10 KEY POINTS ABOUT MAINLAND TANZANIA'S LAWS AND POLICIES ON TERMINATION OF PREGNANCY

20 YEARS CENTER FOR REPRODUCTIVE RIGHTS

The following findings from the Center for Reproductive Rights are based on an extensive review of relevant policies, guidelines, training manuals, curricula, and professional codes of conduct and ethics; an analysis of key laws, court cases, and legal texts; and interviews with lawyers, health care providers and administrators, and academics in mainland Tanzania.

1. **Mainland Tanzania's laws and policies on termination of pregnancy are unclear, confusing, and often contradictory. Yet, these laws and policies are more expansive than most believe,** and the current legal and policy framework offers ample opportunities for increasing access to safe abortion services.

2. **The Maputo Protocol, which Tanzania ratified in 2007, requires the government to** "provide adequate, affordable and accessible health services"[1] to women and to

   > ***protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the [pregnant woman] or the life of the [pregnant woman] or the foetus***.[2]

   By ratifying the Protocol, the Tanzanian Government is obligated under regional human rights law to ensure that safe and legal abortion is available and accessible on all of these grounds.

3. **The Constitution of the United Republic of Tanzania contains key provisions that support access to safe and legal abortion services and post-abortion care.** The Constitution affirms the importance of respecting the rights to life,[3] human dignity,[4] equality and non-discrimination,[5] privacy,[6] and freedom from inhuman and degrading treatment.[7] International and regional human rights standards have established that access to safe and legal abortion and post-abortion care is essential to protecting women's most fundamental human rights.

4. **There is no absolute prohibition on termination of pregnancy in mainland Tanzania. It is permitted to preserve the life or health of the pregnant woman. Health is defined to include both physical and mental health.** This understanding was made clear in the widely recognized English case *Rex v. Bourne* (1938)—a case that has been affirmed throughout the Commonwealth, including by the East African Court of Appeal in *Mehar Singh Bansel v. R* (1959).

   - *Rex v. Bourne* was the first case to address the grounds upon which an abortion could legally be provided in England.[8] This case has had a profound and lasting impact on the legal regimes of former British colonies and Commonwealth countries. Most colonies, Tanzania included, had—and continue to have—an abortion provision nearly identical to the one at issue in *Rex v. Bourne* in their penal codes and, under common-law principles, can look to English case law as an authoritative interpretation of that law.[9] In *Bourne*, Judge Macnaghten reasoned that the use of the word "unlawfully" in the provisions criminalizing abortion in the English Offences Against the Person Act—similar to sections 150–152 of Tanzania's Penal Code—was intentional and suggested that there were circumstances under which abortion could be "lawfully" procured. He then reasoned that a life exception had always been implicit in the provisions criminalizing abortion and found that a "reasonable view" of preserving a pregnant woman's life included preserving her mental and physical health. In essence, *Bourne* created an explicit life and mental and physical health exception to the criminalization of abortion.
   - In 1959, the East African Court of Appeal, which had jurisdiction over the territory of Tanzania, affirmed the *Bourne* decision in *Mehar Singh Bansel v. R*, an abortion case on appeal from the Supreme Court of Kenya.[10] **This decision affirming *Bourne* is binding in Tanzania.**[11]

5. **The mainland Tanzanian Penal Code, in addition to criminalizing "unlawful" abortion, provides for the separate offence of "child destruction."**[12] This section criminalizes the destruction of a "child capable of being born alive" and stipulates that there is a presumption that the foetus is capable of being born alive after the 28th week of pregnancy. While this section criminalizes a termination of pregnancy performed in the final weeks of pregnancy, as with the provisions criminalizing "unlawful abortion," **there is an exception to criminalization when the termination is done to preserve the pregnant woman's life or health.**

6. **The Tanzanian Government acknowledges that the law on termination of pregnancy contains a life and health exception.** The Ministry of Health's 2002 *Post-Abortion Care Clinical Skills Curriculum*—its primary policy and training document concerning post-abortion care—states that "Tanzania Law allows therapeutic abortion, with life of the [pregnant woman] as priority."[13] Similarly, the Ministry of Health's 2007 *Standard Treatment Guidelines (STG) and National Essential Medicines List (NEMLIT) for Mainland Tanzania* identify an exception to the criminalization of termination of pregnancy "where there is a substantial threat to the woman's health or life in continuing the pregnancy."[14]

7. **The law on abortion does *not* specify who may perform a legal termination of pregnancy, leaving room for appropriately trained mid-level providers—such as nurses, midwives, and clinical officers—to provide the service, in addition to qualified medical practitioners.** The World Health Organization has made clear that mid-level providers can safely and beneficially provide first-trimester abortion services.[15]

8. **There is no law, policy, regulation, or code of conduct for medical practitioners, nurses, or midwives in Tanzania requiring that a health care provider consult with one or two other providers and obtain their consent in writing** before performing a termination of pregnancy. Nor is this a legal requirement under common law.[16]

9. **The Tanzanian Government has repeatedly acknowledged the harm of unsafe abortion and has affirmed its commitment to providing comprehensive post-abortion care.**[17] Under the Ministry of Health's *Post-Abortion Care Clinical Skills Curriculum*, **mid-level providers can offer post-abortion care services.**[18]

10. **The absence of comprehensive government policies and guidelines on the provision of safe and legal abortion has grave consequences for women in need of these services.** This also demonstrates a fundamental failure on the part of the Tanzanian Government to create an enabling environment that ensures access to safe abortion services under the law, in violation of its obligations under the Maputo Protocol and various national-level policies.[19]

Endnotes

1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 14(2)(a), *adopted* July 11, 2003, 2nd African Union Assembly, Maputo, Mozambique (*ratified* March 3, 2007) [hereinafter Maputo Protocol]. There is no indication that Tanzania made any reservations when ratifying the Maputo Protocol.

2 Maputo Protocol, *supra* note 1, art. 14(2)(c).

3 Constitution (1977), art. 14.

4 *Id.* art. 12(2).

5 *Id.* arts. 12, 13, 29.

6 *Id.* art. 16.

7 *Id.* art. 13(6)(e).

8 Rex v. Bourne, [1939] 1 K.B. 687.

9 *See* Rebecca J. Cook & Bernard M. Dickens, Abortion Laws in Commonwealth Countries 13 (1979).

10 Mehar Singh Bansel v. R, [1959] E. Afr. L. Rep. 813, 832.

11 *See* e-mail from Principal State Attorney at the Attorney General's Chambers (Mar. 6, 2012) (on file with the Center); interview with Assistant Lecturer in Law, Faculty of Law, University of Dar es Salaam (May 4, 2012); interview with two lawyers, Tanzania Women Lawyers Association (May 3, 2012).

12 Penal Code Act, Cap. 16, sec. 219.

13 Ministry of Health and Social Welfare, Post-Abortion Care Clinical Skills Curriculum: Volume 2, Trainee's Handbook 41 (2002) [hereinafter PAC Trainee's Handbook].

14 Ministry of Health and Social Welfare, Standard Treatment Guidelines (STG) and National Essential Medicines List (NEMLIT) for Mainland Tanzania 51 (3d ed. 2007). These guidelines also specify that termination of pregnancy may be indicated to preserve the pregnant woman's health in cases where the woman is suffering from hypertension in pregnancy or eclampsia. *Id.* at 41-43. Similarly, the Ministry of Health's *Emergency Obstetric Care Job Aid* specifies that termination of pregnancy may be indicated for eclampsia to preserve the pregnant woman's health. Ministry of Health and Social Welfare, Emergency Obstetric Care Job Aid 10 (2008).

15 *See* Marge Berer, *Provision of Abortion by Mid-Level Providers: International Policy, Practice and Perspectives*, 87 Bulletin of the WHO 58 (2009).

16 Glanville Williams, The Sanctity of Life and the Criminal Law 170 (1958); Glanville Williams, Textbook of Criminal Law 302 (2nd ed. 1983).

17 Post-abortion care is a fundamental part of the Ministry of Health's *National Package of Essential Reproductive and Child Health Interventions* and *National Package of Essential Health Interventions in Tanzania*, and is a key component of the proposed intervention package for maternal, newborn, and child health in the *National Road Map Strategic Plan to Accelerate Reduction of Maternal, Newborn and Child Deaths in Tanzania 2008–2015*. Ministry of Health and Social Welfare, National Package of Essential Reproductive and Child Health Interventions 7 (2002); Ministry of Health and Social Welfare, National Package of Essential Health Interventions in Tanzania 32, 37 (2000); Ministry of Health and Social Welfare, The National Road Map Strategic Plan to Accelerate Reduction of Maternal, Newborn and Child Deaths in Tanzania 2008–2015 at 78 (annex 2), 85 (annex 6) (2008).

18 Ministry of Health and Social Welfare, Post-Abortion Care Clinical Skills Curriculum: Volume 1, Trainer's Guide 1, 17 (2002); PAC Trainee's Handbook, *supra* note 13, at 1.

19 *See, e.g.*, Ministry of Health and Social Welfare, National Policy Guidelines for Reproductive and Child Health Services, para 4.3 (2003); Ministry of Health and Social Welfare, National Adolescent Reproductive Health Strategy 2011–2015 at 41 (2011).