

## BETWEEN A ROCK AND A HARD PLACE: THE GLOBAL GAG RULE'S IMPACTS ON WOMEN'S REPRODUCTIVE HEALTH AND ABORTION LAW REFORM IN MALAWI

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### ABSTRACT

In the United States and around the world, women's reproductive health rights are under threat. In Malawi, abortion is almost entirely illegal; and pregnant women and girls oftentimes resort to drinking poison or using crude objects to self-induce abortions. Every year, hundreds of Malawian women and girls die from unsafe abortion. Yet, these deaths are needless and preventable. Empirical research clearly shows that maternal mortality caused by unsafe abortion can be prevented by having laws that allow for safe and legal termination of pregnancy. Maternal mortality caused by unsafe abortion can also be prevented by having strong financial investment in and awareness-raising of family planning services.

This Article examines the harmful impacts of the "global gag rule" in the Malawi context. The rule conditions U.S. global health funding assistance for foreign aid recipients (including sexual and reproductive health NGOs in Malawi) on a recipient's promise that it will not perform or support abortions as a method of family planning—even with non-U.S. funds or the NGO's own funds. The policy further prohibits such NGOs from conducting advocacy around abortion, stifling much needed education and debate about a new abortion law that, if enacted, would save women's lives. The

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policy has been rescinded by every Democratic president and reinstated by every Republican president, subjecting the rights and the lives of countless women and girls in Malawi and around the world to the political winds in the United States. This Article argues that legislation must be enacted to stop the policy once and for all.

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## I. INTRODUCTION AND RESEARCH METHODOLOGY

This Article documents the harmful impacts of the global gag rule on Malawian women's ability to access safe abortion. In particular, it analyzes the country's efforts to reform its 160-year-old law on abortion in order to legalize it under certain circumstances. The authors conducted desk research on the history of the Mexico City Policy, otherwise known as the "global gag rule," with a view to examining whether the intended and stated purpose of the rule—to protect life—is actually borne out by its implementation. The authors also studied the criminal provisions for the law on abortion in Malawi (which prohibits abortion in nearly every circumstance) and the restrictive law's impacts on the incidence of unsafe abortion and maternal mortality.

In March 2020, the authors travelled to Malawi to conduct a human rights fact-finding investigation on the current domestic law's real-life impact on women and girls. As part of this investigation, the authors also learned about the decades-long effort to liberalize the abortion law against the backdrop of ever-changing U.S. foreign policy on the subject. The fact-finding mission was sponsored and organized by the International Women's Human Rights Clinic at Georgetown Law.<sup>1</sup> Together with other faculty and students in the International Women's Human Rights Clinic, the authors interviewed over seventy stakeholders on women's sexual and reproductive health rights, including: affected persons, medical and health professionals, community leaders, lawmakers, magistrates and judges, law enforcement personnel, government officials, women's and children's rights advocates, teachers, academics, leaders of non-governmental organizations and international organizations, and other experts on the subject.<sup>2</sup>

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<sup>1</sup> The clinic faculty designed this mission in accordance with the International Human Rights Fact-Finding Guidelines (The Lund-London Guidelines) that were developed by the International Bar Association's Human Rights Institute and the Raoul Wallenberg Institute. See generally *The Lund-London Guidelines*, RAOUL WALLENBERG INST. (2009), [https://www.ibanet.org/Fact\\_Finding\\_Guidelines.aspx](https://www.ibanet.org/Fact_Finding_Guidelines.aspx) [<https://perma.cc/2MFF-GRMC>] (elucidating guidelines "to contribute to good practice in the conduct of fact-finding visits and in the compilation of reports"). The research protocol was approved by the Georgetown University Institutional Review Board ("IRB") and the Malawi National Committee on Research Ethics in Social Sciences and Humanities ("NCRSH").

<sup>2</sup> To protect interviewees, Clinic faculty and student advocates implemented an extensive informed consent process. Interviewees were informed that no direct

Lawyers and paralegals from Women Lawyers Association Malawi and Women and Law in Southern Africa–Malawi accompanied the clinic team members and provided cultural support and translation services where needed.

This Article presents an up-close look at the urgent need for abortion law reform in Malawi, as well as the ways that the global gag rule stymied the process. This Article begins with some background on the evolution of the global gag rule and its role in the greater context of U.S. foreign aid assistance. This Article then analyzes how Malawi's restrictive law on abortion contributes to the country's high maternal mortality rates, and it provides an overview of the legislative reform efforts to liberalize the law. Finally, this Article argues that the global gag rule stifled much-needed community education and debate about the new Termination of Pregnancy Bill—a draft law that, if enacted, would have made abortion safe and legal for many women and girls in Malawi. Due to being “gagged,” NGOs seeking to promote women's reproductive health in Malawi had little hope of wearing down the religious and cultural resistance to liberalizing the current law on abortion. In effect, the global gag rule's reinstatement in 2017 contributed to the process for law reform stopping dead in its tracks. This report draws on a combination of the desk research and the fact-finding interviews<sup>3</sup> to highlight the far-reaching and severe consequences of the global gag rule on Malawian women's rights to sexual and reproductive health, including access to safe abortion, as well as on the country's ability to make, debate, and enact its own law on abortion. As to whether the intended and stated purpose of the global gag rule—to protect life—is borne out by its

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benefit would arise from their participation in the interview and no harm would come to them if they chose not to participate. Additionally, all interviews were conducted in private locations. Interview notes and audio recordings were stored on secured devices, separate from any identifying information of the interviewee. References to interviewees in this report comply with the precise descriptor approved by the interviewee, including some instances where the interviewee chose to be referred to by a pseudonym or “anonymous” rather than any specific identifier. References also comply with the NCRSH's request that no individual's name or identifying job title be used in the article. For those interviewees who requested during the informed consent process that researchers contact them prior to use in the final report, that approval was sought and received prior to researchers' use herein.

<sup>3</sup> While the small number of interviews prohibits the researchers from drawing any conclusions regarding any statistical significance, the interviews provided extensive insight into—including first-hand accounts of—the realities on the ground.

implementation in Malawi, this Article argues emphatically that it is not.

## II. BACKGROUND OF THE GLOBAL GAG RULE

### *a. The Global Gag Rule in the Context of the U.S. Foreign Aid Landscape*

For much of our country's history, the United States has committed to assisting people in developing countries to "improve their living standards, to realize their aspirations for justice, education, dignity, and respect as individual human beings, and to establish responsible governments."<sup>4</sup> By enacting the Foreign Assistance Act of 1961 – the cornerstone of U.S. law on foreign aid – Congress authorized permanent financial assistance to foreign countries and specifically provided for development assistance relating to population and health.<sup>5</sup> This authorization to provide foreign aid is appropriated annually to various government agencies, such as the United States Agency for International Development ("USAID"), through the enactment of a foreign assistance bill.<sup>6</sup> Among other concerns, the Foreign Assistance Act recognized that "poor health conditions and uncontrolled population growth can vitiate otherwise successful development efforts,"<sup>7</sup> and the law as enacted did not prohibit the use of U.S. funds for abortions performed in aid recipient countries.<sup>8</sup>

However, in the wake of *Roe v. Wade* and the subsequent moral outrage of conservative groups over the liberalization of abortion

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<sup>4</sup> Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 102, 75 Stat. 424 (as enacted).

<sup>5</sup> *Id.*:

Accordingly, the Congress hereby affirms it to be the policy of the United States to make assistance available, upon request, under this part in scope and on a basis of long-range continuity essential to the creation of an environment in which the energies of the peoples of the world can be devoted to constructive purposes, free from pressure and erosion by the adversaries of freedom.

*See also* Foreign Assistance Act Part I and § 104 Population and Health (as amended through 2002).

<sup>6</sup> *See e.g.*, H.R. 2839, 116th Cong. (2019).

<sup>7</sup> Foreign Assistance Act § 104(a) (as amended through 2002).

<sup>8</sup> Foreign Assistance Act § 102 (as enacted).

law in the United States, Congress passed an amendment to the Foreign Assistance Act in 1973 that specifically restricts funding for abortions.<sup>9</sup> The amended Foreign Assistance Act thus added a provision stating that “[n]one of the funds made available . . . shall be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.”<sup>10</sup> This “Helms Amendment,” the namesake of Senator Jesse Helms (R-NC) who introduced the bill, applies to all foreign development assistance activities authorized by the Foreign Assistance Act. The Helms Amendment dealt a financial blow to aid recipients in that they could no longer use U.S. funds for the performance of abortions in their home countries. However, the Helms Amendment stopped short of prohibiting these recipients from using their own funds or funds from other countries to perform abortions, provided they kept that money separate from U.S. development assistance.<sup>11</sup>

Over the next decade, Congress enacted more laws that would further restrict abortion-related development assistance.<sup>12</sup> Of particular relevance to this Article, Congress passed the Siljander Amendment to the Foreign Assistance and Related Programs Appropriations Act of 1982, specifying that no U.S. funds could be

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<sup>9</sup> *Roe v. Wade*, 410 U.S. 113 (1973); Foreign Assistance Act of 1973 § 114 (amending the Foreign Assistance Act of 1961).

<sup>10</sup> Foreign Assistance Act § 114.

<sup>11</sup> Rebecca Oas, *What is the Real Purpose of the Helms Amendment to the Foreign Assistance Act?*, CTR. FOR FAM. & HUM. RTS., Nov. 15, 2019, at 4, <https://cfam.org/definitions/what-is-the-real-purpose-of-the-helms-amendment-to-the-foreign-assistance-act/> [<https://perma.cc/29SX-97QP>]:

The Helms Amendment restricts the use of U.S. funds to support abortion internationally, by prohibiting the commingling of funds. In other words, organizations that perform abortions are still eligible for U.S. funding, but the funding streams they use for abortion must be kept separate from their other work that receives U.S. government support.

<sup>12</sup> Subsequent amendments to the Foreign Assistance Act also prohibited the use of funds for involuntary sterilizations and biomedical research relating to abortion or involuntary sterilizations. See Foreign Assistance Act § 104(f)(2) (as amended by § 104 of the International Development and Food Assistance Act of 1978, Pub. L. No. 95-424, , 92 Stat. 946); Foreign Assistance Act § 104(f)(3) (as amended by § 302(b) of the International Security and Development Act of 1981, Pub. L. No. 97-113, , 95 Stat. 1532). See also CONG. RSCH. SERV., R41360, ABORTION AND FAMILY PLANNING-RELATED PROVISIONS IN U.S. FOREIGN ASSISTANCE LAW AND POLICY 3-9 (2020), <https://fas.org/sgp/crs/row/R41360.pdf> [<https://perma.cc/49HH-QC9P>].

used by development assistance recipients to lobby for abortion.<sup>13</sup> Since then, this provision has been included in all but two annual foreign operations appropriations acts.<sup>14</sup> Like the Helms Amendment, the Siljander Amendment did not prohibit development assistance recipients, such as sexual and reproductive health NGOs, from using their own funds or other countries' funds to lobby for abortion in their home countries.<sup>15</sup>

While these statutory provisions prohibited the use of U.S. development assistance for the performance of abortion or for abortion-related lobbying, their impact and reach paled in comparison to a new executive policy that came into effect in 1984 — the Mexico City Policy.<sup>16</sup> Whereas the Helms and Siljander Amendments refrained from instructing foreign NGOs on how to use (or not to use) their own money or other countries' money, the Mexico City Policy required foreign NGOs to certify that they would neither perform nor promote abortion as a method of family planning (with U.S. funds or otherwise) as a *condition* to receiving U.S. family planning funds in the first place.<sup>17</sup> In essence, the policy forced a difficult choice on NGOs working to promote family

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<sup>13</sup> Foreign Assistance and Related Programs Appropriations Act of 1982, Pub. L. No. 97-121, § 525, 95 Stat. 1657. The Siljander Amendment originally prohibited lobbying *for* abortion but was later changed to also prohibit lobbying *against* abortion. *The U.S. Government and International Family Planning & Reproductive Health: Statutory Requirements and Policies*, KAISER FAM. FOUND. (May 13, 2021), <https://www.kff.org/global-health-policy/fact-sheet/the-u-s-government-and-international-family-planning-reproductive-health-statutory-requirements-and-policies/> [https://perma.cc/2MSD-H49P].

<sup>14</sup> CONG. RSCH. SERV., *supra* note 12, at 5 n.19. The Siljander Amendment's language did not appear in foreign operations appropriations acts for fiscal years 1994 and 1995.

<sup>15</sup> CONG. RSCH. SERV., *supra* note 12, at 11.

<sup>16</sup> Policy Statement of the United States of America at the United Nations Int'l Conf. on Population (Second Session), 5 (Aug. 6-13, 1984), [https://www.uib.no/sites/w3.uib.no/files/attachments/mexico\\_city\\_policy\\_1984.pdf](https://www.uib.no/sites/w3.uib.no/files/attachments/mexico_city_policy_1984.pdf) [https://perma.cc/3YAU-PYL5].

<sup>17</sup> CONG. RSCH. SERV., *supra* note 12, at 11; *see also The Mexico City Policy: An Explainer*, KAISER FAM. FOUND. (Jan. 28, 2021) (citing U.S. AGENCY FOR INT'L DEV., STANDARD PROVISIONS FOR U.S. NONGOVERNMENTAL ORG.: A MANDATORY REFERENCE FOR ADS CHAPTER 303, 303maa, partial revision (May 18, 2020)) [hereinafter KAISER FAM. FOUND.], <https://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer/> [https://perma.cc/3UDG-4SAU] (discussing that "Foreign NGOs" include international and regional NGOs that are based outside the United States and local NGOs in assisted countries); U.S. AGENCY FOR INT'L DEV., STANDARD PROVISIONS FOR NON-U.S. NONGOVERNMENTAL ORG.: A MANDATORY REFERENCE FOR ADS CHAPTER 303, 303mab, partial revision (Aug. 18, 2020) [hereinafter USAID], <https://web.archive.org/web/20201018171104/https://www.usaid.gov/sites/default/files/documents/303mab.pdf> [https://perma.cc/H292-3PGX].

planning and the sexual and reproductive health rights of women and girls in their home countries: either terminate any and all abortion-related activity (even if legal in their home countries and even if conducted using non-U.S. funds) or be disqualified entirely from receiving U.S. development assistance from USAID. It is these restrictions on a foreign NGO's activities that have earned the Mexico City Policy its more colloquial moniker of the "global gag rule."<sup>18</sup>

The global gag rule represented a significant shift in U.S. development assistance policy and, for reasons that will be discussed in detail, would severely impact the operations of family-planning and sexual and reproductive health NGOs in developing countries such as Malawi. Indeed, at the time of the policy's announcement, the United States was the largest donor to countries and agencies operating family planning programs.<sup>19</sup>

*b. The Introduction of the Global Gag Rule and Its Evolution*

*"Attempts to use abortion . . . in family planning must be shunned, whether exercised against families within a society or against nations within the family of man."*<sup>20</sup>

In 1984, representatives from 147 countries convened in Mexico City for the United Nations International Conference on Population.<sup>21</sup> Whereas the United States' previous position was that "rapid population growth was a serious impediment to development," the United States now viewed population as a "neutral phenomenon for development."<sup>22</sup> Furthermore, James Buckley, the head of the United States delegation, declared that "[a]ttempts to use abortion . . . in family planning must be shunned," and he outlined a new policy declaring that "the United

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<sup>18</sup> KAISER FAM. FOUND., *supra* note 17.

<sup>19</sup> Susan F. Rasky, *Reagan Restrictions on Foreign Aid for Abortion Programs Lead to a Fight*, N.Y. TIMES, (Oct. 14, 1984), <https://www.nytimes.com/1984/10/14/world/reagan-restrictions-on-foreign-aid-for-abortion-programs-lead-to-a-fight.html> [<https://perma.cc/DH2W-H65G>].

<sup>20</sup> Policy Statement at U.N. conference, *supra* note 16, at 4.

<sup>21</sup> U.N. *Conferences on Population*, U.N. DEP'T OF ECON. & SOC. AFFS., <https://www.un.org/en/development/desa/population/events/conference/index.asp> [<https://perma.cc/ZWB6-JTM3>].

<sup>22</sup> *Id.*

States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations.”<sup>23</sup> In effect, the policy prohibited foreign NGOs from using *any* money (whether U.S. federal money or not) to perform or promote abortion, if they wanted to receive U.S. development assistance for family planning programs.<sup>24</sup> This conditional eligibility for U.S. funding shocked international family planning agencies, development experts, and some members of Congress, who viewed the new policy as a “significant departure from the principles that [had] guided United States involvement” in family planning efforts abroad for the previous two decades.<sup>25</sup> In addition, opponents of the new policy argued that it was “unworkable, unconstitutional and poorly thought out . . . .”<sup>26</sup>

What is more, the policy could be revoked or reinstated at the will of each U.S. president, and following the first iteration of the global gag rule in 1984 under President Reagan’s administration, there has been a continual back-and-forth pattern of Republican administrations implementing the policy and Democratic ones revoking it.<sup>27</sup> Whereas the Foreign Assistance Act represents the will of Congress to “take the lead” in mobilizing resources that would help developing countries “to improve the quality of life for their people,”<sup>28</sup> the global gag rule places these resources out of the reach of many sexual and reproductive health NGOs with the stroke of a president’s pen.<sup>29</sup>

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<sup>23</sup> Policy Statement at UN conference, *supra* note 16, at 5.

<sup>24</sup> KAISER FAM. FOUND., *supra* note 17.

<sup>25</sup> Rasky, *supra* note 19.

<sup>26</sup> Rasky, *supra* note 19.

<sup>27</sup> As the policy is contained in a presidential memorandum, presidents can revoke, amend, and reinstate the policy as they wish. See VIVIAN S. CHU & TODD GARVEY, CONG. RSCH. SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION 2-3, 7 (2014), <https://sgp.fas.org/crs/misc/RS20846.pdf> [<https://perma.cc/4AV9-H6Q7>] (noting that the distinction between executive orders and presidential memoranda seems to be a matter more “of form than of substance,” with memoranda often used to direct agencies to implement laws that are presidential priorities, and that a President is free to revoke, modify, or supersede their own orders or those issued by a predecessor).

<sup>28</sup> Foreign Assistance Act § 102(a) (as amended through 2002), .

<sup>29</sup> Although such conditionality is technically permitted under the Foreign Assistance Act, the global gag rule offends the Act’s core principles of promoting “good health conditions” and respecting another country’s “right to determine its own policies with respect to population growth.” *Id.* at § 104(a).

Thus, the first iteration of the Mexico City Policy remained in place until 1993. The Clinton administration revoked it, finding that “[t]hese excessively broad anti-abortion conditions are unwarranted . . . [and] undermine[] efforts to promote safe and efficacious family planning programs in foreign nations.”<sup>30</sup> However, within two days of taking office on January 20, 2001, President George W. Bush reinstated President Reagan’s global gag rule in full, noting his own conviction that “taxpayer funds should not be used” to pay for or promote abortion either in the United States or abroad.<sup>31</sup>

President Bush, as well as some later presidents, would go on to amend the terms and scope of the policy, in many cases expanding its implementation. Not long after President Bush reinstated the policy, he issued another memo introducing a broad definition for what is meant by “actively promote abortion,” restricting such activities as:

*Lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning; and . . . [c]onducting a public information campaign in USAID-recipient countries regarding the benefits and/or availability of abortion as a method of family planning.*<sup>32</sup>

Finally, President Bush expanded the global gag rule even further in 2003 when he extended the policy to family planning funding granted by the U.S. Department of State.<sup>33</sup>

Eight years after President Obama revoked all three of President Bush’s memoranda, President Trump’s “Protecting Life in Global

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<sup>30</sup> Memorandum on the Mexico City Policy, 29 WEEKLY COMP. PRES. DOC. 88 (Jan. 22, 1993).

<sup>31</sup> Memorandum on Restoration of the Mexico City Policy, 37 WEEKLY COMP. PRES. DOC. 216 (Jan. 22, 2001). Notably, the construction of President Bush’s statement seems to imply that the global gag rule is the reason why U.S. taxpayer funds could not be used to pay for or to promote abortion, which would be a misunderstanding of the rule. That restriction is already written into the text of the Foreign Assistance Act and does not change with or without the global gag rule in place. And as will be discussed *infra*, one of the consequences of the waxing and waning of this executive policy is its propensity to cause confusion about its scope and restrictions.

<sup>32</sup> Memorandum of March 28, 2001 – Restoration of the Mexico City Policy, 66 Fed. Reg. 17,311 (Mar. 29, 2001) (*emphasis added*).

<sup>33</sup> Memorandum on Assistance for Voluntary Population Planning, 68 Fed. Reg. 52,323 (Aug. 29, 2003).

Health Assistance” policy (or the “PLGHA”) reinstated President Bush’s first memorandum (i.e., President Reagan’s original global gag rule) and expanded its scope in two significant ways.<sup>34</sup> Whereas previously the policy applied to foreign NGOs receiving *family planning* funds from USAID, the Trump administration extended the policy to foreign NGOs receiving *global health* funds from *all departments and agencies*.<sup>35</sup> The effect of this expanded policy is that foreign NGOs that continue to perform or actively promote abortion (or that give any money to other NGOs that do) would become ineligible to receive not only family planning financial assistance from USAID (or the Department of State, as had been added later by President Bush) but also other global health financial assistance unrelated to family planning from all U.S. departments and agencies.

In monetary terms, the Trump administration’s policy put at stake around twelve billion dollars of global health funding—including for programs unrelated to family planning—such as for maternal and child health, malaria, water sanitation, nutrition, and HIV/AIDS, tuberculosis, and other infectious diseases. All of this funding suddenly became conditional on a foreign NGO’s promise that it does not and will not perform or actively promote abortion as a method of family planning (or give any money to other NGOs that do).<sup>36</sup> By comparison, family planning assistance accounted for \$600 million of this total in fiscal year 2020.<sup>37</sup> President Trump’s policy is a twenty-fold increase in potential monetary impact. With a stroke of his pen, President Trump held all of this aid hostage from NGOs serving vulnerable and marginalized people whose health and lives depended on it.

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<sup>34</sup> Memorandum Regarding the Mexico City Policy, 82 Fed. Reg. 8495 (Jan. 23, 2017). The PLGHA was first applied to grants and cooperative agreements issued by USAID, the Department of State, the Department of Defense, and the Department of Health and Human Services in May 2017. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-347, GLOBAL HEALTH ASSISTANCE: AWARDEES’ DECLINATIONS OF U.S. PLANNED FUNDING DUE TO ABORTION-RELATED RESTRICTIONS (2020).

<sup>35</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 5.

<sup>36</sup> Zara Ahmed, *The Unprecedented Expansion of the Global Gag Rule: Trampling Rights, Health and Free Speech*, 23 GUTTMACHER POL’Y REV. 13, 13 (2020).

<sup>37</sup> *Id.*

c. *The Fallacy of "Protecting Life" by Prohibiting Abortion*

"You'd rather accept GGR than crash[] as a country."<sup>38</sup>

The Trump administration's policy was installed under the guise of "Protecting Life in Global Health Assistance," but the policy's new label could not conflict more with the policy's (and its predecessors') actual impact on life and health. The global gag rule has not reduced the number of abortions where it is implemented. In fact, a study published by the World Health Organization shows the opposite relationship: that women in countries that were highly "exposed" to the impacts of the global gag rule had more than two and a half times the odds of experiencing an induced abortion during the years when the global gag rule was in place than when it was not.<sup>39</sup> In these high exposure countries, the rate of induced abortion grew noticeably after the global gag rule was reinstated in 2001 and the increase was more pronounced after 2002.<sup>40</sup> Indeed, the researchers in the study found "robust empirical patterns suggesting that the Mexico City Policy is associated with *increases* in abortion rates in sub-Saharan African countries."<sup>41</sup> "When the policy is in force," the study stated, "family planning organizations that ordinarily provide (or promote) abortion face a stark choice

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<sup>38</sup> Interview with a gender activist in Lilongwe, Malawi (Mar. 10, 2020).

<sup>39</sup> See generally Eran Bendavid, Patrick Avila, & Grant Miller, *United States Aid Policy and Induced Abortion in Sub-Saharan Africa*, 89 BULL. WORLD HEALTH ORG. 873 (2011). This study analyzed the likelihood that a woman of reproductive age would experience an induced abortion during the years when the global gag rule was in effect versus not when it was not. It used data from twenty countries for the years 1994 through 2008. "Exposure" means the amount of foreign aid provided to a country by the United States for family planning and reproductive health during the years when the policy was not being applied. The increase in probability of having an induced abortion was controlled for other non-global gag rule factors, including fixed effects relating to the country and the year of reporting, the women's place of residence and educational level, the use of modern contraceptives, and the receipt of funding from non-U.S. countries.

<sup>40</sup> *Id.* at 877 (While the researchers were not able to draw conclusions about the underlying cause of the increase, they noted that "the complex interrelationships between family planning services and abortion may be involved. In particular, if women consider abortion as a way to prevent unwanted births, then policies curtailing the activities of organizations that provide modern contraceptives may inadvertently lead to an increase in the abortion rate.").

<sup>41</sup> *Id.* (*emphasis added.*)

between receiving United States government funding and conducting abortion-related activities.”<sup>42</sup>

The global gag rule also limits access to healthcare generally, especially where NGOs cannot disentangle abortion-related services from other health services.<sup>43</sup> Marie Stopes International and International Planned Parenthood Federation declined to comply with the global gag rule in 2018, and they chose to forego a combined \$79,407,000 of USAID funding.<sup>44</sup> Even for these relatively large and well-funded international organizations, the loss of U.S. funding resulted in reductions in family planning services and also hurt programs that supported maternal and child health and HIV/AIDS.<sup>45</sup>

Finally, in resource-poor countries with high maternal mortality rates caused by illegal and unsafe abortion, such as Malawi, the global gag rule forces NGOs to choose between a lesser of two evils: abandon any and all abortion services and advocacy, or see your country’s entire health system collapse. The global gag rule’s impacts in Malawi have been particularly devastating. The maternal mortality rate in Malawi is one of the highest in the world—349 women died from pregnancy- or childbirth-related complications out of every 100,000 women who gave birth in 2017.<sup>46</sup> Furthermore, unsafe abortion contributes up to eighteen percent of all maternal deaths.<sup>47</sup> The large number of abortion-related maternal deaths is caused in large part by the country’s 160-year-old law on abortion,<sup>48</sup>

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<sup>42</sup> *Id.* at 873.

<sup>43</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 1.

<sup>44</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 16-17.

<sup>45</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34, at 16-17.

<sup>46</sup> See generally *Maternal mortality*, UNICEF (Sept. 2019), <https://data.unicef.org/topic/maternal-health/maternal-mortality/> [<https://perma.cc/4YUP-DXEF>] (analyzing the “[t]rends in estimates of maternal mortality (MMR), maternal deaths, and lifetime risk of maternal death, 2000–2017” and finding that the global maternal mortality ratio was 211 deaths per 100,000 live births in 2017, and the top 116 countries with “very low” ratios together average twenty-nine deaths per 100,000 live births).

<sup>47</sup> Judith Daire, Maren O. Kloster, & Katerini T. Storeng, *Political Priority for Abortion Law Reform in Malawi: Transnational and National Influences*, 20 HEALTH & HUM. RTS. J. 225, 226 (2018) (citing NAT’L STAT. OFF. OF MALAWI, MALAWI MDG ENDLINE SURVEY 2014 REPORT (2015)).

<sup>48</sup> See PENAL CODE, §§ 149-151, 243 (as amended to 2012) (Malawi); see also *Clandestine and Unsafe Abortion Common in Malawi*, GUTTMACHER INST. (Apr. 4, 2017), <https://www.guttmacher.org/news-release/2017/ clandestine-and-unsafe-abortion-common-malawi> [<https://perma.cc/NEP6-BZND>] (quoting Dr. Chisale Mhango, a senior lecturer at the University of Malawi College of Medicine and

which is also one of the most restrictive criminal abortion laws in the world.<sup>49</sup> Because abortion is a felony crime under nearly all circumstances, women and girls resort to drinking poison, using sharp objects, and employing other dangerous methods in secret to terminate unwanted pregnancies.<sup>50</sup> On the other hand, Malawi is also one of the top ten recipients of health assistance funding that is subject to the global gag rule,<sup>51</sup> which makes the choice of declining U.S. health assistance funding virtually unthinkable. Of the Malawian NGOs that were slated to receive funding under existing awards in 2018, all of them chose to comply with the Trump administration's policy rather than lose that funding.<sup>52</sup> As a result of choosing compliance, however, these NGOs certified that they would not lobby their own government to make abortion safe and legal, nor would they sensitize their community stakeholders to the need for law reform. Furthermore, in the face of strong religious and cultural opposition to liberalizing the current abortion law, NGOs were hamstrung by the policy to challenge any uninformed or misinformed views about the need for and scope of legal change. In the end, women and girls continue to die and suffer serious health consequences as a result of the criminal abortion ban.

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former director of the National Reproductive Health Service, who claims, "[r]estrictive abortion laws do not stop abortion from occurring, they just drive it underground, forcing women to resort to clandestine procedures, which are often unsafe").

<sup>49</sup> See *The World's Abortion Laws*, CTR. FOR REPROD. RTS., <https://maps.reproductiverights.org/worldabortionlaws> [<https://perma.cc/TW6Q-R6UG>] (showing that Malawi's law criminalizes abortion except where it is performed to save the woman's life).

<sup>50</sup> GUTTMACHER INST., *supra* note 48 (explaining that a fifteen-year-old Malawian girl has a one in twenty-nine chance of dying from a pregnancy-related condition, and that unsafe abortion is one of the top causes of maternal mortality in the country and contributes to roughly six to eighteen percent of all maternal deaths); see *infra* notes 73, 75-76.

<sup>51</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34, at 14.

<sup>52</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34, at 23. Table 11 shows that only one Malawi NGO declined the PLGHA conditions, but because there was no planned funding that was forthcoming under that contract, the NGO's decision did not reduce its funding intake. *Id.*

### III. MALAWI'S RESTRICTIVE LAW ON ABORTION AND ITS NEGATIVE HEALTH CONSEQUENCES FOR WOMEN AND GIRLS

*"The difference between America and us is that in America, even if a law is difficult, you don't die. But here, we are dying. That's a big difference."*<sup>53</sup>

#### *a. The Penal Code Criminalizes Abortion in Nearly Every Circumstance*

Malawi has one of the most restrictive abortion laws in the world. As a former British colony, Malawi adopted its current abortion law from England's 1861 Offences Against the Person Act<sup>54</sup>; and the law has not been changed since it was adopted. As one Chief Resident Magistrate noted, "these laws were made in a time [when] women's rights were not issues at all."<sup>55</sup>

Under sections 149 to 151 of the Penal Code, abortion is a felony crime in nearly every circumstance.<sup>56</sup> A pregnant woman who "procures her own miscarriage" using poison, force, or any other means may face seven years imprisonment.<sup>57</sup> A person who gives to or who causes any woman to take any poison or who uses force or any other means, intending to procure a miscarriage, may face fourteen years imprisonment.<sup>58</sup> And a person who supplies anything to a pregnant woman, knowing that the thing is intended to be used for abortion, may face three years imprisonment.<sup>59</sup> Only one legal exception exists to the criminalization of abortion. Section 243 of the Penal Code states that a "person is not criminally responsible for performing in good faith and with reasonable care

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<sup>53</sup> Interview with an obstetrician and gynecologist, University of Malawi College of Medicine, in Blantyre, Malawi (Mar. 13, 2020).

<sup>54</sup> See LAW COMM'N, No. LC/01/56, REPORT OF THE LAW COMMISSION ON THE REVIEW OF THE LAW ON ABORTION, 12 GAZETTE EXTRAORDINARY (Mar. 15, 2016) <https://www.lawcom.gov.mw/sites/default/files/Law%20Commission%20Report%20on%20the%20Review%20of%20the%20Law%20on%20Abortion.pdf> [<https://perma.cc/YP3T-BWQH>]; see Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, §§ 58-59 (Eng., Wales, and N. Ir.).

<sup>55</sup> Interview with a Chief Resident Magistrate in Malawi (Mar. 11, 2020).

<sup>56</sup> PENAL CODE §§ 149-151.

<sup>57</sup> *Id.* § 150.

<sup>58</sup> *Id.* § 149.

<sup>59</sup> *Id.* § 151.

and skill a surgical operation . . . upon an unborn child *for the preservation of the mother's life . . .*"<sup>60</sup> However, the "exception is so narrow that even providers themselves are not sure when they're protected,"<sup>61</sup> said a representative of the Gender and Justice Unit in Lilongwe. "They don't know when it's illegal and the assumption is that it's illegal."<sup>62</sup>

*b. The Criminalization of Abortion Drives Women and Girls to Unsafe Abortion*

Notwithstanding the criminalization of nearly all instances of abortion, termination of pregnancy is prevalent and commonplace in Malawi. Based on a study published in 2017, sexual and reproductive health researchers estimated that over 141,000 abortions took place in 2015 alone.<sup>63</sup> However, because the vast majority of women and girls are not permitted to seek safe and legal abortion, they must resort to clandestine and unsafe methods in order to terminate an unwanted or unplanned pregnancy.<sup>64</sup> Health researchers estimated that in 2015, "51,693 abortions result[ed] in complications requiring post-abortion care," with unsafe abortion ranking as one of the "top five direct causes" of maternal mortality.<sup>65</sup> Indeed, Malawi has one of the highest maternal mortality ratios ("MMRs") in the world in large part because of the criminalization of abortion in nearly all circumstances. By comparison, countries that allow legal abortion on request (with gestational limits) or that permit abortion on broad social or economic grounds, have significantly lower MMRs, some as low as two deaths per 100,000 births.<sup>66</sup>

<sup>60</sup> *Id.* § 243 (*emphasis added*).

<sup>61</sup> Interview with a representative of the Gender and Justice Unit in Lilongwe, Malawi (Mar. 9, 2020).

<sup>62</sup> *Id.*

<sup>63</sup> Chelsea B. Polis et al., *Incidence of Induced Abortion in Malawi, 2015*, PLOS ONE, Apr. 3, 2017, at 9, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0173639> [<https://perma.cc/6RWJ-XEGR>].

<sup>64</sup> See James Chavula, *Govt escalates draft abortion bill*, THE NATION (May 30, 2017), <https://www.mwnation.com/govt-escalates-draft-abortion-bill/> [<https://perma.cc/9ZWW-W8XU>].

<sup>65</sup> Daire, Kloster & Storeng, *supra* note 47, at 226.

<sup>66</sup> Compare UNICEF, *supra* note 46, with CTR. FOR REPROD. RTS., *supra* note 49.

Young women and girls are most at risk of experiencing an incident of unsafe abortion<sup>67</sup> and in the Covid-19 era the rate of pregnancy for this age group has surged.<sup>68</sup> Due to the pandemic, schools in Malawi were closed in March 2020.<sup>69</sup> In the Mangochi district alone, over 7,000 girls became pregnant between January and June 2020; in Phalombe, more than 5,000 cases of teenage pregnancy were reported.<sup>70</sup> School closures and other Covid-19-related circumstances exacerbate pre-existing problems of lack of access to contraceptives and sexual and reproductive health services, including a lack of or misinformation about pregnancy prevention.<sup>71</sup> In the face of an unwanted pregnancy that could threaten her education, her future, or even her life, a girl or woman “will use all means, and mostly unsafe means of terminating this pregnancy.”<sup>72</sup>

The methods used by women and girls to terminate an unwanted pregnancy are dangerous and alarming. “They will use all sorts of things,”<sup>73</sup> said a women’s rights lawyer and a member of the Coalition for Prevention of Unsafe Abortion (“COPUA”) in Lilongwe. “Some have used cassava sticks. Some have used bicycle

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<sup>67</sup> Interview with a manager of Chipembere Community Development Organization, in Blantyre, Malawi (Mar. 13, 2020) (“Mostly, they are ages from 12 up to 18. These are the ages you might find that these issues of abortion are very much common.”); Interview with a scholar on women’s reproductive health in Lilongwe, Malawi (Mar. 8, 2020) (“What tends to happen because the law is so restrictive is people just use whatever they can, whatever means they have. Then others who don’t have the resources or connections, especially the younger persons, they’ll use the most unsafe methods.”).

<sup>68</sup> See Agency, *Teen pregnancies surged during the pandemic, Malawi authorities reveal*, STAR (July 29, 2020, 12:00 PM MYT), <https://www.thestar.com.my/lifestyle/family/2020/07/29/teen-pregnancies-have-surged-during-the-pandemic-malawi-authorities-reveal> [https://perma.cc/FFB6-G2RE].

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Interview with a communications official at SheDecides Malawi, a movement advocating for safe abortion in Malawi, in Lilongwe, Malawi (Mar. 10, 2020) (“I have been to places where people are up the mountains and they don’t have access to SRHR . . . They actually have never heard of condoms before.”).

<sup>72</sup> Interview with a sexual and reproductive health specialist, Centre for Reproductive Health at the University Malawi College of Medicine, in Blantyre, Malawi (Mar. 12, 2020).

<sup>73</sup> Interview with a women’s rights lawyer and a member of COPUA in Lilongwe, Malawi (Mar. 9, 2020).

spokes.”<sup>74</sup> Others might create homemade concoctions from whatever substances or pills might be available, like “soap and salt and medicines.”<sup>75</sup> Some have even ingested crushed glass.<sup>76</sup> As a result of these crude methods, many women and girls experience significant health complications, such as long term abdominal pains<sup>77</sup> or even losing their uteruses in the course of treatment.<sup>78</sup> “I lived through hell,”<sup>79</sup> said a young girl who self-induced an abortion. “After I started taking the medicine I started bleeding heavily. Then things got worse. I couldn’t work. They had to fetch me in an ox cart to take me to the hospital and when I was in hospital, they removed my uterus.”<sup>80</sup> In the most severe cases, women and girls die from the experience.<sup>81</sup>

Furthermore, the cost of funding post-abortion care is a significant financial burden on the country’s national health system,<sup>82</sup> much of which relies on international donor support, including the United States. According to Ipas, an international reproductive health rights organization, public health facilities in

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<sup>74</sup> *Id.*; see also *Facts and figures lead more of Malawi’s religious leaders to support abortion law reform*, INT’L CAMPAIGN FOR WOMEN’S RIGHT TO SAFE ABORTION (Apr. 20, 2016), <https://www.safeabortionwomensright.org/news/facts-and-figures-lead-more-of-malawis-religious-leaders-to-support-abortion-law-reform/> [<https://perma.cc/C9A7-B66N>] (citing original story by Cynthia Okoroafor & Brian Ligomeka). Cassava is a common root vegetable in Malawi. Its stems are long, hard, and knobby.

<sup>75</sup> Interview with a man who works on sexual and reproductive health rights services in Lilongwe, Malawi (Mar. 10, 2020) (“Like you take penicillin and mix it with ibuprofen, mix it with retroviral medicine. You mix something that you don’t even actually know what you’re creating out of it.”).

<sup>76</sup> Interview with a women’s rights lawyer and a member of COPUA, *supra* note 73.

<sup>77</sup> Interview with a representative of the Centre for Youth and Children’s Affairs in Lilongwe, Malawi (Mar. 10, 2020).

<sup>78</sup> David McKenzie & Brent Swails, *US foreign aid cuts could be a ‘death sentence’ to women in Malawi*, CNN (July 27, 2017, 5:02 AM ET), <https://www.cnn.com/2017/07/27/health/malawi-us-foreign-aid-cuts/index.html> [<https://perma.cc/7ATD-DZ7D>].

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *infra* notes 94-98.

<sup>82</sup> *Abortion and Postabortion Care in Malawi*, GUTTMACHER INST. (Apr. 2017), <https://www.guttmacher.org/fact-sheet/abortion-malawi> [<https://perma.cc/25F7-3CVV>] (citing Janie Benson et al., *Costs of Postabortion Care in Public Sector Health Facilities in Malawi: A Cross-Sectional Survey*, 15 BMC HEALTH SERVS. RSCH., Dec. 17, 2015, at 4-5.).

Malawi spend about \$314,000 a year on post-abortion care.<sup>83</sup> Ipas also found that changing the law to make abortion legal and safe would reduce postabortion care costs by twenty to thirty percent.<sup>84</sup> “Treating complications is more expensive than just providing alternatives where women can have safe abortion services,”<sup>85</sup> said a sexual and reproductive health specialist at the Centre for Reproductive Health at the University of Malawi College of Medicine. “Health is very much dependent on donor support,”<sup>86</sup> explained a social science researcher at the University of Malawi. The Malawi government contributes merely twenty percent of the total public health expenditure.<sup>87</sup> “What this means is that without donor support, the country’s health sector would more or less collapse,”<sup>88</sup> added the researcher.

The situation in Malawi illustrates what sexual and reproductive health and rights advocates already know to be true: that restrictive abortion laws do not stop women and girls from getting abortions,<sup>89</sup> it only makes them more vulnerable and forces them to go for unsafe abortions.<sup>90</sup> “I don’t think Malawi is any exception,”<sup>91</sup> said a representative of UNFPA, a United Nations agency working to improve reproductive and maternal health and rights around the world. “Whether it’s legal or illegal, safe or unsafe, usually most women with an unintended pregnancy are going for it to manage

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<sup>83</sup> *In Malawi, access to safe, legal abortion could lower health system costs*, IPAS (Jan. 20, 2016), <https://www.ipas.org/news/in-malawi-access-to-safe-legal-abortion-could-lower-health-system-costs/> [<https://perma.cc/7QHS-PXWT>]; see also LAW COMM’N, *supra* note 54, at 26.

<sup>84</sup> IPAS, *supra* note 83.

<sup>85</sup> Interview with a sexual and reproductive health specialist, *supra* note 72.

<sup>86</sup> Interview with a social science researcher based out of Chancellor College at the University of Malawi in Blantyre, Malawi (Mar. 12, 2020).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Jonathan Bearak et al., *Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimates from a Comprehensive Model for 1990–2019*, 8 LANCET GLOB. HEALTH e1152, e1152 (2020) (“Our findings indicate that individuals seek abortion even in settings where it is restricted.”).

<sup>90</sup> Interview with a manager at Medical Rights Watch, a health organization that promotes the protection and preservation of rights and responsibilities of patients and health workers, in Blantyre, Malawi (Mar. 13, 2020) (“[E]vidence shows that having restrictive laws or banning abortion completely does not stop the woman from procuring an abortion. What that does is . . . push the woman to go and get [an] unsafe abortion[.]”).

<sup>91</sup> Interview with a representative of UNFPA in Lilongwe, Malawi (Mar. 10, 2020).

the consequences of that unintended and, at times, forced pregnancy.”<sup>92</sup>

The restrictive abortion law currently in force plays a central role in the prevalence of unsafe abortion. When asked why women and girls are choosing unsafe abortions, a religious leader replied that “not all doctors will perform an abortion because legally it is not allowed. If the doctors are reported, the chances are they can be disciplined.”<sup>93</sup> A gender activist in Lilongwe recounted an instance where a husband and his pregnant wife were turned away by a clinic officer after seeking to terminate her pregnancy.<sup>94</sup> The clinic officer refused to perform a safe abortion on the woman, noting that it was illegal for him to do so under the law.<sup>95</sup> The family went away and sought an unsafe abortion elsewhere.<sup>96</sup> The next time the clinic officer saw them was when the husband brought his wife back after “everything had gone seriously wrong.”<sup>97</sup> The woman ended up dying from her clandestine and unsafe abortion.<sup>98</sup> “When a woman has decided to abort,” said the gender activist, “nobody is going to stop [her].”<sup>99</sup>

*c. Maternal Death Rates from Unsafe Abortion Drew Attention from International Human Rights Bodies*

The harms associated with unsafe abortion have plagued Malawi for decades, and the government has been called out by human rights treaty monitoring bodies repeatedly for failing to remedy the source of the problem. In its 2006 Concluding Observations on Malawi’s periodic report, the Committee on the Elimination of Discrimination against Women (“CEDAW Committee”) was “alarmed at the persistent high maternal mortality rate, particularly the number of deaths resulting from unsafe

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<sup>92</sup> *Id.*

<sup>93</sup> Interview with a religious leader in Blantyre, Malawi (Mar. 13, 2020).

<sup>94</sup> Interview with a gender activist, *supra* note 38.

<sup>95</sup> Interview with a gender activist, *supra* note 38.

<sup>96</sup> Interview with a gender activist, *supra* note 38.

<sup>97</sup> Interview with a gender activist, *supra* note 38.

<sup>98</sup> Interview with a gender activist, *supra* note 38.

<sup>99</sup> Interview with a gender activist, *supra* note 38.

abortions . . . .”<sup>100</sup> Four years later, in the face of government inaction on the matter, the CEDAW Committee expressed “regret[] that most of the concerns raised and the recommendations made in its previous concluding observations in 2006 have been insufficiently addressed”<sup>101</sup> and specifically noted that the high rate of maternal mortality as a result of unsafe abortions was one of these issues.<sup>102</sup> Furthermore, the CEDAW Committee specifically recommended that Malawi review its Penal Code law on abortion “with a view to removing the punitive provisions imposed on women who undergo an abortion . . . .”<sup>103</sup>

In 2015, a joint statement by a panel of United Nations and regional human rights experts stated that the “criminalization of . . . abortion . . . constitute[s] discrimination based on sex, and is impermissible.”<sup>104</sup> These experts called on all member states to consider the harmful public health effects of criminal abortion laws and to legalize abortion, “at the very minimum,” in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the physical and mental health of the woman or the life of the fetus.<sup>105</sup>

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<sup>100</sup> Committee on the Elimination of Discrimination against Women, Concluding Comments of the Committee on the Elimination of Discrimination against Women: Malawi (35th Sess., 2006), ¶ 31, U.N. Doc. CEDAW/C/MWI/CO/5 (Feb. 3, 2006).

<sup>101</sup> Committee on the Elimination of Discrimination against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women (45th Sess., 2010), ¶ 8, U.N. Doc. CEDAW/C/MWI/CO/6 (Feb. 5, 2010).

<sup>102</sup> *Id.* ¶ 36.

<sup>103</sup> *Id.* ¶ 37.

<sup>104</sup> *Joint Statement by UN Human Rights Experts, 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*, U.N. (Sept. 24, 2015), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=1649> [<https://perma.cc/82MM-5F7C>].

<sup>105</sup> *Id.*

IV. GOVERNMENT REVIEW OF THE LAW ON ABORTION AND THE  
INTRODUCTION OF THE TERMINATION OF PREGNANCY BILL

a. *The Malawi Government Laid the Groundwork for Reviewing and  
Reforming the Law on Abortion When the Global Gag Rule was  
Not in Effect*

Having bemoaned the prevalence of maternal mortality for a long time, and with the causal link between the restrictive law on abortion and the high maternal death rates becoming increasingly clear, the Malawi government could no longer ignore the public health disaster resulting from clandestine and unsafe abortion.<sup>106</sup> First, in 2000 (during the Clinton administration and when the global gag rule was not in effect), a special Law Commission reviewed the Penal Code and recommended that a separate law on abortion be enacted to provide for legal termination of pregnancy on “appropriate grounds.”<sup>107</sup> However, there was little done to carry forward this recommendation from 2001 to early 2009 during the Bush administration in the United States, when the gag rule was reinstated and expanded.<sup>108</sup>

Nearly a decade after the review of the Penal Code, in 2009 (and during President Obama’s administration), the Ministry of Health conducted a national strategic assessment of abortion in Malawi with the World Health Organization and Ipas Malawi.<sup>109</sup> Informed

<sup>106</sup> LAW COMM’N, *supra* note 54.

<sup>107</sup> *Id.*; see also MALAWI LAW COMM’N, REPORT OF THE LAW COMMISSION ON CRIMINAL JUSTICE REFORM ON THE REVIEW OF THE PENAL CODE (CAP. 7:01) (Mar. 31, 2000).

<sup>108</sup> While NGOs such as Ipas Malawi have been working to improve treatment for post-abortion care since 2005, it wasn’t until after President Obama was elected that Ipas Malawi helped to establish COPUA, which “educates the public on unsafe abortion and builds grassroots momentum for law reform.” *Malawi*, IPAS, <https://www.ipas.org/where-we-work/malawi/> [https://perma.cc/J2AD-D7F3]. The provision of post-abortion care is not circumscribed by the global gag rule or the Foreign Assistance Act. See, e.g., *Protecting Life in Global Health Assistance*, I.(10)(ii), HEALTH & HUM. SERVS.—STANDARD PROVISION (May 2017), [https://grants.nih.gov/sites/default/files/HHS%20Standard%20%20Provision\\_ProtectingLifeinGlobalAssistance\\_HHS\\_May%202017.pdf](https://grants.nih.gov/sites/default/files/HHS%20Standard%20%20Provision_ProtectingLifeinGlobalAssistance_HHS_May%202017.pdf) [https://perma.cc/25ZE-FQ8P]. Excluded from the definition of “to perform abortions” is the treatment of injuries or illnesses caused by legal or illegal abortions, for example, post-abortion care. *Id.*

<sup>109</sup> *Malawi*, *supra* note 108.

by these findings, as well as prodded by yet another special Law Commission to “carefully scrutinise the issues of unsafe termination of pregnancy and make *immediate* plans” to review and amend the current laws on abortion, the Ministry of Health and other government agencies began to call for a thorough review of the Penal Code sections on abortion with a view to reforming the law.<sup>110</sup> Thus, in 2013, the Malawi government empaneled a Law Commission on the Review of the Law on Abortion in order to effectuate meaningful legislative change.<sup>111</sup> Also during this time, NGO groups such as Ipas Malawi became highly active in developing grassroots initiatives calling for law reform, ultimately creating a Coalition for Prevention of Unsafe Abortion (“COPUA”) to educate the public on unsafe abortion.<sup>112</sup>

This Law Commission’s challenge was formidable: to understand the magnitude of unsafe abortion in Malawi and to review the law on abortion to ensure its conformity with the constitution, international human rights law, and the government’s policies on family planning and abortion.<sup>113</sup> The Law Commission itself noted the “emotive” nature of the subject and the potential for “mixed reactions and perceptions” from various groups within society.<sup>114</sup> Indeed, the religious and cultural opposition to abortion is pervasive and strong in Malawi society.<sup>115</sup> To fortify public confidence in its findings and recommendations, the Law Commission comprised high-level representatives from the Ministry of Health; the Ministry of Justice; the judiciary; traditional leaders; religious groups such as the Catholic Church, the Malawi Council of Churches, and the Muslim Association of Malawi; the Malawi College of Medicine; and the Law Society.<sup>116</sup>

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<sup>110</sup> LAW COMM’N, *supra* note 54, at 9 (*emphasis added*).

<sup>111</sup> LAW COMM’N, *supra* note 54, at 9.

<sup>112</sup> *Malawi*, *supra* note 108.

<sup>113</sup> LAW COMM’N, *supra* note 54, at 9.

<sup>114</sup> LAW COMM’N, *supra* note 54, at 7.

<sup>115</sup> See, e.g., Charles Pensulo, *Proposal to ease Malawi’s strict abortion laws faces religious opposition*, REUTERS (Sept. 30, 2020, 12:51 PM), <https://www.reuters.com/article/malawi-women-abortion/proposal-to-ease-malawis-strict-abortion-laws-faces-religious-opposition-idUSL5N2GK4XU> [<https://perma.cc/SL7Z-3TLY>]. The leaders of some of the country’s Christian and Muslim groups issued a statement saying, “[n]o institution including parliament, courts, executive arm of the government, Non-Governmental Organisations or foreign agencies have the legal right to terminate life except God.” *Id.*

<sup>116</sup> LAW COMM’N, *supra* note 54, at 7, 9.

Together, this diverse group of stakeholders, policymakers, and experts undertook a comprehensive law review and stakeholder consultation process. From June 2013 to July 2015, the Law Commission held a dozen meetings to scrutinize the Penal Code sections on abortion and to examine comparable statutes from other common law jurisdictions and regional neighbors.<sup>117</sup> The Commissioners also traveled to Ethiopia, Mauritius, and Zambia to gain firsthand knowledge of the harms of unsafe abortion and how to implement a new law on abortion.<sup>118</sup> In addition, the Law Commission held consultations in ten Malawi districts with stakeholders in the faith communities, officials from the Ministry of Health, the Ministry of Education, doctors and other medical practitioners, traditional healers, traditional birth attendants, police officers, health regulatory authorities, and the general public.<sup>119</sup>

*b. The Law Commission Concluded that the Current Law on Abortion Must be Liberalized*

*i. The Law Commission Recognized the Sheer Magnitude of the Abortion Problem in Malawi and the Government's Inability to Reach Its Target MMR Without Liberalizing the Abortion Law*

The Law Commission had the opportunity to review several studies on the incidence of induced abortion in Malawi, which confirmed its belief that the restrictive abortion law was at the heart of the maternal mortality epidemic.<sup>120</sup> It found that not only was the rate of abortion very high (nearly eleven abortions occurred for every 100 births), but the rate of complications resulting from unsafe abortion was also tragically high.<sup>121</sup> The Law Commission stated that nearly seventeen percent of all maternal deaths were due to unsafe abortion, making it the fourth most common cause of maternal death in the country, after bleeding during and after

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<sup>117</sup> LAW COMM'N, *supra* note 54, at 11.

<sup>118</sup> LAW COMM'N, *supra* note 54, at 11.

<sup>119</sup> LAW COMM'N, *supra* note 54, at 26 n.75 (the Law Commission held consultations in the districts of Chitipa, Nkhatabay, Nkhotakota, Mchinji, Dedza, Mangochi, Zomba, Chiradzulu, Mulanje, and Nsanje).

<sup>120</sup> LAW COMM'N, *supra* note 54, at 25.

<sup>121</sup> LAW COMM'N, *supra* note 54, at 25.

childbirth, sepsis, and hypertension.<sup>122</sup> In addition, “[s]ome women who procure abortion do not die but one in five of these women are maimed by severe complications,” stated the Law Commission’s report, “while another one in fourteen experience moderate complications, or have their reproductive organs so badly damaged that they cannot be pregnant again.”<sup>123</sup>

The Law Commission also recognized that women and girls will seek an unsafe abortion despite knowing that the procedure is illegal and dangerous, and even if their religious faith counsels against it.<sup>124</sup> The Law Commission found, in fact, that a large percentage of patients receiving post-abortion care was of religious faiths that have historically opposed abortion, for example, 23.3% were Catholic women.<sup>125</sup>

These statistics, together with the knowledge that women will seek unsafe abortion even if it is illegal, dangerous, and against their religious beliefs, cast doubt on the government’s ability to reach the United Nations’ target maternal mortality rate of seventy deaths per 100,000 lives births by the year 2030 without reforming the law on abortion.<sup>126</sup>

ii. *The Law Commission Recognized that the Issue of Abortion is Intrinsic to Various Women’s Human Rights and that the Current Law on Abortion is Inconsistent with International Law*

The Law Commission recognized that the restrictive law at the source of the high rate of unsafe abortion threatened several of the

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<sup>122</sup> LAW COMM’N, *supra* note 54, at 25.

<sup>123</sup> LAW COMM’N, *supra* note 54, at 25.

<sup>124</sup> LAW COMM’N, *supra* note 54, at 26.

<sup>125</sup> LAW COMM’N, *supra* note 54, at 26 (28.5% were Protestant/Presbyterian, 22.7% were of another Christian faith, 14.5% were of a different faith, and 10.3% were Muslim, while less than one percent of women seeking postabortion care identified with no religion.).

<sup>126</sup> Interview with an official in the Ministry of Health, Reproductive Health Directorate, in Lilongwe, Malawi (Mar. 10, 2020). This target refers to the United Nations Sustainable Development Goal. See UN, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, Goal 3.1, <https://daccess-ods.un.org/access.nsf/GetFile?OpenAgent&DS=A/RES/70/1&Lang=E&Type=D> OC [<https://perma.cc/K6K9-6ENB>].

fundamental human rights accorded to women and girls under international law and the constitution.<sup>127</sup>

First, the Law Commission noted that the right to health is guaranteed by several human rights treaties, and that treaty monitoring bodies have specifically identified unsafe abortion as a barrier to realizing this right.<sup>128</sup> For example, article 12(1) of the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") requires Malawi, a state party, to ensure that men and women have access to family planning services on an equal basis.<sup>129</sup> The CEDAW Committee has interpreted this article to mean that laws that punish women for undergoing a medical service that only women need (like abortion) is a violation of their right to health.<sup>130</sup> One U.N. Special Rapporteur on the right to health stated that criminal laws that restrict abortion are "paradigmatic examples of impermissible barriers to the realization of women's health" and "infringe women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health."<sup>131</sup> Furthermore, the Committee on Economic, Social and Cultural Rights has established that "[h]ealth is a fundamental human right indispensable for the exercise of other

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<sup>127</sup> LAW COMM'N, *supra* note 54, at 27-30.

<sup>128</sup> LAW COMM'N, *supra* note 54, at 27-28.

<sup>129</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (entered into force Sept. 3, 1981) [hereinafter CEDAW], <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> [<https://perma.cc/SQH5-NDT9>], *acceded to by* Malawi on Mar. 12, 1987. Article 16(1)(e) of CEDAW also requires Malawi to ensure that women have the right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." *Id.* at 16(1)(e).

<sup>130</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24 on Article 12 of the Convention (Women and Health)*, ¶¶ 8, 14 U.N. Doc CEDAW/C/GC/24 (1999), [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/INT\\_CEDAW\\_GEC\\_4738\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4738_E.pdf) [<https://perma.cc/M3MV-5AKG>] ("Other barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women punish women who undergo those procedures."), cited in LAW COMM'N, *supra* note 54, at 28-29.

<sup>131</sup> Special Rapporteur of the Human Rights Council, *Interim Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (66th Sess., 2011), ¶ 21, U.N. Doc. A/66/254 (2011), <https://daccess-ods.un.org/access.nsf/GetFile?OpenAgent&DS=A/66/254&Lang=E&Type=DOC> [<https://perma.cc/YC6Z-ZBKR>], cited in LAW COMM'N, *supra* note 54, at 28.

human rights.”<sup>132</sup> And the Law Commission noted that high maternal mortality from unsafe abortion “signifies the inadequate enjoyment by women of their right to the highest attainable standard of health.”<sup>133</sup>

The Law Commission noted that while the constitution does not expressly guarantee a right to health, other constitutional rights (such as the right to life, dignity, equality and non-discrimination, freedom of conscience, and freedom from torture and degrading treatment) have the effect of binding the State to protecting and respecting women’s reproductive health rights—including by providing access to safe abortion.<sup>134</sup>

Second, the Law Commission stated that the debate over the fetal right to life and a woman’s right to choose was a central point of its consultations. Some participants, including members of the Catholic Church, argued that life begins at conception and that legalizing abortion would be morally wrong because it involves killing an innocent human being.<sup>135</sup> However, the Law Commission noted that many courts around the world have avoided taking a direct stance on whether a fetus has a right to life.<sup>136</sup> Even where fetal rights are expressly safeguarded by national law, such as in Germany by its constitution, courts have noted that “criminal law is not an effective solution” for protecting fetal life.<sup>137</sup> Because pregnancy affects women “in ways more profound than any other ‘normal’ human function,” stated the Law Commission, the pro-choice argument is that “the pregnant woman, not the State, is the

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<sup>132</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (The right to the highest attainable standard of health)* (22nd Sess., 2000), ¶ 1, U.N. Doc. E/C.12/2000/4 (2000), [http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6Q5mlBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzDJmC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL\[https://perma.cc/WN8U-GA2Q\]](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6Q5mlBEDzFEovLCuW1AVC1NkPsgUedPIF1vfPMJ2c7ey6PAz2qaojTzDJmC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL[https://perma.cc/WN8U-GA2Q]), cited in LAW COMM’N, *supra* note 54, at 27.

<sup>133</sup> LAW COMM’N, *supra* note 54, at 27 (referencing Tinyade Kachika, *Bioethics, Human Rights, the Law and Maternal Mortality in Malawi* (2007) (unpublished manuscript) (on file with author)).

<sup>134</sup> LAW COMM’N, *supra* note 54, at 13.

<sup>135</sup> LAW COMM’N, *supra* note 54, at 19-20.

<sup>136</sup> LAW COMM’N, *supra* note 54, at 18. For example, the European Commission on Human Rights in *Paton v. United Kingdom*, declined to consider whether the right to life guaranteed by article 2 of the European Convention on Human Rights protects a fetus or not. LAW COMM’N, *supra* note 54, at 18 (citing *Paton v. United Kingdom* (1980), 3 EHRR 408). Furthermore, the U.S. Supreme Court in *Roe v. Wade* also expressly refrained from determining when life begins. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 164 (1973)).

<sup>137</sup> LAW COMM’N, *supra* note 54, at 19.

most appropriate person to make decisions about the foetus.”<sup>138</sup> Furthermore, the Law Commission noted that, in many cases of unsafe abortion, the ultimate choice is not whether a fetus lives or dies, but rather whether a pregnant woman also loses her life.<sup>139</sup> The Law Commission observed that article 6(1) of the International Covenant on Civil and Political Rights protects the right to life, and the Human Rights Committee has interpreted this right to include the right of women to not have to undergo life threatening, clandestine abortions.<sup>140</sup>

Finally, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the “Maputo Protocol”) obligates States Parties to authorize legal abortion in cases of sexual assault, rape, incest, where the pregnancy would endanger the physical or mental health or life of the pregnant woman or would endanger the life of the fetus.<sup>141</sup> Furthermore, the Law Commission noted that the Maputo Plan of Action requires all African Union members to move towards the goal of universal access to sexual and reproductive health services, including by implementing policy measures and encouraging advocacy to reduce the rate of unsafe abortion.<sup>142</sup>

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<sup>138</sup> LAW COMM'N, *supra* note 54, at 19.

<sup>139</sup> LAW COMM'N, *supra* note 54, at 19.

<sup>140</sup> International Covenant on Civil and Political Rights, art. 6(1), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force on Mar. 23, 1976) [hereinafter ICCPR], *acceded to by* Malawi on Dec. 22, 1993, cited in LAW COMM'N, *supra* note 54, at 27; Human Rights Committee, *General Comment No. 28, Article 3 (The equality of rights between men and women)* (68th Sess., 2000), ¶ 10, CCPR/C/21/Rev.1/Add.10 (2000), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.10&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.10&Lang=en) [https://perma.cc/2FTN-KE89], cited in LAW COMM'N, *supra* note 54, at 27.

<sup>141</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 14(2)(c), adopted by the 2nd Ordinary Session of the Assembly of the African Union General Assembly in 2003 in Maputo, CAB/LEG/66.6 (2003), *entered into force* Nov. 25, 2005 [hereinafter Maputo Protocol], <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> [https://perma.cc/NTV9-L2HN], *acceded to by* Malawi on May 20, 2005 (“States Parties shall take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”), cited in LAW COMM'N, *supra* note 54, at 29-30.

<sup>142</sup> African Union Commission, *Maputo Plan of Action for the Operationalisation of the Sexual and Reproductive Health and Rights Continental Policy Framework*, Sp/MIN/CAMH/5(I), ¶ 16-17, (Sept. 2006),

As a result of these treaties and treaty body statements, the Law Commission recognized that the criminal law on abortion in Malawi violated the human rights of women and girls and must be liberalized under certain justifiable circumstances.<sup>143</sup>

*c. The Law Commission Introduced a Termination of Pregnancy Bill that Would Enable More Women and Girls to Access Safe and Legal Abortion*

As part of its comprehensive report on the review of the abortion law, the Law Commission introduced a draft Termination of Pregnancy Bill (“TOP Bill”) that, if enacted, would repeal sections 149 to 151 and 243 of the Penal Code and would expand the grounds upon which women and girls may access legal abortion.<sup>144</sup> Under the TOP Bill, women and girls may seek a legal abortion if:

1. the continued pregnancy will endanger her life;
2. termination of the pregnancy is necessary to prevent injury to her physical or mental health;
3. there is severe malformation of the fetus which will affect its viability or compatibility with life; or
4. the pregnancy is a result of rape, incest, or defilement (i.e., statutory rape).<sup>145</sup>

Advocates for abortion law reform celebrated the TOP Bill because of its potential to prevent maternal deaths and other negative health consequences as a result of clandestine and unsafe abortion. A sexual and reproductive health specialist stated that “it would allow women easy access to abortion, safe abortion

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<http://carmma.org/resource/maputo-plan-action-mpoa-operationalization-sexual-and-reproductive-health-and-rights-srhr> [https://perma.cc/6EWP-3EHU], cited in LAW COMM’N, *supra* note 54, at 30.

<sup>143</sup> The Law Commission also analyzed the country’s obligations under international law and found that, while each of the human rights treaties is not justiciable (meaning the rights therein are not enforceable by law in court) unless the treaties are domesticated into national legislation, States Parties are nevertheless obligated to uphold the rights that are guaranteed by them. LAW COMM’N, *supra* note 54, at 30-32.

<sup>144</sup> LAW COMM’N, *supra* note 54, at 78.

<sup>145</sup> LAW COMM’N, *supra* note 54, at 78-79.

services.”<sup>146</sup> “They don’t have to go to traditional healers or to use other means.”<sup>147</sup> And “if Parliament were to vote in favor of the Termination of Pregnancy Bill, . . . that would reduce the incidence of unsafe abortions in Malawi,”<sup>148</sup> added an individual who works on sexual and reproductive health rights services. “It would reduce [them] at a great rate and by far.”<sup>149</sup>

Even religious groups that have historically opposed abortion as a sin supported the TOP Bill because of its potential to stem the tide of needless deaths from unsafe abortion.<sup>150</sup> One religious leader said he was “shocked” to learn that so many women and girls were hospitalized every year from getting an unsafe abortion.<sup>151</sup> “Why should a schoolgirl, who has been raped, be jailed for terminating her unwanted pregnancy?”<sup>152</sup> he asked. The Malawi Council of Churches, an umbrella organization for the country’s largest grouping of Catholic and Protestant churches, publicly supported the change in law. “We will continue to preach that abortion is a sin but we appreciate government efforts to address maternal mortality caused by unwanted pregnancy,”<sup>153</sup> said Reverend Alex Benson Maulana, the chairperson of the Malawi Council of Churches. The Council, together with members of the Law Commission representing various corners of Malawi society, approved the report and recommended its legislative proposals to the “Government, Parliament and the people of Malawi.”<sup>154</sup>

These findings and recommendations were distributed to all members of Parliament, libraries, universities, and various government ministries in May 2015,<sup>155</sup> and they were presented to

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<sup>146</sup> Interview with a sexual and reproductive health specialist, *supra* note 72.

<sup>147</sup> Interview with a sexual and reproductive health specialist, *supra* note 72.

<sup>148</sup> Interview with a man who works on sexual and reproductive health rights services, *supra* note 75.

<sup>149</sup> Interview with a man who works on sexual and reproductive health rights services, *supra* note 75.

<sup>150</sup> Okoroafor & Ligomeka, *supra* note 74.

<sup>151</sup> Okoroafor & Ligomeka, *supra* note 74 (quoting Prophet Amos Tchuma of the Faith of God Ministries based in Mzuzu, Malawi).

<sup>152</sup> Okoroafor & Ligomeka, *supra* note 74.

<sup>153</sup> George Mhango, *Malawi churches back abortion bill*, DW (Nov. 1, 2016), <https://www.dw.com/en/malawi-churches-back-abortion-bill/a-36222076> [<https://perma.cc/VB6J-D7U7>].

<sup>154</sup> LAW COMM’N, *supra* note 54, at 2-3.

<sup>155</sup> *Malawi government publishes abortion law reform bill*, INT’L CAMPAIGN FOR WOMEN’S RIGHT TO SAFE ABORTION (June 2, 2017),

the general public by press conference in July.<sup>156</sup> Even top faith leaders from around the country convened over two days in July 2016 to understand the magnitude of unsafe abortion and to explore how other African countries have addressed the problem through law.<sup>157</sup> Bishop Dr. Gilford Immanuel Matonga, the Acting General Secretary of the Malawi Council of Churches, stated that the dialogue was “timely and important.”<sup>158</sup> “We cannot stand aside and watch when the many women and girls that are [being] affected are our own congregation members,”<sup>159</sup> he added. “We need to appreciate the law and the situation and make informed decisions.”<sup>160</sup> The Acting Chairperson for COPUA, Simon Sikwese, said that “seeing the contents of the bill will help Malawians to fully understand it and will correct any misconceptions.”<sup>161</sup>

Nevertheless, much work remained to get lawmakers and the broader society on board. A lack of knowledge as well as misinformation contributed to an “aggressive stance” on the subject of abortion and a stubborn refusal to change the law, especially by some religious leaders.<sup>162</sup> “Human life is sacred,”<sup>163</sup> said Archbishop Thomas Luke Msusa of Blantyre in November 2016. “[F]rom its beginning until [its] end, no one can under any circumstance claim for himself the right directly to destroy an innocent human being.”<sup>164</sup> Furthermore, many lawmakers were

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<https://www.safeabortionwomensright.org/news/malawi-government-publishes-abortion-law-reform-bill/> [<https://perma.cc/6TWV-Q6KW>] (citing the original article published in Malawi Nation by James Chavula (May 30, 2017)).

<sup>156</sup> *Unpacking Malawi Special Law Commission final review findings and recommendations on abortion law*, SEXUALITY POL’Y WATCH (July 28, 2015), <https://sxpolitics.org/unpacking-malawi-special-law-commission-final-review-findings-and-recommendations-on-abortion-law/13151> [<https://perma.cc/V96Z-UC73>] (citing the original source published by the Maravi Post).

<sup>157</sup> Mtheto Lungu, *Malawi Churches discuss maternal health, rights and abortion law reform*, NYASA TIMES (July 29, 2016), <https://www.nyasatimes.com/malawi-churches-discuss-maternal-health-rights-abortion-law-reform/> [<https://perma.cc/B65S-358X>].

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Malawi government publishes abortion law reform bill*, *supra* note 155.

<sup>162</sup> *Facts and figures lead more of Malawi’s religious leaders to support abortion law reform*, *supra* note 74.

<sup>163</sup> *How a Malawi bishop argues against abortion*, CNA NEWSLETTER (Nov. 11, 2016, 00:08 AM), <https://www.catholicnewsagency.com/news/how-a-malawi-bishop-argues-against-abortion-25306> [<https://perma.cc/6DPW-Q34S>].

<sup>164</sup> *Id.*

“shy” to speak of the TOP Bill and openly relied on civil society groups for more education and sensitization of the issue in their constituencies.<sup>165</sup>

Around this same time, the political winds in the United States were changing. While Malawi’s NGOs on sexual and reproductive health (and other stakeholders) were free to lobby and advocate for law reform without the risk of losing health funding from the United States during the duration of the special Law Commission’s review, that quickly changed upon Donald Trump’s election as President.

#### V. DERAILMENT OF MALAWIAN ABORTION LAW BY THE 2017 REINSTATEMENT OF THE GLOBAL GAG RULE

*“We have come so far. We have research on abortion in the country, and a draft law sitting with the Ministries of Health and Justice. But we need this bill to be passed.”*<sup>166</sup>

##### *a. The Malawian Abortion Law Reform Effort Came to a Halt After 2016 Despite Initial Momentum*

At the beginning of 2017, a nascent abortion law reform effort was underway in Malawi – the Law Commission had affirmed the serious problem of unsafe abortion in Malawi and had put forward the draft TOP Bill to address the need for liberalization of the existing abortion law.<sup>167</sup> Indeed, national policy change “usually begins with documentable evidence of the problem and clear articulation of solutions,” as one 2016 report put it, noting “Malawi . . . [has] active efforts underway for abortion law reform, with

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<sup>165</sup> *Politicians, academia, and civil society organisations call for speedy abortion law reforms in Malawi*, INT’L CAMPAIGN FOR WOMEN’S RIGHT TO SAFE ABORTION (July 20, 2016), <https://www.safeabortionwomensright.org/news/politicians-academia-and-civil-society-organisations-call-for-speedy-abortion-law-reforms-in-malawi/> [<https://perma.cc/7VXX-WYR3>] (citing the original source published in the Maravi Post by John Saukira (Jul. 15, 2016)).

<sup>166</sup> *Safe Abortion Action Fund, My Hope to Save Lives Through Abortion Law Reform in Malawi*, GIRLS’ GLOBE (Sept. 24, 2020), <https://www.girlsglobe.org/2020/09/24/my-hope-to-save-lives-through-abortion-law-reform-in-malawi/> [<https://perma.cc/537Q-GWC3>].

<sup>167</sup> *See supra* Section IV.

engaged networks of civil society and strong support from key government actors.”<sup>168</sup>

To become law, the TOP Bill needed to be approved by Cabinet, tabled and enacted by Parliament, and assented to by the President.<sup>169</sup> Civil society groups lobbied for the TOP Bill to be presented to Parliament during the fall of 2017, and it was expected that the bill would have been tabled at this time, but it was not.<sup>170</sup>

The TOP Bill was not tabled for debate in subsequent years, either, though government actors continued to voice sporadic support for the draft bill.<sup>171</sup> In 2018, a spokesperson for the Ministry of Health stated that “the due process of scrutinising the bill is underway,” meaning that Cabinet was reviewing the bill, after which it would be tabled in Parliament.<sup>172</sup> A presidential advisor on civil society organizations expressed similar optimism about the bill’s prospects, stating “the government is committed to ending maternal deaths in Malawi . . . one of the ways is to address the problem of unsafe abortions through law reform.”<sup>173</sup> There was also support for the TOP Bill within the Ministry of Health. As a female official in the Ministry of Gender, Children, Disability and Social Welfare noted, “we know that our colleagues in the Ministry of Health support [the TOP Bill], very much because they have seen how women, how they are getting complications through the

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<sup>168</sup> IPAS, MAKING CHANGE HAPPEN: A REVIEW OF PROGRESSIVE ABORTION POLICY CHANGE IN AFRICA 13 (2016) [hereinafter MAKING CHANGE HAPPEN], <https://ipas.azureedge.net/files/POLCAFE16-MakingChangeHappenPolicyChangeAfrica.pdf> [<https://perma.cc/4XQ2-6ELA>].

<sup>169</sup> See MALAWI’S CONSTITUTION OF 1994 WITH AMENDMENTS THROUGH 2017, §§ 48(1) and 49, [https://www.constituteproject.org/constitution/Malawi\\_2017.pdf?lang=en](https://www.constituteproject.org/constitution/Malawi_2017.pdf?lang=en) [<https://perma.cc/5MNE-Q82W>] (The Parliament, which comprises the National Assembly and the President, holds all legislative power); *id.* § 48(3) (the National Assembly makes decisions through a majority of the votes); *id.* § 66(1)(a) (National Assembly has the power to receive, amend, accept, or reject bills laid before it); *id.* § 73(1) (President either assents or withholds assent to bills laid before him or her); *id.* § 96(1)(c) (Cabinet has the function to initiate bills).

<sup>170</sup> Daire, Kloster & Storeng, *supra* note 47, at 232 (noting that national groups lobbied for the bill to be presented to Parliament during the autumn of 2017).

<sup>171</sup> See, e.g., Interview with a female official in the Ministry of Gender, Children, Disability and Social Welfare in Lilongwe, Malawi (Mar. 11, 2020) (noting support for the TOP Bill amongst Ministry of Health officials).

<sup>172</sup> Emily Banda, *Malawi: Authorities optimistic on enactment of new abortion law*, CSJ NEWS (Aug. 27, 2018), <https://csjnews.org/2018/08/27/malawi-pledges-enact-new-abortion-law/> [<https://perma.cc/Y8XF-S6WY>].

<sup>173</sup> *Id.*

untraditional means of abortion and they do agree openly that they support this and it's taking too long to pass."<sup>174</sup>

However, as of January 2021, the TOP Bill had still not been tabled in Parliament and was languishing in the same draft status it had been in since its proposal in 2015. As a gender activist put it:

[N]ow we have a proposed bill. That is lying somewhere. And the government is . . . pretending that they don't know this bill, when the whole exercise of consultation was sanctioned by government . . . . And then later on, government . . . just completely withdraw[s] and you don't see them speaking to it. You speak to them: they pretend they don't hear you.<sup>175</sup>

The sudden lack of movement on the TOP Bill dismayed stakeholders and observers. A women's rights lawyer and a member of COPUA expressed chagrin about the standstill, noting that the process of setting up the Law Commission and the eventual proposal of the TOP Bill finished around 2016—"and it's now 2020. Nothing has moved yet. And our women are still dying . . . . We have wanted this issue to change yesterday."<sup>176</sup>

What accounts, then, for the derailment of Malawi's legal reform effort, which had previously enjoyed "engaged" civil society and "strong support" from government actors<sup>177</sup>—why was the TOP Bill never tabled in 2017 as expected, nor in subsequent years? Nearly 8,000 miles away from Malawi, at the beginning of 2017, newly-elected President Trump was sworn into office. One of Trump's first acts as president was to reinstate an expanded version of the global gag rule—the "Protecting Life in Global Health Assistance" policy—which drastically extended the rule's reach, applying the policy to foreign NGOs receiving global health funds from all U.S. departments and agencies.<sup>178</sup>

Upon the implementation of this policy in 2017, Malawian NGOs were now faced with a difficult choice: accept the conditions on aid, which would mean ceasing all abortion-related services and advocacy programs (funded with money from *any* source), but

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<sup>174</sup> Interview with a female official in the Ministry of Gender, Children, Disability and Social Welfare, *supra* note 171.

<sup>175</sup> Interview with a gender activist, *supra* note 38.

<sup>176</sup> Interview with a women's rights lawyer and a member of COPUA, *supra* note 73.

<sup>177</sup> MAKING CHANGE HAPPEN, *supra* note 168.

<sup>178</sup> Memorandum Regarding the Mexico City Policy, *supra* note 34.

maintain eligibility to receive much-needed U.S. funds for other initiatives, or reject the conditions on aid, which would allow them to continue abortion-related programming but would mean forgoing potentially significant amounts of U.S. foreign aid. Faced with this thorny choice, of the Malawian NGOs that were set to receive funding under existing awards in 2018, all chose to comply with the policy rather than lose funding.<sup>179</sup> Compliance with the policy, however, also meant that these NGOs were no longer permitted to lobby the Malawian government for abortion law reform or to sensitize community stakeholders about the TOP Bill and the need to liberalize the existing law. The reintroduction of the global gag rule in 2017 – after eight years of its absence during the Obama administration – thus demonstrates why the policy has earned its colloquial moniker. It effectively gagged Malawian stakeholders from their advocacy and lobbying efforts around the TOP Bill and contributed to bringing legal reform efforts to a screeching halt.

*b. The Global Gag Rule Contributed to the Curtailment of Malawi's Legal Reform Effort by Prohibiting Lobbying by NGOs and Forcing Difficult Funding Choices*

*i. The Global Gag Rule Restricted Malawian NGOs from Advocating or Lobbying for Abortion Law Reform and Maintaining Momentum for the TOP Bill's Passage.*

Prior to reenactment of the global gag rule, advocacy and lobbying by Malawian NGOs had been a critical piece of the abortion law reform effort in the country. As one study notes, COPUA and its allies “worked concertedly to generate political momentum for safe abortion, such as by lobbying [Members of Parliament] and other state institutions,”<sup>180</sup> engaging in advocacy efforts aimed at government officials as well as the general public in the form of training workshops, debates, social media discussions, radio shows, newspaper articles, TV appearances, concerts, and public rallies.<sup>181</sup> Prior to the 2014 general election in Malawi,

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<sup>179</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34, at 23.

<sup>180</sup> Daire, Kloster & Storeng, *supra* note 47, at 231.

<sup>181</sup> Daire, Kloster & Storeng, *supra* note 47, at 229.

COPUA's targeted lobbying had even secured support to pass the TOP Bill among a majority of MPs, though the subsequent general election and turnover of seats resulted in the need for renewed lobbying efforts.<sup>182</sup>

Advocacy and lobbying efforts are essential to informing the Malawian public about the TOP Bill and what it aims to do—that is, end unsafe abortion, reduce maternal mortality rates, and save lives. Beyond this educational benefit, engaged and informed constituents also help further the legal reform process by pushing governmental actors toward change. In other words, passage of the TOP Bill rests in part on grassroots, community-level support that can pressure governmental actors to see through the legal reform process they started.

Passage of the bill, after all, requires governmental action and receptiveness by MPs to change. As a manager of the Center for Advancement of Human Rights and Development in Malawi put it, "Very few Members of Parliament talk in Parliament . . . . You need to keep noise outside Parliament . . . as soon as you organize a protest and we want you to pass the bill and all that, they will feel safe that they are being supported by the public."<sup>183</sup> COPUA's strategy, for instance, had been to "bring in as many stakeholders as possible to have a common front and cushion abortion law reform advocacy from any backlash. In early discussions, the government indicated clearly that we will need as many voices as possible to move the Bill forward."<sup>184</sup>

Sensitization programs by NGOs help combat misinformation, address religious opposition, and generate popular support. In response to religious opposition, for example, COPUA "intensified its advocacy activities before [Members of Parliament], religious leaders, and traditional leaders" between 2016 and 2017, conducting countrywide meetings to explain the bill and its contents to such leaders and work to gain their support.<sup>185</sup>

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<sup>182</sup> Daire, Kloster & Storeng, *supra* note 47, at 231.

<sup>183</sup> Interview with a manager of the Center for Advancement of Human Rights and Development in Malawi in Blantyre, Malawi (Mar. 12, 2020).

<sup>184</sup> CHANGE, A POWERFUL FORCE: U.S. GLOBAL HEALTH ASSISTANCE AND SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS IN MALAWI 18 (2020) [hereinafter A POWERFUL FORCE], <https://srhrforall.org/download/a-powerful-force-u-s-global-health-assistance-and-sexual-and-reproductive-health-and-rights-in-malawi/?wpdmdl=2254&refresh=5ff5ca51199371609943633> [https://perma.cc/ZA3J-88JU] (quoting interview with Ipas Malawi).

<sup>185</sup> Daire, Kloster & Storeng, *supra* note 47, at 232.

Unfortunately, however, the political lobbying and advocacy efforts that had proved crucial to building momentum for abortion law reform were brought to a standstill by the reinstatement of the global gag rule in 2017. The policy by its terms prohibits “perform[ing] or actively promot[ing] abortion . . . abroad,” and restricted activities include “promoting changes in a country’s laws or policies related to abortion as a method of family planning” – that is, engaging in lobbying.<sup>186</sup> As a youth advocate put it, “a lot of people aren’t saying everything . . . since the gag rule has been reinstated. So, a lot of other major players in the game are also U.S. funded and as a result, they end up just being worried . . . because they don’t want to lose their funding.”<sup>187</sup> A safe motherhood advocate expressed a similar sentiment: “[We get] backlash from the government because [abortion] is not legal . . . and gagged as well with USAID because they’ve made it clear that organizations that are getting funding from [ ] USAID are not supposed to talk about issues to do with abortion.”<sup>188</sup>

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<sup>186</sup> Memorandum of March 28, 2001 – Restoration of the Mexico City Policy, *supra* note 32; *see also* KAISER FAM. FOUND., *supra* note 17. Under USAID’s Standard Provisions for Non-U.S. Nongovernmental Organizations, abortion is a method of family planning when it is for the purpose of spacing births (such as abortions performed for the physical or mental health of the mother or abortions performed for fetal abnormalities). *See* USAID, *supra* note 17. USAID’s Standard Provisions also provide that abortion as a method of family planning does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term, or abortions performed following rape or incest. Thus, applying these provisions, it appears that two of the grounds permitting abortion in the TOP Bill would not be considered “abortion as a method of family planning,” and therefore that activities related to these grounds technically would not be restricted by the global gag rule. *See* LAW COMM’N, *supra* note 54, at 78, § 3(1)(a)–(d) (ground (a) provides for termination of pregnancy where continued pregnancy would endanger the life of the pregnant woman, and ground (d) provides for termination where the pregnancy is a result of rape, incest, or defilement). However, two of the other grounds for termination in the TOP Bill fall squarely within USAID’s definition of “abortion as a method of family planning.” *See id.* (ground (b) provides for termination where necessary to prevent injury to the physical or mental health of a pregnant woman, and ground (c) provides for termination where severe malformation of the fetus would affect its viability). Lobbying efforts are obviously aimed at the TOP Bill as a whole, and the relevant grounds that do or do not pass muster under USAID’s provisions cannot be separated in the overall legal reform effort. Further, as is discussed below, there is little transparency for NGOs as to application of the gag rule’s scope and relevant requirements, which leads to many organizations adopting the broadest interpretation of the rule to avoid running afoul of its requirements. In effect, then, the gag rule restricted lobbying efforts around the TOP Bill as a whole.

<sup>187</sup> Interview with a youth advocate in Lilongwe, Malawi (Mar. 9, 2020).

<sup>188</sup> Interview with a safe motherhood advocate in Lilongwe, Malawi (Mar. 9, 2020).

Further, in cutting short political momentum for reform, the reinstatement of the rule also left political support “vulnerable” and “fragile.”<sup>189</sup> As has been noted earlier, Malawi and Malawian NGOs receive a significant amount of foreign aid from the United States. From 2017 onwards, while NGOs receiving U.S. funds were no longer permitted to engage in abortion law reform advocacy efforts, opponents of reform could continue their activities unimpeded. The rule thus “suppresses the speech and political participation of non-U.S. actors in their own countries [and] . . . gives a distinct advantage to antiabortion advocates in public debates on the issue, by not imposing the same limitations on [them].”<sup>190</sup> And in the meantime, the problem of unsafe abortion and the need for sensitization efforts in the country persists.

As an official from Women and Law in Southern Africa-Malawi noted, thus far there “hasn’t been enough sensitization on the ground for having the TOP Bill passed with the general public . . . [a Member of Parliament] would be in Parliament to pass a vote, but then if he goes back to his constituency, his people would say, ‘why did you pass this Bill’ [in a district that is predominantly pro-life] . . . he would have to face them. And if he knows that his people are not sensitized enough, then he . . . wouldn’t want to.”<sup>191</sup> Another interviewee stated that “very few know about [the TOP Bill] . . . eighty percent of [the country], they don’t have any knowledge about . . . this bill.”<sup>192</sup> A manager of the Centre for Alternatives for Victimized Women and Children echoed the lack of awareness, noting, “one reason why we’re not having the community coming

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<sup>189</sup> Daire, Kloster & Storeng, *supra* note 47, at 231.

<sup>190</sup> Sneha Barot, *When Antiabortion Ideology Turns into Foreign Policy: How the Global Gag Rule Erodes Health, Ethics, and Democracy*, 20 GUTTMACHER POL’Y REV. 73, 76 (2017). The Siljander Amendment does prohibit the use of U.S. foreign assistance funds to lobby against abortion. See USAID, USAID GUIDANCE FOR IMPLEMENTING THE SILJANDER AMENDMENT (2014), <https://www.usaid.gov/sites/default/files/documents/1864/USAID%20Guidance%20for%20Implementing%20the%20Siljander%20Amendment.pdf> [<https://perma.cc/3AL7-FMRS>]. However, this Amendment only covers U.S. government-funded activities; in other words, it does not prohibit an organization from engaging in advocacy against abortion with its own funds or other non-U.S. government funds, even if it is receiving U.S. assistance. *Id.* The gag rule, however, does prohibit an organization from using its own funds or non-U.S. government funds to lobby for abortion.

<sup>191</sup> Interview with an official from Women and Law in Southern Africa-Malawi in Lilongwe, Malawi (Mar. 8, 2020).

<sup>192</sup> Interview with a manager of Chipembere Community Development Organization, *supra* note 67.

up in support of the TOP Bill [is] because, to them, they feel or they don't know [the issue of unsafe abortion] is happening and it's affecting them."<sup>193</sup>

When sensitization efforts are conducted, they can be effective in changing mindsets. As a manager of Chipembere Community Development Organization, an organization that empowers rural women and youth and facilitates economic development, noted, "One approach we have taken is to, at least, disseminate the statistics . . . and [show that] a lot of people are dying because of unsafe abortion . . . . When you have shared the statistics . . . [then] they are coming to their senses."<sup>194</sup> A senior inspector of schools attended a Banja La Mtsogolo ("BLM") workshop about the TOP Bill and stated that beforehand, he "had an idea" of unsafe abortion, but until the workshop "I didn't know to what extent the women are dying," remarking, "It's a painful thing . . . . Why should people die? Why should they do unsafe abortion?"<sup>195</sup>

Advocacy efforts are also critical to combating the spread of misinformation. One manager at Medical Rights Watch stated, "When you ask someone about the abortion law reforms in Malawi, they just think it's abortion on demand. And most church leaders who are opposing the bill think it's abortion on demand."<sup>196</sup> Noting that more advocacy work was needed, he added, "The local people . . . should be empowered with information—the right information—to demand for abortion services."<sup>197</sup> Sensitization efforts are thus a vital component of addressing cultural and religious resistance to liberalization of the law as well combating misinformation about the issues the TOP Bill seeks to address. However, the gag rule's reinstatement meant a significant number of NGOs receiving U.S. funds could no longer conduct such activities, severely undermining the reform effort.

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<sup>193</sup> Interview with a manager of the Centre for Alternatives for Victimized Women and Children in Blantyre, Malawi (Mar. 13, 2020).

<sup>194</sup> Interview with a manager of Chipembere Community Development Organization, *supra* note 67.

<sup>195</sup> Interview with a senior inspector of primary schools in Blantyre, Malawi (Mar. 12, 2020).

<sup>196</sup> Interview with a manager at Medical Rights Watch in Blantyre, Malawi (Mar. 13, 2020).

<sup>197</sup> *Id.*

ii. *The Global Gag Rule Occasioned a Funding Crunch for Family Planning Services, Exacerbating the Problems of Unintended Pregnancies and Unsafe Abortion*

Another effect of the global gag rule's reinstatement has been that numerous programs related to reproductive health or family planning were shut down or paused in light of the new restrictions. For example, for the period from 2014 to 2016, the U.S. government issued between seven and nine awards to Malawi each year which were categorized as for "Maternal and Child Health, Family Planning."<sup>198</sup> For the period from 2017 to 2020, these awards dropped to between one to two each year.<sup>199</sup>

The fact of this diminishment is affirmed by members of Malawian NGOs and other stakeholders working with these programs on the ground. As a manager of Chipembere Community Development Organization put it, "it's a problem of scarce family planning materials because Trump restricted funds for family planning in Malawi . . . . There is no family planning services in the village. So young girls [] have nowhere to go."<sup>200</sup> A social science researcher based out of Chancellor College, University of Malawi, also described a project that was terminated due to the global gag rule:

I've seen [this] since Trump came to power. I was involved in a project that was looking at youth as drivers of change . . . and one of the key issues was looking at how the youth can be agents of change in as far as population growth is concerned . . . . It started in the last years of the Obama administration and it was supposed to run for five years and it only ran for a year and it was terminated.<sup>201</sup>

The pattern of reinstatement and rescission of the global gag rule leaves organizations in the lurch with regard to funding. Programs require time and investment to be effective, but the specter of the global gag rule ensures the continued operation of these programs

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<sup>198</sup> *Malawi*, U.S. FOREIGN ASSISTANCE [https://www.foreignassistance.gov/cd/malawi/\[https://perma.cc/VS59-TQST\]](https://www.foreignassistance.gov/cd/malawi/[https://perma.cc/VS59-TQST]).

<sup>199</sup> *Id.*

<sup>200</sup> Interview with a manager of Chipembere Community Development Organization, *supra* note 67.

<sup>201</sup> Interview with a social science researcher, *supra* note 86.

cannot be relied upon. Organizations are forced to make difficult decisions and the resultant pulling of United States or other donors' funding can have far-reaching and damaging effects.

For example, the Family Planning Association of Malawi ("FPAM"), along with BLM, are two of the primary private clinic providers of sexual and reproductive health services in Malawi.<sup>202</sup> BLM was unable to comply with the reinstated global gag rule in 2017 and was forced to close clinics in Malawi due to the loss in funding.<sup>203</sup> Similarly, when the global gag rule was most recently reinstated, the U.S. government asked FPAM to choose whether to continue their activities or lose funding from the United States (via PEPFAR). One activist describes the consequence of having to make this choice:

So, there's a case that we know about a young girl [that] was raped in that area, a teenage girl. And then because she could not go to any facility — there was now [nowhere] to go and [get] the [emergency contraceptive] . . . . With this facility that was being run by FPAM that had been closed down . . . it's a bit far: 20 kilometers away from the main health facility, so this girl just stayed without the emergency contraceptive . . . so she ended up being pregnant and then when she realized, she went and committed suicide. You think that you are punishing an organization, you end up punishing the whole community for other services, as well.<sup>204</sup>

In short, then, the reinstatement of the global gag rule in 2017 has had devastating direct impacts on Malawi: it stymied the country's abortion law reform process by prohibiting advocacy and lobbying efforts by NGOs who were forced to make the difficult choice to comply with the rule and maintain much-needed U.S. funding. Further, the rule resulted in the shut down or diminishment of critical reproductive health programs, which continues to leave women and girls vulnerable to unintended pregnancies and unsafe abortion.

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<sup>202</sup> A POWERFUL FORCE, *supra* note 184, at 22.

<sup>203</sup> A POWERFUL FORCE, *supra* note 184, at 22.

<sup>204</sup> Interview with a gender activist, *supra* note 38.

*c. The Global Gag Rule Had an Indirect Negative Impact on Malawi's Abortion Law Reform Effort by Exerting Pressure on NGOs and Government Officials to Not Challenge U.S. Policy*

In addition to the global gag rule's direct negative impact on NGO lobbying and advocacy for abortion law reform—activities expressly prohibited by the rule—the policy has also had detrimental indirect effects in Malawi. These indirect effects stem from the hostile U.S. political climate surrounding reproductive rights that underpins reinstatement of the global gag rule. The reinstatement of the rule thus exerted a chilling effect on Malawian NGOs and caused apprehension among governmental officials about upsetting an important foreign aid relationship with the United States.

*i. The Global Gag Rule Creates a Culture of Uncertainty that Resulted in a Chilling Effect on Malawian NGOs.*

The global gag rule's chilling effect has been well documented. Organizations "tend to over-interpret the global gag rule for fear of being found non-compliant," and this existing chilling effect has been "compounded" by the political climate surrounding the Trump administration and sexual and reproductive rights, "namely [the administration's] broader efforts to defund women's and global health programs."<sup>205</sup>

The chilling effect is likely due at least in part to the lack of transparency around decision-making and requirements when the global gag rule is reintroduced; much is left unspoken, creating a culture of uncertainty. After the global gag rule's reinstatement, for example, some foreign NGOs reported receiving a short email that the global gag rule would be included in the next standard terms, while other organizations received only an email with the new standard provision agreement attached, with no mention of the

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<sup>205</sup> CHANGE, PRESCRIBING CHAOS IN GLOBAL HEALTH: THE GLOBAL GAG RULE FROM 1984-2018, at 36-37 (2018) [hereinafter PRESCRIBING CHAOS IN GLOBAL HEALTH], <https://srhrforall.org/download/prescribing-chaos-in-global-health-the-global-gag-rule-from-1984-2018/?wpdmdl=1064&refresh=5ff5cec1236121609944769> [https://perma.cc/K6QZ-8EDV].

global gag rule.<sup>206</sup> The provision itself is buried on page 83 of USAID's standard provisions.<sup>207</sup> This lack of openness about the global gag rule hinders the ability of organizations to make clear-sighted planning and budgetary decisions.

The global gag rule also hampers coalition-building and partnerships among NGOs. NGOs feel uncertain about whether they can enter into new partnerships or maintain existing relationships once the global gag rule has been reinstated.<sup>208</sup> Indeed, after the gag rule was reinstated in 2017, COPUA lost partners (often without explanation), and the resultant shrinking of COPUA's membership and budget "'weakens the voice calling for reform on termination of pregnancy' in Malawi."<sup>209</sup>

One organization that is the prime partner of a key U.S. global health assistance program in Malawi "shared that staff from their organization have to 'run away from those networks' that advocate for abortion and 'cannot attend a meeting where people would advocate for abortion.'"<sup>210</sup> This in turn limits the ability of NGOs to apply necessary pressure to governments and hold them accountable. As an officer of Every Girl in School Alliance noted, "It's about social accountability in the government . . . . I think if we could just band together as organizations, we'd have more power, we'd make more noise, and we'd actually get people to listen."<sup>211</sup>

ii. *The Global Gag Rule is Part of a Broader Funding Relationship that Made Malawian Government Leaders Reluctant to Challenge U.S. Policy Priorities.*

Though the global gag rule does not directly restrict the actions of foreign governments, it is likely the Malawian government's sudden silence in relation to the proposed TOP Bill was due in part to indirect pressure exerted by the reinstatement of the policy. As

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<sup>206</sup> GLOB. JUST. CTR. & CHANGE, CENSORSHIP EXPORTED: THE IMPACT OF TRUMP'S GLOBAL GAG RULE ON THE FREEDOM OF SPEECH AND ASSOCIATION 4 (2019), [https://globaljusticecenter.net/files/Censorship\\_Exported\\_Impact\\_of\\_Trumps\\_GGR.pdf](https://globaljusticecenter.net/files/Censorship_Exported_Impact_of_Trumps_GGR.pdf) [<https://perma.cc/9TWJ-TQKJ>].

<sup>207</sup> *Id.*

<sup>208</sup> PRESCRIBING CHAOS IN GLOBAL HEALTH, *supra* note 205, at 35.

<sup>209</sup> A POWERFUL FORCE, *supra* note 184, at 24.

<sup>210</sup> A POWERFUL FORCE, *supra* note 184, at 24.

<sup>211</sup> Interview with an officer of Every Girl in School Alliance in Lilongwe, Malawi (Mar. 9, 2020).

one gender activist put it, “the coincidence with the global gag rule is very easy to connect . . . . I think, government now has gone to sleep and they don’t want to speak.”<sup>212</sup> A scholar on women’s reproductive health similarly remarked, “[i]t’s political . . . . It is not national but also at the international level . . . there’s pressure from other governments, like [the] U.S. saying, ‘[y]ou shouldn’t . . . take this route.’”<sup>213</sup>

Malawi receives a significant amount of funding from foreign donors. As of 2018, Malawi received approximately \$1.2 billion in net official development assistance, which accounted for eighteen percent of the country’s gross national income and eighty-six percent of the central government’s expenses.<sup>214</sup> A major portion of these funds derive from the U.S. government: the United States is the largest bilateral donor to Malawi.<sup>215</sup> Between 2012 and 2020, for example, appropriated funding from the United States to Malawi ranged from approximately \$183 million to \$299 million, of which funding for health-related activities accounted for between 70%-100% of these totals.<sup>216</sup>

Malawi’s dependence on development assistance, particularly from the United States, has an important impact on the relationship between the countries’ governments. The U.S. government is seen as a “big brother” to the government of Malawi, and the Malawian government “looks up to” the United States.<sup>217</sup> As a result, “the government of Malawi is hesitant to pass laws that would directly contradict the policy and funding stipulations that come with U.S. global health funding.”<sup>218</sup>

The global gag rule is a “prime example” of a restrictive U.S. global health assistance policy that the Malawian government might be hesitant to challenge through the passage of domestic legislation like the TOP Bill.<sup>219</sup> As one study noted, after 2017, “the government

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<sup>212</sup> Interview with a gender activist, *supra* note 38.

<sup>213</sup> Interview with a scholar on women’s reproductive health in Lilongwe, Malawi (Mar. 8, 2020).

<sup>214</sup> *Net ODA received (% of central government expense) – Malawi*, WORLD BANK, <https://data.worldbank.org/indicator/DT.ODA.ODAT.XP.ZS?locations=MW&view=chart> [<https://perma.cc/SWV7-B8K2>].

<sup>215</sup> *Country Development Cooperation Strategy*, USAID, <https://www.usaid.gov/malawi/cdcs> [<https://perma.cc/YTF6-82LQ>].

<sup>216</sup> U.S. FOREIGN ASSISTANCE, *supra* note 198.

<sup>217</sup> A POWERFUL FORCE, *supra* note 184, at 18.

<sup>218</sup> A POWERFUL FORCE, *supra* note 184, at 17.

<sup>219</sup> A POWERFUL FORCE, *supra* note 184, at 18.

need[ed] to play its cards carefully given that passage of the [abortion] law [could] threaten its development relationship with [USAID].”<sup>220</sup>

Indeed, the Centre for Solutions Journalism reported that the former Minister of Health slowed the bill in Parliament “due to its potential to negatively impact the government of Malawi’s relationship with the U.S. government.”<sup>221</sup> In making its policy decisions, the Malawian government must weigh a funding situation in which “if they make [a] mistake,” they could jeopardize their relationship with the United States and risk losing critical funds.<sup>222</sup> The significant funding at stake—necessary in a country like Malawi, which depends on foreign aid—exerts implicit pressure on government officials to comply with U.S. policy priorities.

As one gender activist put it, if you were an official in a situation like this, “what do you do? . . . we will crash if we don’t accept. You’d rather accept the global gag rule than crashing as a country.”<sup>223</sup> Thus, though the gag rule does not apply to foreign governments, it is deemed by foreign officials to represent a hostile U.S. administration stance toward abortion that should not be challenged. In Malawi, this had led NGOs and activists to conclude that the government decided to suddenly keep quiet on the issue of abortion and delay convening and meeting on the TOP Bill because of the global gag rule: “They don’t want to speak . . . . They would rather see people die [than] lose this money.”<sup>224</sup>

## VI. ASSESSING THE HARMS CAUSED BY THE GLOBAL GAG RULE

It is too late now to undo Malawi’s legal reform trajectory, disrupted as it has been by the reinstatement of the global gag rule; and it remains to be seen whether a renewed lobbying effort after revocation of the rule under the Biden administration will lead to the TOP Bill’s eventual passage.<sup>225</sup> In assessing the harms caused in

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<sup>220</sup> Daire, Kloster & Storeng, *supra* note 47, at 232.

<sup>221</sup> A POWERFUL FORCE, *supra* note 184, at 19.

<sup>222</sup> Interview with a gender activist, *supra* note 38.

<sup>223</sup> Interview with a gender activist, *supra* note 38.

<sup>224</sup> Interview with a gender activist, *supra* note 38.

<sup>225</sup> In autumn 2020, there was some increased movement and discussion about tabling the TOP Bill in Malawi. Lawmakers were “expected to debate the bill before the current sitting of parliament end[ed] on October 23.” Lameck Masina,

Malawi, though, it may be possible to prevent such a situation from occurring in other countries in the future. What is needed is a permanent end to the global gag rule.

*a. The Global Gag Rule Leads to Poor Health Outcomes for Women and Girls*

It is evident that the global gag rule has a serious, detrimental effect when in place, not only in terms of life-threatening health impacts for women and girls, but also intrusion into foreign countries' own legislative agendas. In Malawi, as this Article has discussed, the 2017 reinstatement of the global gag rule silenced voices that would have been critical to the passage of the TOP Bill. Enactment of the global gag rule made it impossible for many NGOs to sustain lobbying campaigns, educational workshops, and community outreach in support of abortion law reform. The global gag rule—and the funding crunch its reinstatement occasioned—thus contributed to halting vital community momentum that could have helped propel legislative change in Malawi.<sup>226</sup> In addition, many women and girls who are at risk of unintended pregnancies are unable to access services they need due to essential clinical programs being forced to shut down.

In a sense, the costs of this reform effort being derailed are immeasurable. Hundreds of women and girls continue to die in Malawi every year due to unsafe abortion. But one way of assessing the scale of the harm might be to imagine a parallel timeline, one in which the gag rule was not reinstated in 2017 and stakeholder momentum and lobbying efforts had been allowed to continue unabated. What if this had helped lead to the Malawian government's enactment of the TOP Bill in 2017, as once anticipated?

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*Malawi's Liberalized Abortion Law Sparks New Debate*, VOICE OF AM. NEWS (Sept. 15, 2020, 12:16 PM), <https://www.voanews.com/africa/malawis-liberalized-abortion-bill-sparks-new-debate> [<https://perma.cc/ZM2W-4H5L>]. However, this did not occur, and the bill still has not been debated in Parliament, a necessary step towards its passage. See, e.g., Archangel Nzungaya, *Youths Urged to Show Strong Support for Abortion Bill*, MALAWI 24 (Dec. 12, 2020), <https://malawi24.com/2020/12/12/youths-urged-to-show-strong-support-for-abortion-bill/> [<https://perma.cc/8T6G-FL7Y>] (noting that according to the chairperson for the Parliamentary Health Committee, "the bill has not been discussed in the Parliament").

<sup>226</sup> See *supra* Section V.

In South Africa, for instance, enactment of a new, liberalized abortion law in 1996 led to a ninety-one percent decrease in deaths related to unsafe abortion in the years following the law's enactment.<sup>227</sup> While Malawi's TOP Bill is not the same as South Africa's law, some significant decrease in deaths could still be expected, likely enough to put the Malawian government's target maternal mortality rate of seventy deaths per 100,000 live births by the year 2030 within reach.<sup>228</sup>

One study, which examined the association between abortion laws and maternal mortality in 162 countries between 1985 and 2013, found that maternal mortality is lower when abortion laws are less restrictive.<sup>229</sup> In Malawi, if the global gag rule had not been in place and a less restrictive abortion law had been enacted, it is possible that up to 384 women's lives could have been saved each year, or a total of up to 1,152 lives from 2017 to 2020.<sup>230</sup>

The regrettable irony is that the global gag rule's purpose, as reflected in the name of the Trump administration's most recent iteration of the policy, is "protecting life."<sup>231</sup> The policy aims to restrict funding for abortion-related services and in so doing, presumably saves fetal lives. However, the policy thus far has done

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<sup>227</sup> Janie Benson, Kathryn Andersen & Ghazaleh Samandari, *Reductions in Abortion-Related Mortality Following Policy Reform: Evidence from Romania, South Africa and Bangladesh*, 8 REPROD. HEALTH., DEC. 22, 2011, at 6, <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/1742-4755-8-39> [https://perma.cc/W9SC-EX4S].

<sup>228</sup> Interview with an official in the Ministry of Health, Reproductive Health Directorate, *supra* note 126; see also *Transforming Our World: The 2030 Agenda for Sustainable Development*, *supra* note 126, at Goal 3.1.

<sup>229</sup> Su Mon Latt, Allison Milner & Anne Kavanagh, *Abortion Laws Reform May Reduce Maternal Mortality: An Ecological Study in 162 Countries*, 19 BMC WOMEN'S HEALTH, Jan. 5, 2019, at 2-5, <https://link.springer.com/article/10.1186/s12905-018-0705-y> [https://perma.cc/HDP2-TARQ].

<sup>230</sup> These figures have been extrapolated by combining data from several sources. According to 2017 data, Malawi had an estimated maternal mortality rate of 349 per 100,000 live births and an average of 612,000 live births per year. *Maternal Mortality in 2000-2017*, WORLD HEALTH ORG., [https://www.who.int/gho/maternal\\_health/countries/mwi.pdf?ua=1](https://www.who.int/gho/maternal_health/countries/mwi.pdf?ua=1) [https://perma.cc/USS9-G3SJ]. Using these two figures, one can estimate an average of 2,135 maternal deaths in Malawi per year. The National Statistical Office of Malawi has separately estimated that unsafe abortion contributes up to eighteen percent of all maternal deaths. NAT'L STAT. OFF. OF MALAWI, *Malawi MDG Endline Survey 2014 Report (2015)*, cited in Daire, Kloster & Storeng, *supra* note 47, at 226 (applying the National Statistical Office's percentage to maternal deaths per year, one can estimate an average of 384 deaths per year due to unsafe abortion in Malawi).

<sup>231</sup> Memorandum Regarding the Mexico City Policy, *supra* note 34.

little to reduce rates of abortion during its periods of implementation and in fact has had the opposite effect.<sup>232</sup>

In Malawi, too, what has occurred is the derailment of a legal reform effort that now continues to leave the country's restrictive abortion law in force. As determined by the Law Commission, the existing law has not prevented abortion from taking place; rather, it has driven women and girls to seek unsafe and clandestine abortions, often at risk of life-threatening complications or even death.<sup>233</sup> The global gag rule, in blocking NGOs' efforts to liberalize the existing law, aids preservation of a status quo that not only fails to save fetal lives, but also puts maternal lives in grave jeopardy.

This deleterious outcome is at odds with the United States' own broader foreign aid objectives on global health. The architects of the Trump gag rule have "created a policy that will disrupt and reverse the United States' long-held development goal of improving health worldwide."<sup>234</sup> USAID, for example, lists global health as a key sector on its website, and preventing maternal deaths as a strategic priority.<sup>235</sup> It is of course difficult to achieve such priorities with antithetical policies such as the global gag rule in place.

*b. The Global Gag Rule Intrudes on Foreign Nations' Sovereignty*

The pattern of implementation and rescission of the global gag rule leaves NGOs trapped in a cycle of uncertainty as to whether their programs and efforts around abortion-related issues and legal reform can continue for any extended period of time. For example, even if the TOP Bill were passed during 2021—after the Biden administration's rescission of the global gag rule—advocates could not rely on potential funding sources beyond January 2025, when it is possible the administration could change, and the global gag rule could be instituted again. Such uncertainty hampers the sustained commitment that is necessary to effect meaningful legal change and successful implementation.<sup>236</sup>

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<sup>232</sup> See *supra* Section II.C.

<sup>233</sup> See *supra* Section IV.B.

<sup>234</sup> Sneha Barot, *supra* note 190, at 73.

<sup>235</sup> *Global Health*, USAID, <https://www.usaid.gov/global-health> [<https://perma.cc/ZUH2-HVJS>].

<sup>236</sup> Latt, Milner & Kavanagh, *supra* note 229, at 6 ("Successful implementation of abortion law reform requires public awareness of changes in the law. . . ."); see

Put another way, the global gag rule subjects NGOs in foreign countries to the vagaries of the U.S. electoral process and the policies of leaders chosen by U.S. voters. As stated in the Foreign Assistance Act, “every country has the right to determine its own policies with respect to population growth.”<sup>237</sup> In restricting U.S. donees from using funds from *any* source to lobby for abortion, the global gag rule dictates not only how U.S. funds must be used, but also those from international donors. Donor countries that have placed no such restriction on the use of their funds—or who may in fact wish their funds to be used for abortion law reform—are thus made subject to a wholly United States-made policy.

In Malawi, the global gag rule has already hampered the country’s legal reform effort, a process begun by the Malawian government and lobbied for by its own citizens. Such cross-border interference in domestic affairs is not only anathema to basic principles of international law—namely, sovereignty<sup>238</sup>—but also the Malawian constitution.

As section 1 of the Malawian constitution states, “Malawi is a sovereign State.”<sup>239</sup> Further, the constitution is founded on the principle that “all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests.”<sup>240</sup> The global gag rule intrudes on this fundamental constitutional tenet by inserting U.S. political authority, interests, and concerns where the interests of the Malawian people should be paramount.

Such Malawian interests include a right to choice, and to be free from state regulation of women and girls’ bodies. As a sexual and reproductive health specialist at the Centre for Reproductive Health at the University of Malawi College of Medicine put it, “I believe

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*also* GUTTMACHER INST., MAKING ABORTION SERVICES ACCESSIBLE IN THE WAKE OF LEGAL REFORMS: A FRAMEWORK AND SIX CASE STUDIES 33 (April 2012), [https://www.guttmacher.org/sites/default/files/report\\_pdf/abortion-services-laws\\_0.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/abortion-services-laws_0.pdf) [<https://perma.cc/Q4BL-99E4>] (“Successful implementation of abortion law reform can take years, and requires ongoing commitment from government, providers and advocates for women’s health and rights.”).

<sup>237</sup> Foreign Assistance Act of 1961 (as amended through 2002), *supra* note 5, § 104.

<sup>238</sup> See, e.g., U.N. Charter art. 2, ¶ 1 (“This Organization is based on the principle of the sovereign equality of all of its Members.”).

<sup>239</sup> MALAWI’S CONSTITUTION OF 1994 WITH AMENDMENTS THROUGH 2017, § 1, [https://www.constituteproject.org/constitution/Malawi\\_2017.pdf?lang=en](https://www.constituteproject.org/constitution/Malawi_2017.pdf?lang=en) [<https://perma.cc/5MNE-Q82W>].

<sup>240</sup> *Id.* at § 12(1)(a).

that women and girls have rights . . . . They should be given opportunity for choice. Choice is a right. It's an individual's right. It's a human right."<sup>241</sup> And as a legal intern noted, "the state shouldn't have a say in what happens to your body."<sup>242</sup>

These interests also include promoting the health and well-being of the Malawian people. The constitution guarantees the right to life, and it requires the state to "actively promote" the welfare of the people of Malawi by "progressively adopting and implementing policies and legislation aimed at achieving" goals such as providing adequate health care.<sup>243</sup> As discussed above, the Law Commission noted that Malawi's current restrictive abortion law threatened several fundamental human rights—including the right to life and the right to health—accorded to women and girls under international law.<sup>244</sup> The global gag rule can thus be seen as hampering Malawi's efforts to bring itself into compliance with both international law and its domestic obligations under its constitution.

#### VII. U.S. LEGISLATION TO PERMANENTLY PREVENT THE GLOBAL GAG RULE FROM BEING REINSTATED IN THE FUTURE

Though the dream of legal reform in Malawi has been irrevocably deferred, what can still be changed is the path of other countries that may embark upon similar efforts to reform restrictive abortion laws in the future. As this Article has illustrated, the global gag rule restricts lobbying and sensitization efforts that are essential to pushing for government action. It is not enough that the global gag rule is at times rescinded and activities may resume; concerns about unreliable funding and which U.S. political party might win the next election persist beyond each four-year cycle. The global gag rule—and the policy's erratic implementation—results in a drastically uncertain funding landscape for NGOs conducting activities that are crucial to ensuring the long-term success of legal reform. The delay the global gag rule can cause to abortion law

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<sup>241</sup> Interview with a sexual and reproductive health specialist, *supra* note 72.

<sup>242</sup> Interview with a legal intern at a law firm in Lilongwe, Malawi (Mar. 8, 2020).

<sup>243</sup> MALAWI'S CONSTITUTION OF 1994 WITH AMENDMENTS THROUGH 2017, §§ 13(c), 16, [https://www.constituteproject.org/constitution/Malawi\\_2017.pdf?lang=en](https://www.constituteproject.org/constitution/Malawi_2017.pdf?lang=en) [<https://perma.cc/5MNE-Q82W>].

<sup>244</sup> See *supra* Section IV.B.2.

reform efforts is also deadly to women and girls, who continue to die under a restrictive law the country itself was trying to change.

Breaking the cycle of uncertainty and ensuring countries can undertake abortion law reform efforts without interference requires permanently eliminating the global gag rule. What is needed is legislative change in the United States in the form of a statute that recognizes other countries' rights to sovereignty and the United States' own democratic process, which cannot be reversed by presidential whim or fiat.

Such a statute might look, for example, like the Global Health, Empowerment and Rights Act ("Global HER Act"), which was introduced in the House and Senate in February 2019.<sup>245</sup> That proposed bill establishes that a foreign NGO may not be disqualified from receiving U.S. international assistance solely because the organization provides medical services, such as abortion, using non-U.S. government funds, and that such organizations may not be subject to requirements relating to their use of non-United States funds for advocacy or lobbying activities.<sup>246</sup> One of the bill's goals is to "guarantee that foreign NGOs will not be forced to sacrifice their right to free speech in order to participate in U.S.-supported programs abroad," and to "expand access to health programs for women around the world to improve health and development outcomes."<sup>247</sup>

Whether legislative change takes the specific form of the Global HER Act or not, what is undoubtedly needed is a de-linking of the United States' fickle gag rule and periodic hostility toward reproductive rights with foreign countries' own policy priorities on these issues. It is self-evident that the United States may do as it wishes with its own money. Indeed, the Helms and Siljander Amendments have long put restrictions on the use of U.S. funds for abortion-related services and activities abroad, including advocacy and lobbying efforts.<sup>248</sup> What is different about the Siljander and Helms Amendments, however, is that they were promulgated

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<sup>245</sup> See Global Health, Empowerment and Rights Act, H.R. 1055, 116th Cong. (2019).

<sup>246</sup> *Id.*

<sup>247</sup> See, e.g., Press Release, Jeanne Shaheen, *Shaheen Leads Bipartisan Group of Senators to Introduce Global HER Act to Permanently Repeal the Global Gag Rule* (Jan. 24, 2017), <https://www.shaheen.senate.gov/news/press/shaheen-leads-bipartisan-group-of-senators-to-introduce-global-her-act-to-permanently-repeal-the-global-gag-rule> [<https://perma.cc/YPP5-HG96>].

<sup>248</sup> See, e.g., KAISER FAM. FOUND., *supra* note 13, at Table 1.

through the legislative process, and have remained more or less consistently in place since their introduction. Such policies, enshrined in law, do not result in the culture of uncertainty that plagues implementation of the gag rule, enacted as it is periodically by executive order, with unpredictable expansions and reiterations.

Importantly, the global gag rule dictates not only the usage of U.S. funds, but also *foreign* governments' funds. In countries such as Malawi, where the U.S. dominates the foreign aid landscape, the gag rule gives primacy to America's reproductive health policy of the moment over other donors' and countries' own policy priorities in this sector. NGOs should no longer be forced into the difficult position of choosing between continuing their activities, if possible, on a drastically limited budget, or ceasing necessary programs simply to conform to certain U.S. administrations' priorities. Removing the "gag" on foreign NGOs for good will enable them to speak freely on critical legal reform issues in their own countries and realize the improved health outcomes the global community has hoped for years to achieve.