on this due diligence standard in deciding an individual complaint in favor of a victim of domestic violence. In *Ms. A.T. v. Hungary*, the Committee “conclude[d] that the obligations of the State party that are set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of, and protection from violence against women,” including private acts of violence.⁶⁷ The Committee suggested that such preventative measures as protective or restraining orders or adequate domestic violence shelters might have constituted due diligence in protecting victims of domestic violence; the State’s failure to provide any such preventative mechanisms constituted a state failure to exercise due diligence, thus imputing the responsibility to the State.⁶⁸ States have a duty to provide *just and effective remedies* for women subjected to violence. The right to a remedy should include: access to justice; reparation for harm suffered (proportionate to the physical and mental harm undergone and to the gravity of the human rights violations); restitution; compensation; satisfaction; rehabilitation; and guarantees of non-repetition and prevention.⁶⁹ Women need access to shelters, medical, psychological and other support, legal aid and other services.⁷⁰

46. International and regional human rights bodies have increasingly recognized sexual violence, particularly rape, as a form of torture and cruel, inhuman or degrading treatment, at least under certain circumstances.⁷¹ The Committee against Torture, which oversees compliance with the Convention against Torture, has repeatedly expressed concern about sexual violence against women and framed the issue in the context of torture and cruel, inhuman or degrading treatment.⁷²

⁶⁶ CEDAW, *General Comment No. 19: Violence against Women*, para. 9 (1992).

⁶⁷ CEDAW Communication No. 2/2003, para. 9.3 (2003).

⁶⁸ *Id.* at para. 9.4.

⁶⁹ *Id.* at para. 269; see also *AT v. Hungary* CEDAW decision.

⁷⁰ *Id.* at para. 270.

⁷¹ See e.g. *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-Am. C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996) [finding a violation of Article 5 (right to humane treatment) of the American Convention on Human Rights]; see also *Aydin v. Turkey*, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 Sept. 1997 [finding a violation of Article 3 (prohibition of torture) of the European Convention on Human Rights]; *V.L. v. Switzerland*, CAT/C/37/D/262/2005, UN Committee Against Torture (CAT), 20 Nov. 2006, available at: www.unhcr.org/refworld/docid/47975afd21.html [finding that sexual abuse by the police constituted torture even though it was perpetrated outside of formal detention facilities].

⁷² See Committee against Torture, *Concluding Observations: Albania*, U.N. Doc. CAT/C/CR/34/ALB, para. 8(o) (2005); *Bosnia and Herzegovina*, U.N. Doc. CAT/C/BIH/CO/1, paras. 10(d) and (e) (2005); *Burundi*, U.N. Doc. CAT/C/BDI/CO/1, para. 11 (2006); *China*, U.N. Doc. CAT/C/CHN/CO/4, paras. 28 and 30 (2008); *Chile*, U.N. Doc. CAT/C/CR/32/5, para. 7(k) (2004); *Chile*, U.N. Doc. CAT/C/CHL/CO/5, para. 18, (2009) *Colombia*, U.N. Doc. CAT/C/CR/31/1, paras. (9(d)(ii) and 10(f) (2003); *Indonesia*, U.N. Doc. CAT/C/IDN/CO/2, para. 16 (2008); *Japan*, U.N. Doc. CAT/C/JPN/CO/1, para. 25 (2007); *Mexico*, U.N. Doc. CAT/C/MEX/CO/4, para. 19 (2006); *Nepal*, U.N. Doc. CAT/C/NPL/CO/2, para. 27 (2005); *Sri Lanka*, U.N. Doc. CAT/C/LKA/CO/2, para. 13 (2005); *Zambia*, U.N. Doc. CAT/C/ZMB/CO/2, para. 23 (2008).

47. Under Article 1 of the Convention against Torture, four threshold requirements must be met to demonstrate torture: 1) intentional infliction of, 2) pain and suffering (physical or mental), 3) for a specific purpose, such as discrimination and 4) involving a public official or person acting in an official capacity.⁷³ It is clear that sexual violence inflicts physical and mental pain and suffering on the survivor. In terms of the third element, the Special Rapporteur on Torture has confirmed that the “purpose element [for torture] is always fulfilled, if the acts can be shown to be gender-specific,” in line with the explicit reference in Article 1 of the Convention against Torture to discrimination.⁷⁴ Furthermore, the Special Rapporteur has defined gender-specific violence as any violence that is “aimed at ‘correcting’ behavior perceived as non-consonant with gender roles and stereotypes or at asserting or perpetuating male domination over women.”⁷⁵

48. The Committee against Torture in its General Comment 2 has recognized that women are particularly vulnerable to torture or ill-treatment in a range of settings, including by private actors in communities and homes, and that they may be subject to violations of the Convention on the basis of their “actual or perceived non-conformity with socially determined gender roles.”⁷⁶ Thus, sexual violence can meet the four threshold requirements to demonstrate torture.

49. Sexual violence in educational institutions can clearly constitute torture and cruel, inhuman and degrading treatment under the Convention against Torture whether the violence is inflicted by administrators or teachers in public or private institutions. The Committee against Torture emphasizes this in its General Comment No. 2, where it states that States have an obligation to “prohibit, prevent and redress torture and ill-treatment in all contexts of custody and control,” including schools and other institutions that provide care to children.⁷⁷ States are also obligated to address torture and ill-treatment in “other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.”⁷⁸

50. The Committee has also emphasized that States must protect minority or marginalized groups that are especially vulnerable to torture and cruel, inhuman and degrading treatment and has recognized that gender can be a key element of vulnerability.⁷⁹ Children and adolescents are particularly vulnerable to torture and ill-treatment in educational institutions given gender constructions and stereotypes, their status as minors and the custodial role that teachers and administrators play in relation to them. Given the intersecting vulnerabilities of this population, it is particularly important for States to ensure their protection, including “prosecuting and punishing all acts of violence and abuse against these individuals” and “ensuring implementation of other positive measures of prevention and protection.”⁸⁰

⁷³ Convention against Torture, art. 1 [hereinafter CAT].

⁷⁴ Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, (7th Sess.), para. 30, U.N. Doc. A/HRC/7/3 (2008) [hereinafter Special Rapporteur on Torture – Promotion and Protection of All Human Rights 2008].

⁷⁵ *Id.* at para. 30.

⁷⁶ Committee against Torture, *General Comment 2: Implementation of article 2 by States Parties*, (44th Sess., 1992), para. 232, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007) (hereinafter CAT—General Comment 2).

⁷⁷ *Id.* at para. 15.

⁷⁸ *Id.*

⁷⁹ *Id.* at paras. 21-22.

⁸⁰ *Id.* at para. 21.

51. Articles 2 and 16 of the Convention against Torture require States parties to take measures to prevent torture and cruel, inhuman and degrading treatment in territories under their jurisdiction. These include undertaking “effective legislative, administrative, judicial or other measures”⁸¹ to address acts committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁸² The Committee against Torture has made it clear, however, that States parties also bear responsibility for acts of torture or ill-treatment committed by non-state or private actors when State authorities or others acting in an official capacity know or have reasonable grounds to believe that these acts are taking place and do not exercise due diligence to “prevent, investigate, prosecute and punish” these acts.⁸³

52. In respect to the right of individuals to be free from torture or other cruel, inhuman or degrading treatment (CIDT),⁸⁴ the Human Rights Committee found that it was “the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity *or in a private capacity*.”⁸⁵ The ICCPR articulates a particularly high standard for due diligence with respect to article 7 rights, “not[ing] that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime.”⁸⁶

53. Under Articles 13 and 14 of the Convention against Torture, State parties are obligated to ensure that a victim of torture or CIDT obtains access to justice and legal redress that includes “fair and adequate compensation, including the means for as full rehabilitation as possible.”⁸⁷ The Convention against Torture guarantees any individual who alleges to have been subject to torture or cruel, inhuman, or degrading treatment the right to complain to the authorities and to have his or her case “promptly and impartially examined” (Article 13).⁸⁸ The Convention against Torture also requires, in these cases, that steps be taken to ensure the protection of the complainant and witnesses “against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”⁸⁹

54. The due diligence standard for private actors has also been articulated at the regional human rights level. The case of *Velásquez Rodríguez*, decided by the Inter-American Court of Human Rights in 1988,

⁸¹ CAT, art. 2.

⁸² *Id.* art. 16.

⁸³ CAT – General Comment 2, para. 18 (“Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission.”)

⁸⁴ *International Covenant on Civil and Political Rights*, Article 7.

⁸⁵ Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, para. 2, HRI/GEN/1/Rev.7 (1992) (hereinafter “Human Rights Committee, General Comment No. 20”) (emphasis added).

⁸⁶ *Id.* at para. 8.

⁸⁷ *Id.* art. 14.

⁸⁸ CAT, art. 13 (Art. 13 refers specifically to victims of torture, but art. 16 extends the obligations contained in art. 13 to victims of CIDT as well.).

⁸⁹ *Id.*

sets forth the basic principles under which human rights violations can be imputed to a State:⁹⁰ the State may be held responsible when private actors commit human rights violations with the support or acquiescence of the government.⁹¹ Second, an act of a purely private person “can lead to international responsibility of the State, not because of the act itself, but because of the *lack of due diligence to prevent the violation or to respond to it*” in a manner appropriate under the circumstances.⁹² The Court explained that “when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention . . . the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.”⁹³ The “State has a legal duty to take reasonable steps to prevent human rights violations” and to use the means at its disposal to investigate the violations, punish the perpetrators, and ensure the victims adequate compensation.⁹⁴ Whenever it allows a violation of human rights to occur without taking such reasonable measures to prevent and remedy the situation, a State incurs international responsibility.⁹⁵

55. Where a person or entity is authorized by legislation to carry out the typical attributions of governmental authority, the conduct of such a person or entity may be considered an act of the State, as long as that person or entity was acting in a quasi-governmental capacity. More broadly, State responsibility may result from the acts of non-State third parties, where the State failed to comply with its duty to regulate and monitor these entities.

CONCLUSION: THE STATE HAS AN OBLIGATION TO PREVENT SEXUAL VIOLENCE IN BOTH PUBLIC AND PRIVATE EDUCATIONAL SETTINGS, AND TO ENSURE THAT SURVIVORS OF SEXUAL VIOLENCE RECEIVE BOTH REDRESS AND REMEDY, INCLUDING THE NECESSARY KEY REPRODUCTIVE HEALTH SERVICES.

Key steps that the government should take include:

- Ensure that both public and private schools understand their obligations to prevent and report sexual violence and to ensure that survivors of sexual violence receive treatment immediately.
- Ensure emergency contraception (EC) is available, accessible, affordable and of good quality for all women and girls in Kenya. Take steps to ensure that survivors of sexual violence are able to access EC free of charge in police stations, hospitals, health clinics and other institutions where survivors seek assistance.

⁹⁰ *Velásquez Rodríguez* case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, para. 164 (July 29, 1988). These principles have more recently been cited by the Inter-American Court in the *Ximenes Lopes* case, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149, paras. 124-25 (July 4, 2006); the *Mapiripán Massacre* case, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, para. 232 (Sept. 15, 2005); the *Pueblo Bello Massacre* case, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, para. 120 (Jan. 31, 2006); and the *Sawhoyamaya Indigenous Community* case, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, para. 153 (Mar. 29, 2006).

⁹¹ *Velásquez Rodríguez* case at para. 173.

⁹² *Id.* at para. 172 (emphasis added). See also *Diplomatic and Consular Staff*, 1980 I.C.J. Reports 3, 31-32, paras. 63, 67 (holding that the responsibility of Iran was engaged by the “inaction” of its authorities which “failed to take appropriate steps” to avoid violations of international law by private actors, in circumstances where such steps were evidently called for); *Corfu Channel*, Merits, 1949 I.C.J. Reports 4, 22-23.

⁹³ *Id.* at para. 176.

⁹⁴ *Id.*

⁹⁵ *Id.* at para. 173.

- Ensure that school officials, healthcare providers, social workers and the general public understand that the current legal regime on abortion permits abortion in all cases of pregnancy resulting from rape or incest, as these pregnancies pose a risk to the mental and physical health of the pregnant woman.
- Consider making explicit, through legislation, that abortion is permitted in all cases of pregnancy resulting from rape or incest to ensure that healthcare providers and women clearly understand what is legally permissible.
- Guarantee access to quality and confidential sexual and reproductive healthcare services, including access to family planning information and services and evidence-based sexuality education, for all adolescents.
- Ensure that all health care providers are trained to recognize and treat emotional, physical, and sexual abuse among youth, including providing referrals and confidential, non-judgmental counseling.
- Ensure that all healthcare providers are familiar with the National Guidelines on Management of Sexual Violence in Kenya. Health care providers should routinely offer youth, who have been sexually assaulted, STI and HIV counseling and testing, emergency contraception, and post-exposure prophylaxis to prevent HIV infection. Young women should also receive pregnancy counseling and testing, and safe abortion services if desired. In addition, health care providers should be trained to refer offenders to social services and to call on the criminal justice system for support.⁹⁶

Dated.....this day of2012

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⁹⁶ Rachel Goldberg. 2006. Living Up to their Name: Profamilia Takes on Gender-based Violence. *Quality/Calidad/Qualité* No. 18. New York: The Population Council; World Health Organization, 2004. *Clinical Management of Rape Survivors: Developing Protocols for Use with Refugees and Internally Displaced Persons* (revised ed.). Geneva: WHO.

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