

## Mariam's Story

# A Wife is Lost

*Mariam was my wife of nine years. She died November 16, 2001. She had been very happy to learn that she was going to have a fourth child. When she told me the news, she joked that if I was lucky, we may finally have a daughter after three boys and I would get a namesake for my mother. I told her that having a girl would make me happy, but that children were children.*

*When we got married, Mariam was just 20 years old. She was very easy to live with and considered it a point of honor to take care of the family and the many visitors we had. I was proud of her, but at the same time, I sensed that she was tired and I told her to take care of herself. She was very jovial and playful, saying that she did not want to give me an opportunity to take another wife. She worked informally selling beauty supplies and household products.*

*It was at the time of delivery that she had complications, even though she had received regular care throughout her pregnancy from a trained midwife. When she had pains, I took her to the midwife. We all went together to the local maternity hospital. When we arrived at the maternity hospital, it was 11 o'clock. The premises were dirty and cluttered. The workers were cleaning up. Some women were waiting for appointments. Some were even sitting on the floor.*

*Right away, the midwife gave my wife a serum in which she had mixed some product. That's when my wife's pains became very violent. After a while, she started to bleed heavily. The midwife ran to find a surgeon to perform a caesarian section. The baby—a girl—survived. Her mother died. I don't know the cause of death, but I always think it had something to do with the product that the midwife gave to my wife.*

*I was very upset. I still am. My mother came to take care of the children, who never stopped calling for their mother. After six months, my father asked me to remarry. I said no. One day, he came from the village with a woman who he introduced as the woman he had found for me. Despite my protests, she stayed. My life, as well as that of my children, was turned completely upside down. I accepted the woman, but told her that I did not want more children.*



*photo by Bill Horn, Lutheran World Relief*

## Chapter II

# Surviving Pregnancy and Childbirth: A Human Right

The right to survive pregnancy and childbirth has rich support in international, regional and Malian law. It is grounded in women's right to life, the most fundamental of human rights guarantees. In addition, the rights to reproductive health care, to non-discrimination and to reproductive self-determination entitle women to the conditions necessary for safe pregnancy and childbirth. These rights are enumerated in a number of international and regional human rights instruments, in international consensus documents, and in national laws.<sup>293</sup> These legal instruments impose obligations on states to ensure enjoyment of their guarantees. They also define a moral responsibility belonging to all members of the international community to work toward realization of these rights for women all over the world.

This chapter discusses the international, regional and Malian legal foundations of the right to survive pregnancy and childbirth. It surveys the legal texts protecting that right, identifies corresponding duties of governments, and discusses standards for measuring compliance with those duties. It concludes with a brief discussion of the responsibility of the international community to take action to promote maternal survival in low-income countries such as Mali.

### **A. MATERNAL SURVIVAL WITHIN A HUMAN RIGHTS FRAMEWORK**

Identifying a human right to safe pregnancy and childbirth begins with a review of the principal international human rights treaties [See Appendix B]. Basic support for this right can be found in three of the earliest human rights instruments—the Universal Declaration of Human Rights (Universal Declaration),<sup>294</sup> the International Covenant on Civil and Political Rights (Civil and Political Rights Covenant)<sup>295</sup> and the International Covenant on Economic, Social and Cultural Rights (Economic, Social and Cultural Rights Covenant).<sup>296</sup> Support is even more explicit in two more recent United Nations treaties—the Convention on the

Rights of the Child (Children's Rights Convention)<sup>297</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>298</sup> International treaties are legally binding for the states that have ratified them. Many nations have incorporated a number of these rights into their constitutions and other laws.

These international treaties have been supplemented by regional treaties, which also contain provisions relating to maternal survival. These regional treaties include the African Charter on Human and Peoples' Rights (the Banjul Charter),<sup>299</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention)<sup>300</sup> and the American Convention on Human Rights (the American Convention).<sup>301</sup> The regional instruments place legal obligations upon states parties that may go beyond those imposed by international treaties. Where international and regional guarantees are similar, the interpretations of regional treaty language at the national and regional levels can help clarify the scope of similar provisions in international treaties.

Of particular value in interpreting the human rights treaties are the observations and recommendations of the various United Nations committees that monitor national compliance with international human rights treaties. Nations that are parties to the human rights treaties are required to submit periodic reports to these committees to document their compliance with the norms enumerated in a particular treaty. Several of these committees have specifically addressed the issue of maternal mortality, maternal health, and safe motherhood.<sup>302</sup> The treaties under which such committees have been established include CEDAW, the Civil and Political Rights Covenant, the Economic, Social and Cultural Rights Covenant, and the Children's Rights Convention.

Further, support for approaching safe pregnancy and childbirth through a human rights framework is found in documents adopted at international conferences. While not legally binding on governments, these conference documents contribute to the advancement of international norms and may assist in interpreting the scope of provisions contained within existing human rights instruments. The Programme of Action of the 1994 International Conference on Population and Development (the Cairo Programme)<sup>303</sup> and the 1995 Fourth World Conference on Women (the Beijing Platform)<sup>304</sup> explicitly recognize the responsibility of govern-

ments to promote maternal survival. These documents recommend that programs aimed at reducing maternal mortality contain a number of complementary elements, such as ante- and post-partum care and counseling; skilled assistance during childbirth; emergency care for obstetric complications; management of abortion complications and post-abortion care and safe pregnancy termination where legal; family planning information and services; and adolescent reproductive health and education services.

Mali is a party to each of the principal human rights treaties, as well as the Banjul Charter and the African Charter on the Rights of the Child (African Child Rights Charter). The government of Mali is bound to uphold the international legal obligations it has undertaken. Under Malian law, treaties and international agreements that are duly ratified or approved have, from the moment of their publication, superior force to that of national law.<sup>305</sup> This means that all national laws, both formal and customary, must conform to the principles upheld in internationally binding treaties.<sup>306</sup>

At the same time, members of Malian civil society can hold the government accountable under the laws of Mali itself, primarily those provisions given force in the national Constitution, Mali's law of highest authority. Many of the human rights principles articulated in international instruments are also given protection in Mali's Constitution. These constitutional protections are reinforced in provisions of other legal texts, including the national Penal Code and Labor Code. All national-level legislation must conform to the provisions of the Constitution.<sup>307</sup> Laws that are contrary to the letter and spirit of the Constitution are, in principle, invalid.<sup>308</sup>

## **B. A CLOSER LOOK: INTERNATIONAL AND MALIAN LAW AND MATERNAL MORTALITY**

Women who needlessly die due to complications relating to pregnancy and childbirth are deprived of their **right to life**, which, as described below, is protected in international human rights instruments. The factors that contribute to maternal mortality are multiple. No one actor or category of actors can be held responsible. However, lack of adequate health care, broad societal discrimination, and denial of women's authority to make decisions concerning their reproductive lives bear much of the responsibility for needless maternal deaths. These factors not only contribute

to depriving women of their right to life, but they are themselves violations of widely acknowledged human rights. Recognition of the **right to health care**, the **right to non-discrimination** and the **right to reproductive self-determination** is key to a concerted effort to prevent maternal death.

## 1. Women's Right to Life

The right to life is universally acknowledged in binding human rights instruments. Governments must uphold this right not only by refraining from arbitrary killings, but also by ensuring that those in their jurisdictions are secure from arbitrary and preventable loss of life. The inability of women in Mali and around the world to approach pregnancy and childbirth—normal and celebrated events in a woman's life cycle—without a high risk of death reflects governments' noncompliance with their duty to ensure the right to life.

### *a. International and regional standards*

Women's right to life is protected in such basic human rights instruments as the Universal Declaration, the Civil and Political Rights Covenant and the Banjul Charter. The right to life has been interpreted to require states to take "positive measures" aimed at preserving life.<sup>309</sup> The Human Rights Committee (HRC)—the treaty body that monitors state compliance with the Civil and Political Rights Covenant—has stated the following:

*The right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot be properly understood in a restrictive manner and the protection of this right requires that states adopt positive measures.*<sup>310</sup>

Governments' obligations to take such positive measures is particularly pressing in the context of pregnancy and childbirth. Women giving birth not only fulfill their individual desires to create and shape their families, but they ensure the very survival of their communities and societies. The benefits of childbirth that are shared by societies translate into a duty to protect the lives of pregnant women. The fundamental human rights instruments recognize governments' responsibility in this regard. The Universal Declaration states that "motherhood and childhood are entitled to special

care and assistance.”<sup>311</sup> The Economic, Social and Cultural Rights Covenant goes further by declaring that “special protection should be accorded to mothers during a reasonable period before and after childbirth.”<sup>312</sup> The Human Rights Committee acknowledged the special status of pregnant women under international law when it recognized explicitly that the right to life entitles women to protection from preventable maternal death. Its General Comment on the Equality of Rights between Men and Women states the following:

*When reporting on the right to life protected by article 6, States parties should provide data on birth rates and on pregnancy- and childbirth-related deaths of women.... States parties should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.... The Committee also wishes to have information on the particular impact on women of poverty and deprivation that may pose a threat to their lives.*<sup>313</sup>

Regional human rights bodies, such as the European Commission of Human Rights, have also stressed that states have positive obligations under law to protect not only against intentional killings, but also against unintentional but preventable loss of life. In the case of *Tavares v. France*, the Commission responded to the claim that a public hospital’s failure to prevent a maternal death was a violation of the right to life, protected in Article 2 of the European Convention. While finding no violation in the case at hand, the Commission stressed that states are required not only to refrain from intentional killings, but also to “take measures necessary for the protection of life.”<sup>314</sup> The Commission implied that a complete failure to regulate public hospitals and ensure compliance with regulations might constitute a violation of the right to life under Article 2.<sup>315</sup>

Finally, the Cairo Programme, a document devoted to recommending government action to improve women’s reproductive health, proclaims that “everyone has the right to life.”<sup>316</sup> Among the specific goals adopted at both the Cairo and Beijing conferences was the reduction of maternal mortality by one half of 1990 levels by the year 2000 and by a further one half by 2015.<sup>317</sup>

## MALIAN CONSTITUTIONAL STANDARDS

### Right to Life

**Art. 1:** The human person is “sacred and inviolable.” Every person is guaranteed respect for “the right to life.”<sup>320</sup>

### Right to Health

**Art. 16:** “[H]ealth” and “social protection” constitute “recognized rights.”<sup>321</sup>

### Right to Equality

**Preamble:** “The Sovereign People of Mali ... proclaims its determination to defend the rights of Women....”<sup>322</sup>

**Art. 2:** “Every Malian is born and remains free and equal in rights and duties.... [A]ny discrimination based on social origin,... [and] gender ... is prohibited.”<sup>323</sup>

### Right to Reproductive Self-Determination

**Art. 1:** The Constitution guarantees the right to “the liberty, to the security and to the integrity of [the] person.”<sup>324</sup>

**Art. 4:** “[E]very person has the right to freedom of thought [and] conscience....”<sup>325</sup>

**Art. 6:** “[T]he private and family life ... are inviolable.”<sup>326</sup>

### *b. Malian standards*

The foundation for the right to survive pregnancy and childbirth under Malian law lies in the Constitution, which provides broad protections for human life.<sup>318</sup> Declaring the human person “sacred and inviolable,” it guarantees “the right to life.”<sup>319</sup>

Under basic human rights norms, governments are bound to ensure that women’s reproductive capacity does not subject them to preventable death. Until access to health care, including reproductive health care, is assured and women are free of pervasive discrimination and permitted to make decisions regarding their

reproductive health, complications of pregnancy and childbirth will continue to threaten women's right to life. The following three subsections focus on the legal foundations of the rights to health care, non-discrimination and reproductive self-determination.

## **2. Right to Health Care, Especially Reproductive Health Care**

Ensuring access to high-quality reproductive health services is crucial to efforts to reduce maternal mortality. Experts have identified a number of health-care interventions that contribute to a reduction in maternal mortality, including ensuring access to the following: pre- and postnatal care, trained attendants at birth, emergency obstetric care, and family planning. Not only are these interventions necessary for women's enjoyment of the right to life, but access to health care, including reproductive health care, is itself a protected international human right.

### *a. International and regional standards*

International human rights law guarantees individuals "the highest attainable standard of physical and mental health."<sup>327</sup> The World Health Organization has defined health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."<sup>328</sup> While the right to health does not guarantee perfect health for all people, the Committee on Economic, Social and Cultural Rights has interpreted the right to health to guarantee "the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."<sup>329</sup> As discussed previously in Chapter I, the right to health care encompasses the guarantee of health care "availability, accessibility, acceptability, and quality."<sup>330</sup> International instruments have specifically noted the importance of health care for women during pregnancy and childbirth.

The Universal Declaration, the Economic, Social and Cultural Rights Covenant, CEDAW, the Children's Rights Convention, and the African Charter on the Rights of the Child specifically obligate governments to protect maternal health.<sup>331</sup> The CEDAW Committee has issued a number of general recommendations that further develop this right. In its General Recommendation on Health, it stated that women's access to health-care services, "particularly in the areas of family planning, pregnancy, confinement and during the post-natal period,"<sup>332</sup> is imper-

ative. With regard to maternal mortality, the CEDAW Committee points out the following:

*Studies such as those which emphasize the high maternal mortality and morbidity rates worldwide and the large numbers of couples who would like to limit their family size but lack access to do so ... provide an important indication for States parties of Possible [sic] breaches of their duties to ensure women's access to health care.*<sup>333</sup>

Moreover, in the specific context of pregnancy, the CEDAW Committee directs governments to "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."<sup>334</sup> Noting the "risk of death or disability from pregnancy-related causes" women face because they lack the funds to obtain or access the necessary services, which include antenatal, maternity and post-partum services, the CEDAW Committee states:

*[I]t is the duty of States parties to ensure women's right to safe motherhood and emergency obstetric services and they should allocate to these services the maximum extent of available resources.*<sup>335</sup>

The CEDAW Committee's recommendations support the claim that there is a governmental duty to ensure all women's access to maternal care, pre- and postnatal care, emergency obstetric care, and family planning.

Other United Nations treaties provide support for ensuring access to the entire range of health-care services that can reduce the risk of maternal mortality. The Children's Rights Convention requires that states take measures to "ensure appropriate prenatal and postnatal health care for mothers."<sup>336</sup> Under the Economic, Social and Cultural Rights Covenant, states are obligated to reduce the stillbirth and infant mortality rates, prevent epidemic and endemic diseases, and "creat[e] ... conditions which would assure to all medical service and medical attention...."<sup>337</sup> This provision should obligate states to create the conditions under which all women have access to maternal health-care services. The Banjul Charter's guarantee of the right

to health provides comparable protections.<sup>338</sup>

The recommendations of various international conferences also focus on the duties of governments with respect to maternal health care. Beginning with the 1993 Vienna Declaration and Programme for Action, states have affirmed “the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life span ... [and] ... a woman’s right to accessible and adequate health care and the widest range of family planning services....”<sup>339</sup> The Cairo Programme explicitly urges the following:

*All countries, with the support of all sections of the international community, must expand the provision of maternal health services in the context of primary health care.... The underlying causes of maternal morbidity and mortality should be identified, and attention should be given to the development of strategies to overcome them....*<sup>340</sup>

The Cairo Programme specifically calls for “education on safe motherhood, prenatal care that is focused and effective, maternal nutrition programmes, adequate delivery assistance that avoids excessive recourse to Caesarean sections and provides for obstetric emergencies; referral services for pregnancy, childbirth and abortion complications; post-natal care and family planning....”<sup>341</sup> These principles proclaimed in Cairo were confirmed by the Beijing Conference.<sup>342</sup> More recently, governments renewed their commitments to the Cairo Programme during the five-year review process. In identifying “key actions” for the further implementation of the Cairo Programme, governments agreed to these conditions:

*Ensure that reduction of maternal morbidity and mortality is a health sector priority and that women have ready access to essential obstetric care, well-equipped and adequately staffed maternal health-care services, skilled attendance at delivery, emergency obstetric care, effective referral and transport to higher levels of care when necessary, post-partum care, and family planning.*<sup>343</sup>

*b. Malian standards*

The Malian Constitution also provides that “health” and “social protection” constitute “recognized rights.”<sup>344</sup> A recently adopted law elaborates upon these rights in the context of reproductive health care.<sup>345</sup> Quoting Article 7.2 of the Cairo Programme of Action, it defines “reproductive health” as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.”<sup>346</sup> Citing the needs of “vulnerable groups” such as women, children and young adults, it states that the aim of reproductive health care is to reduce maternal and child mortality and morbidity.<sup>347</sup> The law declares the equality of men and women in matters of reproductive health, affirming that all persons are entitled to enjoy a safe and responsible sex life.<sup>348</sup> It states that any individual or couple has the right to reproductive health services that are of the best possible quality and, in particular, it ensures the rights of women to health care during pregnancy and childbirth aimed at preserving the health of the pregnant woman and the newborn.<sup>349</sup> The components of reproductive health care defined in the law appear in the box on page 71.

In addition, the government’s respect for the right of pregnant women to health care is reflected in the national Labor Code, which provides that a pregnant woman is entitled to a 14-week maternity leave (six weeks prior to and eight weeks after giving birth),<sup>351</sup> during which she receives free health care and maintains her salary under the conditions established by the Social Contingency Code.<sup>352</sup> For the first 15 months after giving birth, she has the right to take a nursing break at her workplace for one hour per workday.<sup>353</sup> Finally, employing a pregnant woman in work that exceeds her strength, is dangerous, or might offend her “moral standards,” is prohibited.<sup>354</sup>

The right to health is indirectly supported in legal provisions protecting patients’ rights. The Penal Code assigns criminal penalties to “anyone who, through carelessness, imprudence, lack of attention, negligence or noncompliance with regulations, involuntarily strikes, causes injuries, or spreads diseases to another person.”<sup>355</sup> It further stipulates that “anyone who voluntarily administers substances [to] or performs procedures or operations on a person that result in, or might result in, illness or an incapacity to work” is subject to penalties.<sup>356</sup> The act is punishable even if the patient has given his or her consent. Penalties increase if illness, permanent disability, or death results.<sup>357</sup>

### **COMPONENTS OF REPRODUCTIVE HEALTH CARE UNDER LAW NO. 02-044 ON REPRODUCTIVE HEALTH<sup>350</sup>**

- Orientation, information, communication, research, means, and methods and all other services related to family planning and reproductive health.
- Information and counseling on sexuality, responsible parenthood and reproductive health;
- Prenatal, perinatal and postnatal care, including the promotion of breastfeeding;
- Infant survival, including both care for healthy infants and curative care, particularly comprehensive care for childhood illnesses;
- Prevention and treatment of sterility, infertility and impotence;
- Prevention of abortion and means to treat complications of this practice;
- Post-abortion care, including counseling on family planning;
- Prevention and treatment of reproductive tract infections;
- Treatment of genital disorders;
- Treatment of the consequences of FC/FGM;
- Care for the reproductive health needs of older adults and young people;
- Treatment and prevention of sexually transmissible infections (STIs) and HIV/AIDS.

Generally, patients' rights are guaranteed by the regulation of the health-care profession's ethical behavior. The medical professional Code of Ethics stipulates that "the Code's provisions hold for every doctor or dental surgeon registered in the National Medical Association. Any violation of these provisions comes under the disciplinary jurisdiction of the Associational board, in addition to any legal actions that might be brought against the offenders."<sup>358</sup> A physician's primary duty is to respect life and the human person in all circumstances.<sup>359</sup> He or she must assist and care for all patients with the same dedication and without any discrimination,<sup>360</sup> and is prohibited from practicing medicine under conditions that might compromise the quality of health care.<sup>361</sup> Professional confidentiality is required of every doctor, unless the law provides an exemption.<sup>362</sup> A doctor or dental surgeon is prohibited from all acts that might discredit the profession, especially fraudulent practices related to charlatanism.<sup>363</sup> Any doctor or dental surgeon who introduces a diagnostic procedure, or a new or insufficiently tested treatment, to the medical profession com-

mits a reprehensible act unless care is taken to warn his or her colleagues of the potential dangers.<sup>364</sup> A doctor or dental surgeon who misleads colleagues or clientele by presenting an insufficiently proven procedure as beneficial and safe commits a serious offense.<sup>365</sup>

The pharmacist's professional Code of Ethics also stipulates that adherence to its provisions is required of any person registered in the National Association of Pharmacists.<sup>366</sup> In every circumstance, a pharmacist's primary duty is to respect life and the human person.<sup>367</sup> He or she must refrain from any action that might discredit the profession<sup>368</sup> or from issuing a false medical certificate.<sup>369</sup> He or she is also required to maintain professional confidentiality.<sup>370</sup>

The right to health care corresponds to a governmental duty to ensure women's access to maternal health-care services. Given the attention that the international community and the Malian government have given in normative instruments to the needs of pregnant women, the means of ensuring survival of pregnancy and childbirth should be viewed as an essential element of health care.

### **3. Right to Non-Discrimination**

Pervasive discrimination against women contributes to women's risk of death during pregnancy and childbirth. Maternal mortality is a reflection of the devaluation of female life and a measure of the social neglect of women. Where women are undervalued, their health care needs are ignored, the physical demands placed on them by pregnancy and childbirth are underestimated, their nutrition suffers, and they are expected to bear children regardless of their health and economic needs. Violence against women, in its various forms, has been found to increase during pregnancy. All of these manifestations of discrimination heighten the risk to women's lives during pregnancy and childbirth. Discrimination against women not only prevents them from enjoying their right to life, it violates basic human rights norms ensuring gender equality.

#### *a. International and regional standards*

Each of the principal human rights instruments guarantees women the right to equality and non-discrimination.<sup>371</sup> Article 1 of CEDAW takes a broad view of discrimination against women, defining it as "any distinction, exclusion or restriction

made on the basis of sex” that has the “effect or purpose” of hindering a woman’s ability to enjoy her human rights equally with men.<sup>372</sup> This definition encompasses all forms of discrimination, including both deliberate acts and passive omissions, and covering the actions of both government officials and private parties. While CEDAW was the first instrument to define discrimination this broadly, the prohibition of gender discrimination has had long-standing support in numerous international and regional instruments and conference documents. It is a fundamental principle of human rights law.<sup>373</sup>

As noted above, Article 12 of CEDAW requires states to “eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services....”<sup>374</sup> Women suffer from both direct and indirect forms of discrimination in attempting to access health care. Forms of direct discrimination include laws and policies that deny women access to health care that only they need. Broader, indirect discrimination in the area of health care occurs when relatively few resources are devoted to women’s particular health-care needs. The Cairo Programme and the Beijing Platform stress the importance of “gender-sensitive standards” in the delivery of health-care services and the duty of states to ensure that care is provided free of “discrimination, coercion and violence.”<sup>375</sup>

Discrimination in the area of health care cannot be separated from the discrimination faced by women in every sector of society. Under Article 5 of CEDAW, states have a duty to modify stereotypical and harmful social and cultural patterns. States are required to put an end to customs, practices, and socio-cultural norms that perpetuate discrimination against women.<sup>376</sup> Cultural practices such as female circumcision/female genital mutilation (FC/FGM) are a form of gender discrimination that put women at greater risk of maternal mortality and morbidity. Child marriage and frequent childbearing not only reflect a stereotypical notion of women as primarily maternal, they increase the hazards women face during pregnancy. Violence against pregnant women, found to be highly prevalent in communities around the world,<sup>377</sup> is another form of pervasive discrimination that heightens the risks of maternal mortality. Where women, including pregnant women, are expected to forgo food in order to ensure that their husbands and children have eaten well, they may suffer from malnutrition. These nutritional deficits make them susceptible to anemia, which can aggra-

vate the severity of a hemorrhage during delivery.

Certain groups of women face not only gender discrimination, but discrimination on such bases as economic status, geographic situation, and age. The rights of so-called “vulnerable” women have received special protection under international law, particularly in the area of health care. For example, many women face discrimination on the basis of economic status or residence outside of urban areas. Under Article 14 of CEDAW, governments must make special efforts to ensure that women in rural communities are not disadvantaged, particularly regarding “access to adequate health care facilities, including information, counselling and services in family planning.”<sup>378</sup> The CEDAW Committee has recognized that for some women, “high fees for health care services, . . . distance from health facilities and absence of convenient and affordable public transport” are barriers to services that are themselves a form of discrimination.<sup>379</sup> The Cairo Programme and the Beijing Platform concur that health-care services should be accessible and affordable to all women.<sup>380</sup>

In addition, adolescents face special barriers to reproductive health care. WHO, UNICEF and UNFPA define adolescents as people between the ages of 10 and 19.<sup>381</sup> The Children’s Rights Convention defines a “child” as a person “below the age of 18 years unless under the law applicable to the child, majority is obtained earlier.”<sup>382</sup> The rights of most adolescents, therefore, are protected by the Children’s Rights Convention. All children are entitled to enjoy the “highest attainable standard of health” and medical care, which is secured by Article 24.1 of the Children’s Rights Convention.<sup>383</sup> The Cairo Programme endorses a policy of non-discrimination where adolescents are concerned.<sup>384</sup> Adolescents should enjoy the same rights to reproductive health services as adult women.

Furthermore, adolescents are entitled to enjoy special protections against practices that are harmful to women. The Children’s Rights Convention requires governments to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”<sup>385</sup> Similarly, the African Charter on the Rights of the Child requires governments to “take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth, and development of the child. . . .”<sup>386</sup> It highlights customs and practices “prejudicial to the health or life of the child” and “those customs and practices discriminatory to the child on the grounds of sex or other status.”<sup>387</sup> The

Charter also specifies that “child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.”<sup>388</sup> As noted above, FC/FGM is generally practiced upon young girls and adolescents and can put a woman at greater risk during delivery. Public health data show that child marriage, which leads to early and repeated childbearing, also has serious consequences on adolescent women’s health and lives.

*b. Malian standards*

The Malian Constitution provides strong protections against gender discrimination. It states in its preamble that “[t]he Sovereign People of Mali ... proclaims its determination to defend the rights of Women....”<sup>389</sup> It further states that “Every Malian is born and remains free and equal in rights and duties.”<sup>390</sup> It also declares that “any discrimination based on social origin,... [and] gender ... is prohibited.”<sup>391</sup>

The Constitution’s commitment to non-discrimination has been reflected to some extent in other national legislation. The Ministry of Health is formulating a policy to prohibit the practice of FC/FGM by health-care providers in medical facilities.<sup>392</sup> The provision, however, does not reach the traditional practitioners who are primarily responsible for perpetrating the practice. It is widely believed that such actors could be prosecuted under general provisions of the penal code, which set penalties for the intentional infliction of “strikes or wounds” that result in a mutilation or privation of the use of a member or of a sense.<sup>393</sup>

In August 2001, the Penal Code was amended to include the crime of torture, following the definition pronounced in the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.<sup>394</sup> Theoretically, the definition’s inclusion of acts causing severe pain and suffering that are committed intentionally for “any reason based on discrimination of any kind” may cover harmful practices such as FC/FGM and other forms of violence against women.<sup>395</sup> To make such a case, one would have to prove that the act was performed with the “consent or acquiescence” of a public official or other person acting in an official capacity.<sup>396</sup> According to the Penal Code, acts of torture resulting in mutilation, amputation, or privation of the use of a member or a sense are punishable with five to ten years of imprisonment.<sup>397</sup>

The Labor Code also has several provisions that are intended to uphold women's equality. Echoing a constitutional guarantee,<sup>398</sup> the code declares that every citizen is guaranteed the right to work and training.<sup>399</sup> Furthermore, men and women have equality with regard to compensation for their work: There is equal pay for equal work for all regardless of origin, gender, age, and status.<sup>400</sup> These principles are not only articulated in the civil service statute,<sup>401</sup> but also hold for workers in the professional private sector.

Because discrimination against women takes many forms and is perpetuated by many different actors, its elimination poses certain challenges to governments. Not only must governments review their own laws and policies to ensure non-discrimination, but they must also address pervasive forms of discrimination that hinder women's ability to enjoy all of their rights, including the right to survive pregnancy and childbirth.

#### **4. Right to Reproductive Self-Determination**

When a woman is unable to control her fertility, she is more likely to experience unwanted pregnancy and have multiple births at shorter intervals. She is thus more physically vulnerable to complications and her risk of maternal mortality is elevated. In addition, thousands of women with unwanted pregnancies undergo unsafe abortion procedures every year. Access to family planning and safe abortion services are a crucial means of preventing maternal death and morbidity. States are thus obligated to ensure that men and women have access to a full range of contraceptive choices and reproductive health services and that they have information about family planning and sexual and reproductive health.

##### *a. International and regional standards*

The right to reproductive self-determination is implicit in the long-recognized rights to physical integrity, to liberty and to privacy and family life.<sup>402</sup> It has received its most direct recognition, however, with the articulation of the right to determine the number and spacing of one's children. This right has been pronounced by the international community in documents adopted at international conferences and in CEDAW. It was first articulated in 1968, at the International Conference on Human Rights in Teheran. It was reaffirmed in 1974 at the World Population

Conference in Bucharest, in 1984 at the International Conference on Population in Mexico City, in 1994 at the Cairo Conference, in 1995 at Beijing,<sup>403</sup> and, most recently, at the five-year reviews of Cairo and Beijing in 1999 and 2000, respectively.<sup>404</sup> The right was given legal force in Article 16(e) of CEDAW, which provides that states shall ensure men and women “[t]he same rights 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.”<sup>405</sup>

*b. Malian standards*

The Constitution provides protections of the right to reproductive self-determination by guaranteeing the right to “the liberty, to the security and to the integrity of [the] person.”<sup>406</sup> It also provides that “every person has the right to freedom of thought [and] conscience....”<sup>407</sup> and guarantees privacy rights, stating “the private and family life ... are inviolable.”<sup>408</sup> The latter protection is not absolute, however, and is qualified by a provision permitting the state to interfere with these domains within the conditions specified by law.<sup>409</sup>

Mali’s recently adopted Reproductive Health Law explicitly links principles of self-determination to reproductive health. While elsewhere emphasizing limitations on access to abortion<sup>410</sup> and requiring spousal consent for voluntary sterilization procedures,<sup>411</sup> the law declares that “[m]en and women have the equal right to freedom, responsibility, and information and may use the methods of family planning or birth regulation of their choice, provided these methods are not against the law.”<sup>412</sup> It requires that providers convey to their clients information on the benefits, risks and effectiveness of all contraceptive methods, with particular emphasis on individuals’ right to informed consent prior to sterilization procedures.<sup>413</sup>

Denial of women’s reproductive self-determination jeopardizes their lives by preventing them from planning their births according to their individual physical, social and emotional capacities. More generally, women must be able to make decisions regarding their reproductive health care in order for that care to be responsive to their particular needs.

## C. DUTIES OF GOVERNMENTS TO ENSURE WOMEN'S RIGHT TO SURVIVE PREGNANCY AND CHILDBIRTH

Recognition that preventable maternal mortality is a violation of women's right to life raises questions about what governments are obligated to do to put an end to this violation. Commentators have developed a useful framework to guide governmental compliance with human rights norms.

### 1. What Must Governments Do?

Governments are obligated to respect, protect and fulfill human rights.<sup>414</sup> The duty to respect rights requires governments to refrain from taking action that directly violates these rights. For example, governments should remove laws and policies that undermine women's status and put their lives at risk. The duty to protect rights obligates states to prevent and punish violations of rights by private parties or organizations. Actions to protect women's rights would include taking steps to stop practices that are harmful to women and other social customs that heighten women's risks during pregnancy and childbirth. Finally, the duty to fulfill women's rights requires governments to take measures and, in some cases, make expenditures that enable individuals to realize their rights. So, for example, governments are required to invest in improving the quality of reproductive health-care services and take affirmative measures to raise women's status in society.

### 2. Standards for Measuring Fulfillment of Governmental Duties

Once a human right has been defined and a set of corresponding governmental duties has been identified, we are faced with the question of how to measure governmental compliance with these duties. Many of the duties identified above cannot be fulfilled overnight. Their enforcement, therefore, will require monitoring over a considerable period of time. Where the human rights at issue are guarantees of economic, social, and cultural rights, international legal instruments do not require that full compliance be achieved immediately. Rather, most of these duties may be fulfilled incrementally, in keeping with governments' changing capacities. The Economic, Social and Cultural Rights Covenant requires states "to take steps . . . to the maximum of [their] available resources" to realize the rights protected in the covenant.<sup>415</sup>

Still, fulfillment of economic, social and cultural rights does require immediate government action. First, governments are required to end all forms of discrimination that affect women's enjoyment of their rights. This means eliminating laws and policies that deny women equal access to health care, including access to services that only women need.<sup>416</sup> Laws that render safe abortion services inaccessible, for example, are a form of discrimination against women—as well as a denial of reproductive self-determination—that governments are obligated to address.

More generally, the Committee on Economic, Social and Cultural Rights has advised states that the progressive realization of economic, social and cultural rights is not an excuse for inaction:

*The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. . . . Nevertheless, the fact that realization over time . . . is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. . . . [T]he phrase must be read in light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States Parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.<sup>417</sup>*

The same committee has noted that the right to health gives rise to certain “core obligations” on the part of states “to ensure the satisfaction of, at the very least, minimum essential levels of . . . essential primary health care.”<sup>418</sup> Among these obligations is the duty to “ensure the right of access to health facilities, goods, and services on a non-discriminatory basis” and to “ensure equitable distribution of all health facilities, goods and services. . . .”<sup>419</sup> According to the committee, the obligation “[t]o ensure reproductive [and] maternal (prenatal as well as postnatal)” care should be granted priority comparable to core obligations.<sup>420</sup>

In the context of maternal mortality, the international community has stressed that steps to promote survival of pregnancy and childbirth are affordable for low-income countries, as well as wealthier countries. The World Bank has estimated

that, in a low-income country, a standard “package” of maternal and newborn health services would cost approximately USD 3 per person per year and that maternal health services alone could cost just USD 2 per person.<sup>421</sup> This research supports calls for immediate investment in women’s survival. The lesson is reinforced by the success of several low-income countries in reducing maternal mortality despite severely limited financial resources. Honduras has been cited as one such success, having nearly halved its maternal mortality ratio between 1990 and 1997 after prioritizing programs to promote women’s access to obstetric care.<sup>422</sup> Similarly, Sri Lanka’s success over the last 50 years in reducing its maternal mortality ratio, despite financial hardship, has been attributed to government commitment to the expansion of the health-care and transportation systems, an increase in female literacy, and the rise in women’s status.<sup>423</sup>

Precise standards for measuring governments’ compliance with their duty to ensure survival of pregnancy and childbirth have not been universally adopted, although UN agencies such as WHO and UNICEF have developed widely accepted indicators for government progress in improving women’s reproductive health and rates of survival. The WHO indicators include inquiries into national fertility and contraceptive prevalence rates; maternal mortality ratios; women’s recourse to trained health personnel during pregnancy and childbirth; the numbers of basic and comprehensive obstetric facilities per 500,000 population; perinatal mortality rates; percentages of births of low birth weight; syphilis serology prevalence rates; percentages of anemic women; percentages of obstetric and gynecology admissions due to abortion; prevalence rates of FC/FGM; percentages of women trying for a pregnancy for two years or more; and incidences of urethritis in men.<sup>424</sup> In 2001, these indicators were reevaluated and two new indicators, relating to HIV/AIDS prevalence and knowledge about HIV transmission or prevention, were added to the list.<sup>425</sup>

UNICEF, in consultation with NGOs, has developed guidelines for the delivery of obstetric care.<sup>426</sup> These guidelines focus on the number of health facilities providing lifesaving care for women with obstetric complications; the geographical distribution of these facilities; the use of these facilities by pregnant women; the extent to which women with obstetric complications obtain emergency obstetric services; the adequacy of the lifesaving surgery (i.e. the number of cesarean sections) being provided in these facilities; and the quality of these services, as measured by

the number of women who die in their care.<sup>427</sup> It has been recommended that these guidelines be used to measure government performance in its actions to reduce levels of maternal mortality.<sup>428</sup>

Given the multiple factors contributing to maternal mortality, evaluations of public health interventions to prevent it can be complemented by other inquiries into governments' commitment to ensuring women's enjoyment of their right to survive pregnancy and childbirth. In some contexts, where women lack access to even the most basic reproductive health-care services or where these services are subject to inadequate government oversight and regulation, members of civil society can work for greater government accountability in fulfilling the human right to health care. Similarly, where pervasive gender discrimination, both formal and customary, has harmful effects on women's health and erects barriers to health care, advocates for women's rights and health may question the government for its failure to comply with its duty to end discrimination against women. Finally, NGOs and other actors may identify legal and social factors that interfere with women's reproductive decision-making and target these conditions for greater government intervention.

### **3. Duties of the International Community**

The contrast between the levels of maternal mortality in low-income countries and those in industrialized countries reflects the reality that a country's limited financial resources, while not the sole determinant, is a significant contributing factor of its capacity to reduce maternal mortality. A human rights approach to maternal mortality, therefore, requires consideration of the obligations of wealthier nations to lower the incidence of maternal mortality in low-income countries. Human rights violations are generally considered the responsibility of the state in whose jurisdiction they occur.<sup>429</sup> The Economic and Social Rights Committee, however, has emphasized the duty of wealthy countries to promote enjoyment of economic, social, and cultural rights internationally. In its General Comment on the Nature of States Parties Obligations, the committee invoked Articles 55 and 56 of the Charter of the United Nations, well-established principles of international law, and the provisions of the Economic and Social Rights Covenant itself to assert the following:

*[I]nternational cooperation for development and thus for the realization of*

*economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee ... emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.*<sup>430</sup>

These principles were reiterated in the Economic and Social Rights Committee's General Comment on the Right to Health. In that document, the committee stated:

*Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required....*<sup>431</sup>

In addition, governments acting collectively in international organizations have a duty to comply with international legal standards. According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, an authoritative restatement of states' duties under the Economic, Social and Cultural Rights Covenant:

*It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights.*<sup>432</sup>

Recognition of an international human right to survive pregnancy and childbirth obligates governments to prevent maternal mortality both domestically and internationally. Governments of industrialized countries that provide international

assistance should prioritize programs aimed at maternal survival. By the same token, low-income countries should prioritize maternal health care in their requests for assistance from industrialized countries and multilateral organizations.

Women's right to life entitles them to live through pregnancy and childbirth. Their rights to health care, nondiscrimination, and reproductive self-determination—the conditions necessary for maternal survival—are themselves protected under international law. These rights give rise to a governmental duty to take immediate action to prevent maternal mortality. The next chapter will examine the extent to which these internationally accepted norms are reflected in the policies of Mali that are aimed at improving women's status and ensuring their access to health care.