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## Gender-Based Violence Laws in Ten African Countries with High HIV Prevalence and Incidence Among Adolescent Girls and Young Women

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### Abstract

To understand laws pertaining to gender-based violence (GBV) in countries with high HIV prevalence particularly among adolescent girls and young women (AGYW), we reviewed GBV laws and regulations from initial ten eastern and southern African countries participating in the United States President's Emergency Plan for AIDS Relief (PEPFAR) Determined, Resilient, AIDS-free, Mentored, and Safe (DREAMS) Initiative and highlighted similarities and differences across these jurisdictions. All ten countries (Eswatini, Kenya, Lesotho, Malawi, Mozambique, South Africa, Tanzania, Uganda, Zambia, and Zimbabwe) have GBV legislation in place but lack robust information on its implementation and enforcement. Given the known association between GBV and HIV acquisition among AGYW, an increased understanding of GBV laws, their variation across countries and respective gaps, as well as the interplay between enabling, protective, and punitive laws can strengthen policy environments for improved GBV prevention and response, which in turn can lower incidental HIV acquisition among AGYW. For greater impact, GBV policies would require reform, implementation, monitoring, and enforcement.

### I. INTRODUCTION

Gender-based violence (GBV) has been defined by the United States President's Emergency Plan for AIDS Relief (PEPFAR) as follows:

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[A]ny form of violence that is directed at an individual based on biological sex, gender identity . . . or behaviors that are not in line with social expectations of what it means to be a man or woman, boy or girl . . . . It includes physical, sexual, and psychological abuse; threats; coercion; arbitrary deprivation of liberty; and economic deprivation, whether occurring in public or private life. GBV is rooted in power differences, including social, economic, and political inequalities. It is characterized by the use and abuse of physical, emotional, or financial power and control. GBV can occur across childhood, adolescence, reproductive years, and old age.<sup>1</sup>

This broad PEPFAR definition of GBV is adopted in this article, although legal definitions of GBV or similar terms vary considerably by country. GBV is a pervasive problem affecting all countries.<sup>2</sup>

GBV is linked to increased risk of human immunodeficiency virus (HIV) acquisition<sup>3</sup> and decreased access to and use of HIV services among HIV-positive women.<sup>4</sup> Adolescent girls and young women (AGYW) ages 15–24 in eastern and southern African countries are disproportionately affected by HIV with an average prevalence more than double that of males in the same age group.<sup>5</sup> Although in sub-Saharan Africa HIV incidence has declined in all ages and shifted slightly to older ages over the years,<sup>6</sup> AGYW in this geographic region are still a priority population for HIV interventions because this group accounted for about a quarter of all new HIV infections as of 2021 despite representing just 10% of the total population.<sup>7</sup>

In 2014, PEPFAR initiated the Determined, Resilient, Empowered, AIDS Free, Mentored, and Safe (DREAMS) program to prevent HIV among AGYW.<sup>8</sup> The DREAMS Initiative

<sup>1</sup>U.S. DEP'T OF STATE, THE PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF [PEPFAR], UPDATED GENDER STRATEGY FY 2014, at 30 (2013) (alteration in original).

<sup>2</sup>See WORLD HEALTH ORG. [WHO], VIOLENCE AGAINST WOMEN PREVALENCE ESTIMATES, 2018 (2021); see also G.A. Res. 71/313, annex, Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development, at 9 (July 6, 2017) (establishing Target 5.2, “[e]liminating all forms of violence against all women and girls in the public and private spheres,” under Goal 5 “[a]chieve gender equality and empower all women and girls”); U.N. WOMEN & U.N. DEP'T OF ECON. & SOC. AFFAIRS, STATISTICS DIV., PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS: THE GENDER SNAPSHOT 2022, at 22 (2021) (assessing the level of progress in different regions of the world with respect to Indicator 5.2.1, women and girls subjected to intimate partner violence, against Target 5.2, *supra*).

<sup>3</sup>See, e.g., Kristin L. Dunkle et al., *Gender-Based Violence, Relationship Power, and Risk of HIV Infection in Women Attending Antenatal Clinics in South Africa*, 363 LANCET 1415 (2004); Kristin L. Dunkle & Michele R. Decker, *Gender-Based Violence and HIV: Reviewing the Evidence for Links and Causal Pathways in the General Population and High-Risk Groups*, 69 AM. J. REPROD. IMMUNOLOGY 20 (Supp. 1 2013); Ying Li et al., *Intimate Partner Violence and HIV Infection Among Women: A Systematic Review and Meta-Analysis*, 17 J. INT'L AIDS SOC'Y 18845 (2014).

<sup>4</sup>See, e.g., Abigail M. Hatcher et al., *Intimate Partner Violence and Engagement in HIV Care and Treatment Among Women: A Systematic Review and Meta-Analysis*, 29 AIDS 2183 (2015); Anna M. Leddy et al., *Gender-Based Violence and Engagement in Biomedical HIV Prevention, Care and Treatment: A Scoping Review*, 19 BMC PUB. HEALTH 897 (2019).

<sup>5</sup>See, e.g., Kristin Brown et al., *Status of HIV Epidemic Control Among Adolescent Girls and Young Women Aged 15–24 Years – Seven African Countries, 2015–2017*, 67 MORBIDITY & MORTALITY WKLY. REP. 29 (2018); Isolde Birtthistle et al., *Recent Levels and Trends in HIV Incidence Rates Among Adolescent Girls and Young Women in Ten High-Prevalence African Countries: A Systematic Review and Meta-Analysis*, 7 LANCET GLOBAL HEALTH (2019).

<sup>6</sup>See Kathryn A. Risher et al., *Age Patterns of HIV Incidence in Eastern and Southern Africa: A Modeling Analysis of Observational Population-Based Cohort Studies*, 8 LANCET HIV (2021).

<sup>7</sup>See Ayesha B.M. Kharsany & Quarraisha A. Karim, *HIV Infection and AIDS in Sub-Saharan Africa: Current Status, Challenges and Opportunities*, 10 OPEN AIDS J. 34, 35 (2016); JOINT U.N. PROGRAMME ON HIV/AIDS [UNAIDS], 2020 GLOBAL AIDS UPDATE: SEIZING THE MOMENT 19 fig.0.9 (2020); UNAIDS, IN DANGER: UNAIDS GLOBAL AIDS UPDATE 2022 260 fig.6.2 (2022).

<sup>8</sup>See Janet Saul et al., *The DREAMS Core Package of Interventions: A Comprehensive Approach to Preventing HIV Among Adolescent Girls and Young Women*, 13 PLOS ONE e0208167 (2018).

aims to decrease HIV among AGYW through layered evidence-based programming, including addressing GBV and underlying gender inequality and harmful gender norms.<sup>9</sup>

To inform programming and policy development for HIV prevention including violence prevention and response, the Violence Against Children and Youth Surveys (VACS) supported by PEPFAR and led by the Centers for Disease Control and Prevention (CDC) in the United States provide critical data.<sup>10</sup> Findings from the VACS demonstrate high prevalence of childhood sexual violence in multiple PEPFAR countries, especially with high HIV burden.<sup>11</sup> Given the significant prevalence of violence and known association of violence with HIV acquisition, PEPFAR includes violence prevention and response in its annual guidance, which is an integral part of the DREAMS Initiative.<sup>12</sup>

For the following analysis, GBV-related laws or GBV laws are broadly defined as laws that potentially prevent or facilitate GBV. Through an increased understanding of GBV laws and their respective gaps and weaknesses, it is expected that each country can strengthen its domestic legal environments and allocate sufficient resources to strategically improve GBV prevention and response metrics while monitoring the interplay between enabling, protective, and punitive laws in their implementation and enforcement.<sup>13</sup> Such policy and programmatic changes would align well with the overall HIV prevention initiative and have the potential of contributing to efforts to reduce HIV prevalence and incidence among AGYW.

## II. KEY ELEMENTS FOR GBV LAWS

All ten countries that are initially participating in the DREAMS Initiative—Eswatini, Kenya, Lesotho, Malawi, Mozambique, South Africa, Tanzania, Uganda, Zambia, and Zimbabwe, in the alphabetical order, have multiple laws addressing GBV. Additionally, all have developed national HIV strategic plans that address certain aspects or forms of GBV.<sup>14</sup> Several of these countries also have formulated national strategic plans or policies to specifically combat

<sup>9</sup>*Id.* at 1–2.

<sup>10</sup>GRETA M. MASSETTI ET AL., CDC, LINKING VIOLENCE AGAINST CHILDREN AND YOUTH SURVEYS TO COORDINATED AND EFFECTIVE ACTION: CDC AND THE TOGETHER FOR GIRLS PARTNERSHIP 4 (2020).

<sup>11</sup>See Steven A. Sumner et al., *Prevalence of Sexual Violence Against Children and Use of Social Services – Seven Countries, 2007–2013*, 64 MORBIDITY & MORTALITY WKLY. REP. 565, 567 (2015).

<sup>12</sup>See U.S. DEP'T OF STATE, PEPFAR 2022 COUNTRY AND REGIONAL OPERATIONAL PLAN (COP/ROP) GUIDANCE FOR ALL PEPFAR-SUPPORTED COUNTRIES § 6.6.2.1 (2021); U.S. DEP'T OF STATE, PEPFAR FY 2024 TECHNICAL CONSIDERATIONS § 6.6.2.1 (2023).

<sup>13</sup>See Kathryn M. Yount et al., *Development and Validation of the LoVI: The Laws on Violence Against Women and Girls Index*, 20 BMC INT'L HEALTH & HUMAN RIGHTS 13 (2020) (index tracking global progress and development of GBV laws); UNAIDS, IN DANGER: UNAIDS GLOBAL AIDS UPDATE 2022, at 265–66 tbl.6.2 (2022) (HIV laws and policies scorecard from 21 countries in eastern and southern Africa).

<sup>14</sup>NAT'L EMERGENCY RESPONSE COUNCIL ON HIV & AIDS, THE NATIONAL MULTISECTORAL HIV AND AIDS STRATEGIC FRAMEWORK 2018–2023, at 39 (2018) (Eswatini); NAT'L AIDS CONTROL COUNCIL, KENYA AIDS STRATEGIC FRAMEWORK II 2020/2021–2024/2025, at 24, 44 (2021); NAT'L AIDS COMM'N, NATIONAL HIV & AIDS STRATEGIC PLAN 2018/19 – 2022/23, at 62 (2018) (Lesotho); NAT'L AIDS COMM'N, MALAWI NATIONAL STRATEGIC PLAN FOR HIV AND AIDS 2020–2025, at 63 (2020); CONSELHO NACIONAL DE COMBATE AO HIV E SIDA [NAT'L COUNCIL TO COMBAT HIV & AIDS], PLANO ESTRATÉGICO NACIONAL DE COMBATE AO HIV E SIDA [NATIONAL STRATEGIC PLAN TO COMBAT HIV AND AIDS] (PEN V) 2021–2025, at 52 (2021) (Mozam.); S. AFR. NAT'L AIDS COUNCIL, LET OUR ACTIONS COUNT: SOUTH AFRICA'S NATIONAL STRATEGIC PLAN FOR HIV, TB AND STIS 2017–2022, at 29 (2017); UNITED REPUBLIC OF TANZ. PRIME MINISTER'S OFFICE, TANZANIA NATIONAL MULTISECTORAL STRATEGIC FRAMEWORK FOR HIV AND AIDS 2018/19 TO 2022/23, at ix fig.1 (2018); UGANDA AIDS COMM'N, NATIONAL HIV AND AIDS STRATEGIC PLAN 2020/21–2024/25, at 33 (2020); NAT'L HIV/AIDS/STI/TB COUNCIL, NATIONAL HIV AND AIDS STRATEGIC FRAMEWORK 2017–2021, at 46 (2017) (Zam.); MINISTRY OF HEALTH AND CHILD CARE & NAT'L AIDS COUNCIL, ZIMBABWE NATIONAL HIV AND AIDS STRATEGIC PLAN 2021–2025, at 39 (2020).

GBV, indicating the government's commitment to addressing GBV along with various other gender issues.<sup>15</sup> However, these GBV laws vary considerably across the jurisdictions, and many gaps and loopholes exist. As detailed below, the comprehensiveness of these existing laws could be strengthened by identifying several potential areas for improvement as benchmarked against selected key elements of GBV laws and prioritizing those areas for future legislative reform.

The authors came to consensus on a framework for analysis consisting of an extensive but non-exhaustive list of selected key elements for GBV-related laws, focusing on the presence or absence of these key elements in the countries' legislation as well as how they were addressed. The elements assessed in this article are: constitutional provisions, GBV definition, child marriage, rape, reporting, and response. In addition to these selected six elements, the authors acknowledge that access to justice and enforcement are two fundamental components to effectuate the GBV laws. Access to justice in this context narrowly means a survivor's access to judicial remedies to punish acts of GBV or court orders to deter further GBV by keeping perpetrators away from survivors. The enforcement element, on the other hand, concerns how the law on the books is turned into the law in practice by criminal and civil justice systems if it is carried out, mainly involving police officers, prosecutors, and the judiciary. Generally, a dearth of publicly available information exists on implementation, enforcement, and monitoring of GBV laws in the ten countries studied, and the authors leave the discussion on these aspects of GBV laws on another occasion. At least the comparative framework of the abovementioned six elements serves as a benchmark, thereby allowing for assessment of the comprehensiveness of each country's relevant laws. These elements assessed could all be improved to strengthen the legal and policy environments for enhanced GBV prevention and response.

Search terms in publicly available legal databases included but were not limited to: assault, domestic violence, gender-based violence, rape, sexual offence, age, years, marriage, and consent. Over thirty sources were initially reviewed in the summer of 2017 and were monitored in years 2020 through 2022 to verify or update the data, including those available on official government websites from the ten countries, government gazettes, and legal information institutes, as well as sources obtained through international organizations and the United States Law Library of Congress's reference services. The following subsections summarise and highlight the extent and manner in which the ten countries' laws incorporate

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<sup>15</sup>GOV'T OF KENYA, INT'L CTR. FOR RES. ON WOMEN, U.N. WOMEN & U.N. POPULATION FUND, GENERATION EQUALITY FORUM: KENYA'S ROADMAP FOR ADVANCING GENDER EQUALITY AND ENDING ALL FORMS OF GENDER BASED VIOLENCE AND FEMALE GENITAL MUTILATION BY 2026 (2021); DEP'T OF CHILD. SERVS., NATIONAL PREVENTION AND RESPONSE PLAN ON VIOLENCE AGAINST CHILDREN IN KENYA 2019–2023 (2020); MINISTRY OF GENDER AND YOUTH, SPORTS & RECREATION, LESOTHO GENDER AND DEVELOPMENT POLICY 2018–2030 (2018); MINISTRY OF GENDER, CHILD., DISABILITY & SOC. WELFARE, NATIONAL PLAN OF ACTION TO COMBAT GENDER-BASED VIOLENCE IN MALAWI 2014–2020 (2014); GOV'T OF MALAWI, NATIONAL STRATEGY FOR ADOLESCENT GIRLS AND YOUNG WOMEN 2018–2022 (2018); DEP'T OF WOMEN, YOUTH & PERSONS WITH DISABILITIES, NATIONAL STRATEGIC PLAN ON GENDER-BASED VIOLENCE AND FEMICIDE (2020) (S. Afr.); MINISTRY OF HEALTH, COMTY. DEV., GENDER, ELDERLY & CHILD., NATIONAL PLAN OF ACTION TO END VIOLENCE AGAINST WOMEN AND CHILDREN IN TANZANIA 2017/18 – 2021/22 (2016); MINISTRY OF GENDER, LABOUR & SOC. DEV., THE NATIONAL POLICY ON ELIMINATION OF GENDER BASED VIOLENCE IN UGANDA (rev. ed. 2019); MINISTRY OF HEALTH, NATIONAL PLAN OF ACTION FOR SEXUAL AND GENDER BASED VIOLENCE AND VIOLENCE AGAINST CHILDREN 2019/2030 (2019) (Uganda); MINISTRY OF WOMEN AFFAIRS, GENDER & COMTY. DEV., ZIMBABWE NATIONAL GENDER BASED VIOLENCE STRATEGY 2012–2015 (2012).

the six elements that are considered as key features of GBV-related laws. Areas for future focus are delineated element by element.

A limitation of the approach is that the laws and data reviewed on GBV tend to be generalizable to all ages, rather than specifically to AGYW. A second limitation is that our review was only of the content of laws and does not thoroughly address their implementation or public health impact on populations in their respective jurisdictions. We also did not research subnational (e.g., state, provincial, county) laws or policies. Lastly, the domestication and implementation of relevant international human rights treaties, notably the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>16</sup> and the Convention on the Rights of the Child (CRC),<sup>17</sup> which are ratified or acceded to by all the ten countries, is outside the scope of the present analysis.<sup>18</sup>

### A. Constitutional Provisions

Constitutional GBV provisions are assessed since the national constitution is typically the highest law of the land. The other elements are found in primary (i.e., Acts) or secondary (i.e., regulations) legislation. When these lower laws conflict with the constitution, the latter generally takes precedent. The following constitutional provisions are most relevant: approach to resolving conflicts between customary or traditional law and the constitution, non-discrimination, women and children's rights, including a right to freedom from violence.

As to the resolution of conflicts between constitutional provisions preventing discrimination on the basis of sex or gender and customary law allowing it, countries take varied approaches. In Lesotho, section 18 of the Constitution establishes freedom from discrimination,<sup>19</sup> but this provision does not apply where it conflicts with customary law.<sup>20</sup> Thus, the constitution may condone a female being discriminated against in Lesotho. Similarly, in Zambia, the Constitution makes provision in article 23(4) of the Bill of Rights for lawful discrimination under customary law or personal law with respect to adoption, marriage, and divorce,<sup>21</sup> thereby weakening the general prohibition against discrimination

<sup>16</sup>Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>17</sup>Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>18</sup>*Cf.* Convention (No. 190) Concerning the Elimination of Violence and Harassment in the World of Work art. 1, June 21, 2019, U.N.T.S. I-56938 (defining the term “violence and harassment” as inclusive of gender-based violence and harassment). The treaty entered into force for South Africa and Lesotho on Nov. 29, 2022 and Mar. 15, 2024, respectively, among the ten countries assessed in this article.

<sup>19</sup>CONST. OF LESOTHO (1993) § 18(1) (“Subject to the provisions of subsections (4) . . . no law shall make any provision that is discriminatory either of itself or in its effect.”); *id.* § 18(3) (defining term “discriminatory” as “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status . . .”).

<sup>20</sup>*Id.* § 18(4)(c) (“Subsection (1) [of section 18] shall not apply to any law to the extent that the law makes provision . . . for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law . . .”); *see also* Marriage Act 10 of 1974 § 42 (Lesotho) (“This Act shall apply to all marriages solemnized in Lesotho save and except marriages contracted in accordance with Sesotho law and custom . . .”); *cf.* Qhalehang A. Letsika, *The Place of Sesotho Customary Law Marriage Within the Modern Lesotho Legal System*, U. BOTSWANA L.J., Dec. 2005, at 73, 85. *But see* Children’s Protection and Welfare Act 7 of 2011 LESOTHO GOV’T GAZETTE EXTRAORDINARY VOL. 56, NO. 40 §§ 17, 20(2)(e) (Lesotho) (providing that a child not be subjected to, and their parent or guardian has a responsibility towards the child to ensure that the child is not subjected to “cultural rites, customs or traditional practices” that are likely to negatively affect the child’s life, health, welfare, dignity or physical, emotional, psychological, mental and intellectual development).

<sup>21</sup>*See* CONST. OF ZAMBIA (1991) art. 23, cl. 4, paras. c–d (“Clause (1) [of article 23] shall not apply to any law so far as that law makes provision . . . with respect to . . . marriage, divorce . . . or other matters of personal law; . . . for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that



on the basis of sex under the same article.<sup>22</sup> Malawi's Constitution takes the opposite approach. The Malawi Constitution's section 24(2) on the rights of women states, "Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as -- sexual abuse, harassment and violence . . . ."<sup>23</sup> Akin to Malawi, in Zimbabwe the Constitution's section 80 on the rights of women voids "all laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution . . . to the extent of the infringement."<sup>24</sup> Uganda's Constitution similarly contains a provision to protect specifically the rights of women in relation to customs and traditions.<sup>25</sup> South Africa's Constitution not only prohibits discrimination on the basis of gender and sex but establishes a right to be free from all forms of violence under the Bill of Rights.<sup>26</sup> At the same time it is more lenient to customary and personal law by permitting "legislation recognizing marriages concluded under any tradition, or a system of religious, personal or family law"<sup>27</sup> in conjunction with an interpretive provision "every court . . . must promote the spirit, purport and objects of the Bill of Rights" in reference to customary law.<sup>28</sup> Mozambique's Constitution likewise explicitly recognizes the traditional authority of customary law.<sup>29</sup> Eswatini takes a different approach by honoring women's independent decision making as provided in section 28, "[a] woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed," while juxtaposing "Swazi law and custom" extensively within its Constitution.<sup>30</sup> Kenya's Constitution contains the overarching supremacy clause together with the non-violence and

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matter which is applicable in the case of other persons . . . ."). *But see* Constitution of Zambia (Amendment) Bill No. 37 (2016) GOV'T GAZETTE (Bills) (attempting to eliminate discriminatory provisions in Part III, Bill of Rights segment of the Constitution, including article 23, *supra*, which failed by a referendum in 2016).

<sup>22</sup>CONST. OF ZAMBIA (1991) art. 23, cl. 1 ("Subject to clauses (4) . . . [of article 23] no law shall make any provision that is discriminatory either of itself or in its effect."); *id.* art. 23 cl. 3 (defining the term "discriminatory" as "affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions[,] colour or creed . . .").

<sup>23</sup>Republic of Malawi (Constitution) Act No. 20 (1994) [CONST. OF MALAWI] § 24(2)(a); *see also* Gender Equality Act, Cap. 25:06 (2013) §§ 3, 5 (Malawi) (prohibiting "harmful practices" defined as social, cultural, or religious practices which, on account of sex, gender or marital status, do or are likely to result in physical, sexual, emotional, or psychological harm to any person); HIV and AIDS (Prevention and Management) Act No. 9 (2018) §§ 2, 4, 1st sched. (Malawi) (prohibiting "harmful practices" defined as any social, religious or cultural practice that puts a person at risk of HIV infection or re-infection, such as sexual cleansing).

<sup>24</sup>Constitution of Zimbabwe Amendment (No. 20) Act, 2013 § 2 sched. [CONST. OF ZIMBABWE] § 80(3); *see also id.* § 46(2) ("[W]hen developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of [the Declaration of Rights including § 80, *supra*].").

<sup>25</sup>*See* Constitution (Amendment) Act, No. 11 (2005) Acts Supp. No. 7 to UGANDA GAZETTE VOL. 98, NO. 64 § 11 (amending Article 32, clause 2 of the Constitution as "[l]aws, cultures, customs and traditions which are against the dignity, welfare or interest of women . . . or which undermine their status, are prohibited by this Constitution"); *see also* CONSTITUTION art. 2(2) (1995) (Uganda) ("If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."); *id.* art. 21 ("[A] person shall not be discriminated against on the ground of sex . . ."); *id.* art. 246(4) ("The allegiance and privileges accorded to a traditional leader or a cultural leader by virtue of that office shall not be regarded as a discriminatory practice prohibited under article 21 of this Constitution; but any custom, practice, usage or tradition relating to a traditional leader or cultural leader which detracts from the rights of any person as guaranteed by this Constitution, shall be taken to be prohibited under that article.").

<sup>26</sup>*See* S. AFR. CONST., 1996 § 9(3) ("The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status . . ."); *id.* § 12(1)(c) ("Everyone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources . . .").

<sup>27</sup>*Id.* § 15(3)(a)(i).

<sup>28</sup>*Id.* § 39(2) ("When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."); *id.* § 39(3) ("The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.").

<sup>29</sup>CONSTITUIÇÃO DA REPÚBLICA [CONST. OF THE REPUBLIC] (2004) art. 118, para. 1 (Mozam.) (valuing traditional authority in accordance with customary law). *But see id.* art. 35 (providing as the principle of universality and equality that all citizens, equal before the law, shall enjoy the same rights regardless of sex).

non-discrimination clauses.<sup>31</sup> Tanzania's Constitution outlaws discrimination based on sex but without reference to customs, tradition, or cultural practices.<sup>32</sup> Of particular note is that Kenya, South Africa, and Zimbabwe appear to be the only countries whose constitutions unambiguously establish a right to freedom from all forms of violence,<sup>33</sup> and these three governments may have a constitutional duty to prevent violence, as further reinforced by the right to reproductive health care created in their respective constitutions.<sup>34</sup>

As the preceding examples show, some countries prioritize customary discrimination over constitutional protection while other countries take the opposite approach by prioritizing constitutional protection against discrimination. In Lesotho and Zambia, customary laws condoning gender discrimination override constitutional non-discrimination provisions.<sup>35</sup> Efforts to address GBV in these countries may benefit from facilitating community-led assessment of the effects of local norms and customary laws on women. The DREAMS core package includes community mobilization and educational programs to enact changes in gender norms.<sup>36</sup> In addition, some violence prevention programs focus on changing attitudes and beliefs about gender norms, such as teaching boys to become respectful men.<sup>37</sup>

## B. Definition of GBV

It is important to understand whether, and if so, how GBV or a similar term is defined under the law. To effectively deter, prevent, respond to, and punish GBV, the law must clarify who are considered perpetrators and survivors of GBV and what acts constitute GBV or similar terms such as domestic violence. Without explicitly defining GBV or domestic and sexual violence it is difficult to effectively legislate, prohibit, and prosecute it. The lack of concrete legal definitions or scope of prohibited acts poses a barrier to the enforcement of laws that only generally outlaw GBV. Access to survivor services may also be hindered if the determination of one's status as a GBV survivor is left to the discretion of service providers rather than being clearly delineated in or protected by the law. In addition to laws, national policies and guidelines can define GBV or similar terms for purposes of public health surveillance and provision of services to survivors, though these may lack force of law.

<sup>30</sup>Constitution of the Kingdom of Swaziland Act, No. 1 of 2005 § 28(3); *id.* § 20(2) (“[A] person shall not be discriminated against on the grounds of gender . . .”). *But see id.* § 115 (providing a carveout pertaining to matters primarily regulated by unwritten Swazi law and custom).

<sup>31</sup>CONSTITUTION art. 2(4) (2010) (Kenya) (“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency . . .”); *id.* art. 29(c) (“Every person has the right to freedom and security of the person, which includes the right not to be . . . subjected to any form of violence from either public or private sources . . .”); *id.* art. 53(1)(d) (“Every child has the right . . . to be protected from . . . all forms of violence . . .”); *id.* art. 27(4) (“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status . . .”).

<sup>32</sup>CONST. OF TANZANIA, Cap. 2 art. 13(2), (5) (1977).

<sup>33</sup>CONSTITUTION art. 29(c) (2010) (Kenya); *id.* art. 53(1)(d); S. AFR. CONST., 1996 § 12(1)(c); CONST. OF ZIMBABWE (2013) § 52(a).

<sup>34</sup>*See* CONSTITUTION art. 43(1)(a) (2010) (Kenya) (“Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care . . .”); S. AFR. CONST., 1996 § 27(1)(a) (“Everyone has the right to have access to health care services, including reproductive health care . . .”); CONST. OF ZIMBABWE (2013) § 52(b) (“Every person has the right to bodily and psychological integrity, which includes . . . subject to any other provision of this Constitution, to make decisions concerning reproduction . . .”); *id.* § 76(1) (“Every citizen . . . of Zimbabwe has the right to have access to basic health-care services, including reproductive health-care services.”).

<sup>35</sup>*See supra* notes 19–22 and accompanying text.

<sup>36</sup>*See* Saul et al., *supra* note 8, at 6.

<sup>37</sup>*See* Rebecca Stewart et al., *Gendered Stereotypes and Norms: A Systematic Review of Interventions Designed to Shift Attitudes and Behaviour*, 7 HELIYON 1,12 (2021).

Only one country, Zambia, literally defines GBV. In Zambia's Anti-Gender-Based Violence Act, "gender-based violence" is defined as:

any physical, mental, social or economic abuse against a person because of that person's gender, and includes – (a) violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to the person, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life; and (b) actual or threatened physical, mental, social or economic abuse that occurs in a domestic relationship.<sup>38</sup>

The other nine countries do not use the term GBV, but eight of these countries' laws define similar terms to GBV such as "domestic violence."<sup>39</sup> For example, Lesotho is the latest to enact its standalone domestic violence legislation in 2022, but until then the country had to rely primarily on the provisions of the Sexual Offences Act to deter violence against AGYW.<sup>40</sup>

Among these eight countries that define terms similar to GBV in their laws, two stand out as examples from both ends of the spectrum from specificity to generality. In Kenya's Protection Against Domestic Violence Act, "violence" is defined as "abuse that includes – child marriage . . . forced marriage . . . sexual violence within marriage" and various other categories of harmful acts directed against girls and women.<sup>41</sup> The same Kenyan law states that, "'domestic violence', in relation to any person, means violence against that person, or threat of violence or of imminent danger to that person, by any other person with whom that person is, or has been, in a domestic relationship,"<sup>42</sup> which in turn is defined as "is married to that other person; . . . is living in the same household with that person; . . . is a family member of that other person; . . . has a close personal relationship with the other person."<sup>43</sup> Thus, Kenyan law has specifically prohibited various acts of violence which are

<sup>38</sup>Anti-Gender-Based Violence Act No. 1 (2011) GOV'T GAZETTE (Acts) § 3(1) (Zam.) (providing a list of defined terms including "domestic relationship" as elements of the definition of term "gender-based violence"; e.g., defining "physical, mental, social or economic abuse" as inclusive of "abuse delivered from the following cultural or customary rites or practices: . . . (iv) forced marriage; (v) sexual cleansing; (vi) child marriage; . . ."); see also Anti-Gender-Based Violence (Court) Rules No. 8 (2016) GOV'T GAZETTE (SI) r. 3(1) (Zam.) (adopting the same definitions of GBV as provided in the Anti-Gender-Based Violence Act, *supra*).

<sup>39</sup>See Sexual Offences and Domestic Violence Act, No. 15 of 2018, SWAZ. GOV'T GAZETTE EXTRAORDINARY VOL. 56, No. 111 § 77(2) (Eswatini) (defining "domestic relationship," term used to define "domestic violence" as "a relationship . . . in any of the following ways– . . . married to each other, including marriage according to any law, custom or religion"); Prevention of Domestic Violence Act, Cap. 7:05 (2006) § 2 (Malawi) (defining "domestic violence"); Lei No. 29/2009 Lei sobre a Violência Doméstica praticada contra a Mulher [Act No. 29/2009 Law on Domestic Violence Perpetrated Against Women], de 29 de Setembro de 2009, BOLETIM DA REPÚBLICA [B.D.R.] [BULL. OF THE REPUBLIC] Anexo, Glossário [Annex, Glossary] (Mozam.) (defining terms "violência" [violence], "violência contra a mulher" [violence against women], and "violência sexual" [sexual violence]); Domestic Violence Amendment Act 14 of 2021 cl. 2 (S. Afr.) (amending and expanding existing definition of terms such as "domestic violence" and "sexual abuse" as provided under the Domestic Violence Act 116 of 1998, section 1); Domestic Violence Act [Chapter 5:16] (2006) § 3(1)(iv)–(v) (Zim.) (encompassing within the scope of "domestic violence" "abuse derived from . . . cultural or customary rites or practices that discriminate against or degrade women . . . forced marriage; or child marriage"); *id.* § 4(2) (including acts of emotional, verbal, psychological and economic abuse within the meaning of domestic violence but excluding from the scope of offence of domestic violence).

<sup>40</sup>Compare Counter Domestic Violence Act 14 of 2022 LESOTHO GOV'T GAZETTE EXTRAORDINARY VOL. 67, NO. 72 §§ 2, 3(i) (listing within the purview of "domestic violence" several categories of "abusive practices" such as forced and child marriages and forced initiation), *with* Sexual Offences Act 3 of 2003 LESOTHO GOV'T GAZETTE EXTRAORDINARY VOL. 48, No. 29 § 2 (providing interpretation of terms such as "sexual act" and "coercive circumstances" but not directly defining GBV or domestic violence or similar terms), *and* Penal Code Act 6 of 2012 LESOTHO GOV'T GAZETTE EXTRAORDINARY VOL. 57, No. 30 § 30(2) ("A spouse who intentionally applies unlawful force to another, commits the offence of assault.").

<sup>41</sup>Protection Against Domestic Violence Act, No. 2 (2015) KENYA GAZETTE SUPP. NO. 60 § 3(1)(a).

<sup>42</sup>*Id.* § 3(2).

<sup>43</sup>*Id.* § 4(1).



gender-based without using the exact term, GBV. In contrast, the relevant legal definitions in Uganda are relatively general and vague. In Uganda's Domestic Violence Act, "domestic violence" encompasses "sexual abuse" which "includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of another person."<sup>44</sup> Thus, it is unclear whether child marriage, forced marriage, and sexual violence within marriage, all acts explicitly prohibited under Kenya's law, are included within Uganda's legal prohibition.<sup>45</sup>

Tanzania does not explicitly define the terms GBV or similar terms in their laws thus potentially complicating the prosecution of cases.<sup>46</sup> Without a clear legal definition or scope of the act of GBV, it is more challenging for a victim to report an offence to law enforcement, for laws to be enforced, and for the perpetrator to be prosecuted.

### C. Child Marriage

The question relating to child marriage is whether minors are legally allowed to marry, since girl marriage has been associated with elevated health risks for mother and child<sup>47</sup> as well as increased intimate partner violence.<sup>48</sup> For the purpose of this article, child marriage refers to marriage of a minor, i.e., anyone younger than the age of majority who may enter a legally valid marriage with one's free will.

The legal minimum age for marriage without third party consent is set as 18 years old in seven of the ten countries,<sup>49</sup> while in Eswatini, Lesotho and Zambia it is set as 21 years

<sup>44</sup>Domestic Violence Act, No. 3 (2010) Acts Supp. No. 3 to UGANDA GAZETTE VOL. 103, No. 21 § 2 (defining "domestic violence" as "any act or omission of a perpetrator which harms, injures or endangers the health, safety, . . . of the victim . . . and includes causing physical abuse, sexual abuse, . . ." in which "victim" means "a person in a domestic relationship who directly or indirectly suffers threatened or actual domestic violence").

<sup>45</sup>See *id.* § 3(1)(f), 3(2) (defining "domestic relationship" between a victim and a perpetrator as a family relationship or relationship in a domestic setting including relationship of marriage, kinship, shared residence, and employment, and further providing the court's discretion to determine domestic relationship).

<sup>46</sup>See Sexual Offences Special Provisions Act No. 4 (1998) § 3 (Tanz.) (interpreting "sexual offence" as any of the offences created in Chapter XV of the Penal Code, but failing to address "domestic violence" or similar terms); PENAL CODE, Cap. 16 (2022) §§ 129A–162 (Tanz.) (comprising Chapter XV, Offences Against Morality).

<sup>47</sup>See Yvette Efevbera et al., *Girl Child Marriage as a Risk Factor for Early Childhood Development and Stunting*, 185 SOC. SCI. & MED. 91 (2017).

<sup>48</sup>See Rachel Kidman, *Child Marriage and Intimate Partner Violence: A Comparative Study of 34 Countries*, 46 INT'L J. EPIDEMIOLOGY 662 (2017); see also Negar Omidakhsh & Jody Heymann, *Improved Child Marriage Laws and Its Association with Changing Attitudes and Experiences of Intimate Partner Violence: A Comparative Multi-national Study*, 10 J. GLOBAL HEALTH (2020) (supporting the hypothesis that national changes to a protective child marriage policy positively influence norms and health at the national level).

<sup>49</sup>See The Marriage Act, No. 4 (2014) KENYA GAZETTE SUPP. NO. 62 § 4 (providing, irrespective of different regimes of marriage, without exceptions that "[a] person shall not marry unless that person has attained the age of eighteen years"); *id.* § 87 ("Any person who marries a person who is below the minimum age commits an offence . . ."); CONST. OF MALAWI (1994) § 22(6) ("No person over the age of eighteen years shall be prevented from entering into marriage."); *id.* § 22(4)–(5) (proscribing forced marriage as applicable to "all marriages at law, custom . . ."); Marriage, Divorce and Family Relations Act, Cap. 25:01 (2015) § 14 (Malawi) (rectifying inconsistency between statutory, religious, and customary marriage laws concerning minimum age by providing "[s]ubject to section 22 of the Constitution, two persons . . . who are both not below the age of eighteen years . . . may enter into marriage with each other"); Lei No. 22/2019 of 11 de Dezembro de 2019, Lei da Família e revoga a Lei No. 10/2004, de 25 de Agosto 2004 [Act No. 22/2019 of 11 December 2019, Family Law Act revoking Act No. 10/2004 of 25 August 2004], de 11 de Dezembro de 2019, B.D.R. art. 32(a) (Mozam.) (prescribing the age of below 18 years as an absolute legal impediment to marriage without exceptions); Lei No. 7/2008 Lei de Promoção e Protecção dos Direitos da Criança [Act No. 7/2008 Law on the Promotion and Protection of the Rights of the Child], de 9 de Julho de 2008, B.D.R. art. 3 (Mozam.) (defining "child" as under 18 years); Children's Act 38 of 2005 §§ 17, 313 sched. 4 (S. Afr.) (repealing the Age of Majority Act, 57 of 1972 which set the age of majority as 21 years by providing "[a] child, whether male or female, becomes a major upon reaching the age of 18 years"); Law of Marriage Act, Cap. 29 (2019) § 13(1) (Tanz.) ("No person shall marry who, being male, has not attained the apparent age of eighteen years or, being female, . . . fifteen years."); *id.* § 17(1) ("A female who has not attained the apparent age of eighteen years shall be required, before marrying, to obtain the consent . . ."); Law of the Child Act, Cap. 13 (2009) § 4(1) (Tanz.) ("A person below the age of eighteen years shall be known

old,<sup>50</sup> although interpretation of each country's marriage law may vary. Marriage of a minor is permissible under categorical exceptions or exclusions to a general prohibition of child marriage, in six of the ten countries: Eswatini, Lesotho, South Africa, Tanzania, Uganda, and Zambia. This is due to these six countries' third party consent exceptions that allow parents, guardians, government officials or judges to consent on behalf of the child to lower minimum ages with legal capacity to marry to as low as 15 or 16 years of age or younger.<sup>51</sup> Categorically excluding a minor whose previous marriage dissolved by death or divorce from the definition of a minor, could allow child re-marriage.<sup>52</sup> Contrast this to Kenya,

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as a child.”); Constitution (Amendment) Act, No. 11 (2005) § 10 (Uganda) (amending the 1995 Uganda Constitution article 31(1) as “[a] man and a woman are entitled to marry only if they are each of the age of eighteen years and above”); Children Act (1997) Cap. 59 § 2 (Uganda) (defining a “child” as below 18 years old); Children (Amendment) Act, No. 9 (2016) Acts Supp. No. 8 to UGANDA GAZETTE VOL. 109, No. 38 § 2 (adding the definition of “child marriage” as “any union whether formal or informal involving any person below the age of 18 years for the purpose of living as husband and wife”); CONST. OF ZIMBABWE (2013) § 78(1) (“Every person who has attained the age of eighteen years has the right to found a family.”); Marriages Act [Chapter 5:17] (2022) § 3(1) (Zim.) (“No person under the age of eighteen years may contract a marriage or enter into an unregistered customary law marriage or a civil partnership.”).

<sup>50</sup>See Marriage Act, No. 47 of 1964 § 3(2) (Eswatini) (“Minors below the age of twenty-one years but above the ages specified [male 18 and female 16 years] may marry with the consent of their legal guardian . . . .”); Sexual Offences and Domestic Violence Act, No. 15 of 2018 § 43 (Eswatini) (“A person shall not marry a child [under the age of 18 years old] in contravention of the Marriage Act No. 47 of 1964, *supra* . . . .”); The Age of Majority Ordinance 62 of 1829 § 2 (Lesotho) (prescribing the legal age for attaining majority as 21 years old); Marriage Act 10 of 1974 § 25(1) (Lesotho) (“No marriage officer shall solemnize a marriage between parties of whom one or both are minors . . . .”); Marriage Act, Cap. 50 (1964) § 17 (Zam.) (“If either party . . . is under twenty-one years of age, the written consent . . . shall be produced.”).

<sup>51</sup>Marriage Act, No. 47 of 1964 § 3(2) (Eswatini) (“Minors below the age of twenty-one years but above the ages specified in subsection (1) may marry with the consent of their legal guardian . . . .”); *id.* § 3(1) (providing that no male below the age of 18 and no female below 16 have capacity to marry, along with a ministerial grant exception to these age limits as “if the special circumstances . . . warrant such a marriage, the [Deputy Prime] Minister may grant special dispensation allowing [child] marriage.”); Marriage Act 10 of 1974 § 25(2) (Lesotho) (providing for parental or guardian consent exceptions to allow underage marriage below 21 years old); *id.* § 26(1)–(4) (providing that a District Administrator may grant consent in the absence of a parent or guardian and a High Court judge can further overturn their objections to grant consent to marriage of a minor); *id.* § 27(1) (setting ages with legal capacity to marry as 18 years for male and 16 years for female but providing that the Minister may grant consent to child marriage if it is deemed desirable, and further providing for a judge’s consent exception to the Minister’s consent requirement); Marriage Act 25 of 1961 § 24(1) (S. Afr.) (“No marriage officer shall solemnize a marriage between parties of whom one or both are minors [under 18 years old] unless the consent [of parent or guardian] which is legally required . . . has been granted . . . .”); *id.* § 25(1) (providing that in the absence of a minor’s parent or guardian’s consent, a commissioner of child welfare may in their discretion grant written consent); Marriage Amendment Act 51 of 1970 § 9 (S. Afr.) (lowering the age with legal capacity to marry for females from 16 to 15 years old by amending the Marriage Act 25 of 1961 section 26(1), enabling girls of the age 15 years to marry as long as the consent of their parent or guardian or commissioner is obtained but without need for the permission of Minister of Home Affairs or a judge’s consent as “[n]o boy under the age of eighteen years and no girl under the age of fifteen years shall be capable of contracting a marriage except with the written permission of the Minister, which he may grant [if] he considers such marriage desirable . . . [p]rovided further that such permission shall not be necessary if . . . the consent of a judge or court . . . has been granted”); Recognition of Customary Marriages Act 120 of 1998 § 3(1), (3)–(4) (S. Afr.) (permitting customary marriage of a minor under 18 years with the consent of a parent, legal guardian, or commissioner, or with the written permission of a public officer); Law of Marriage Act, Cap. 29 (2019) § 17(1)–(2) (Tanz.) (providing that “[a] female who has not attained the apparent age of eighteen years shall be required . . . to obtain the consent [of her parent or guardian]” and in their absence “the court may . . . give consent”); *id.* § 13(2)(a)–(b) (“[T]he court shall, in its discretion, have power . . . to give leave for a marriage where . . . [either party is] below the ages prescribed [18 for boys and 15 for girls] . . . if each party has attained the age of fourteen years[] and . . . special circumstances . . . make the proposed marriage desirable.”); Marriage Act (1904) Cap. 251 §§ 17, 19 (Uganda) (providing for third party consent requirement to marriage of a minor in combination with an age threshold which is no longer consistent with the constitution as “[i]f either party to an intended marriage . . . is under twenty-one years of age, the written consent of [parent or guardian] . . . must be produced” and “[i]f there is no parent or guardian . . . then the Minister or a judge of the High Court may consent to the marriage . . . after due inquiry that the marriage is a proper one”); Marriage Act, Cap. 50 (1964) § 17 (Zam.) (requiring third party consent to child marriage under 21 years old as “the written consent [of parent or guardian] shall be produced . . . save as is otherwise provided in section 19”); *id.* § 19 (overriding the parental consent requirement under the section 17, *supra*, in case of their refusal or absence by obtaining consent from “a Judge of the High Court”); *id.* § 33(1) (permitting younger child marriage as “[a] marriage [of a child under 16 years] shall be void: [p]rovided that this section shall not apply when a Judge of the High Court has . . . [in] the case it is not contrary to the public interest, given his consent to the marriage”). *But see* Attorney General v. Gyumi (Civil Appeal 204 of 2017) [2019] TZCA 348, 1 T.L.R. 114 (Tanz.) (affirming the Tanzania High Court’s holding, Misc. Civil Cause No. 5 of 2016, declaring provisions permitting child marriage, sections 13 and 17 of the Law of Marriage Act, Cap. 29, *supra*, unconstitutional despite the statute yet to be amended since).

<sup>52</sup>Marriage Act, No. 47 of 1964 § 3(2) (Eswatini) (permitting child marriage and re-marriage as “persons who have previously been married . . . shall not be regarded as minors”); Marriage Act 10 of 1974 § 25(1) (Lesotho) (“[A] minor does not include a person who is under the age of twenty-one years . . . [whose] valid marriage . . . has been dissolved by death or divorce.”); Marriage Act 25 of

Malawi, Mozambique, and Zimbabwe where one must be 18 or older to marry according to their constitutions or legislation, without exceptions. As for traditional customary law marriages, marriageable age is not prescribed in written laws of some countries, and in such circumstances a person could marry at puberty or may reach majority by operation of law upon entering a customary law marriage.<sup>53</sup> These various legal loopholes as well as the discrepancy left unamended in related marriage provisions in domestic legislation, as has been the case in Uganda,<sup>54</sup> can facilitate the perpetuation of child marriage. Progress should be noted, as Kenya, Malawi, Mozambique, and Zimbabwe have amended their laws only in the last decade to fully prohibit child marriage. Historically these four countries also had similar categorical exceptions in their marriage laws, but the harmful provisions were eventually repealed,<sup>55</sup> most recently in Zimbabwe in 2021.<sup>56</sup> In addition to the marriage statute, most countries have tightened or are in the process of tightening their sexual offences, domestic violence, or child protection legislation to outlaw child marriage.<sup>57</sup> Court

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1961 § 24(2) (S. Afr.) (“[A] minor does not include a person who is under the age of twenty-one years and previously contracted a valid marriage which has been dissolved by death or divorce.”); Marriage Act (1904) Cap. 251 § 17 (Uganda) (“If either party to an intended marriage, not being a widower or widow, is under twenty-one years of age, the written consent of [parent or guardian] must be produced . . . .”); Marriage Act, Cap. 50 (1994) § 17 (Zam.) (“If either party . . . not being a widower or widow, is under twenty-one years of age, the written consent [of third party] shall be produced . . . .”).

<sup>53</sup>See e.g., *Mudzuru v. Ministry of Justice* (Constitutional Application 79 of 2014, CC 12 of 2015) [2016] ZWCC 12 (Jan. 20, 2016) (Zim.) (declaring the Customary Marriages Act [Chapter 5:07] (1917) unconstitutional as it does not provide for a minimum age limit for customary law marriage); Letsika, *supra* note 20, at 73, 76; CONSELHO DE MINISTROS, REPÚBLICA DE MOÇAMBIQUE [COUNCIL OF MINISTERS, REPUBLIC OF MOZAMBIQUE], ESTRATÉGIA NACIONAL DE PREVENÇÃO E COMBATE DOS CASAMENTOS PREMATUROS EM MOÇAMBIQUE (2016–2019) [NAT’L STRATEGY FOR PREVENTING AND COMBATING CHILD MARRIAGES IN MOZAMBIQUE] 9 (2015) (discussing initiation rites as cultural factors contributing to child marriages).

<sup>54</sup>In Uganda, multiple marriage statutes are in force in accordance with different marriage regimes, with or without reference to prescribed ages of a minor requiring third party consent: Marriage of Africans Act (1904) Cap. 253 § 5, Marriage and Divorce of Mohammedans Act (1906) Cap. 252 § 5(1)(a), Hindu Marriage and Divorce Act (1961) Cap. 250 § 2(1)(c)–(d), and Customary Marriage (Registration) Act (1973) Cap. 248 §§ 11(a)–(b), 32. *But see* *Aboneka v. Attorney General* (Constitutional Petition 35 of 2021) [2023] UGCC\_ (20 Feb. 2023), which declared as unconstitutional provisions for marriages of minors in the Marriage and Divorce of Mohammedans Act, Hindu Marriage and Divorce Act, and Customary Marriage (Registration) Act, *supra*.

<sup>55</sup>The Marriage Act, No. 4 (2014) § 97 & sched. (Kenya) (repealing entirely the Marriage Act (1902) Cap. 150 including sections 19 and 21, which provided for third party consent by either a person having the lawful custody, Minister, a Supreme Court judge or a Registrar, in conjunction with a widow/widower categorical exclusion); Constitution (Amendment) (No.3) Act No. 15 (2017) § 2 (Malawi) (closing the loophole in the 1994 Malawi Constitution that permitted child marriage by deleting subsections 22(7)–(8), which provided “[f]or persons between the age of fifteen and eighteen years a marriage shall only be entered into with the consent of their parents or guardians” and “[t]he State shall actively discourage marriage between persons where either of them is under the age of fifteen years”); *id.* § 3 (raising the prescribed age of a child from under 16 to under 18 years by amending subsection 23(6)); Marriage, Divorce and Family Relations Act, Cap. 25:01 (2015) § 114 (Malawi) (eliminating inconsistency among different marriage regimes by repealing the Marriage Act (Chapter 25:01), African Marriage (Christian Rites) Registration Act (Chapter 25:02), and Asiatics (Marriage, Divorce and Succession) Act (Chapter 25:03); Lei No. 22/2019 Lei da Família [Act No. 22/2019 Family Law Act], de 11 de Dezembro de 2019, B.D.R. art. 32(a) (Mozam.) (eliminating the third party consent exception under the 2004 Family Law Act, No. 10/2004 article 30(2), which provided that a woman or man over 16 years of age, on an exceptional basis, may contract a marriage with consent from parents or legal representatives when there are circumstances of recognized public and family interest). *But see* Act No. 22/2019 Family Law Act, art. 28(2) (Mozam.) (permitting a betrothal of a minor, in the case of a religious marriage through a preliminary publication process, with consent of parents, legal representatives or a guardian in the presence of two witnesses before a religious dignitary).

<sup>56</sup>Marriages Act [Chapter 5:17] (2022) § 3(2) (Zim.) (“For the avoidance of any doubt, it is declared that child marriages are prohibited and under no circumstances shall any person contract, solemnise, promote, permit, allow or coerce or aid or abet [a marriage or any other related arrangement].”); *Mudzuru*, [2016] ZWCC 12 (Zim.) (declaring the Marriage Act (1964) [Chapter 5:11] section 22(1) unconstitutional as provided: “[n]o boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister . . . . Provided that . . . such permission shall not be necessary if . . . the consent of a judge . . . has been granted,” resulting in the enactment of the Marriages Act [Chapter 5:17], *supra*).

<sup>57</sup>See Sexual Offences and Domestic Violence Act, No. 15 of 2018 § 43 (Eswatini) (“A person shall not marry a child in contravention of the Marriage Act No. 47 of 1964 . . . .”); Children’s Protection and Welfare Act, 2012, No. 6 of 2012 §§ 2, 41(1)(b) (Eswatini) (protecting children defined as those under 18 years old from forced marriage, similar to Lesotho’s equivalent provision, as “[a] child is in need of urgent protection if there is reasonable cause to believe that . . . the child is being forced to marry”); Marriages Bill, Bill No. 8 of 2022, ESWATINI GOV’T GAZETTE Vol. 9, No. 46 § 68(1)(e)–(f) (holding a parent liable for marrying off their child by force or deceit); Protection Against Domestic Violence Act, No. 2 (2015) § 3(1)(a)(i) (Kenya) (defining “violence” in the domestic violence context as inclusive of child marriage); The Children Act, No. 29 (2022) KENYA GAZETTE SUPP. NO. 119 §§ 2, 23(1) (providing that “[n]o person shall subject a child to . . . child marriage [defined as marriage or cohabitation with a child under

rulings have also played a role in declaring relevant provisions unconstitutional and hence driving legislative reforms.<sup>58</sup> Nonetheless, statistics show that the practice of child marriage continues to varying degrees even where it is prohibited by law,<sup>59</sup> as demonstrated by the proportion of women aged 20–24 years who were married or in a union before age 18, which is one of the United Nations Sustainable Development Goals indicators (SDG 5.3.1)—Eswatini 5%, Kenya 23%, Lesotho 16%, Malawi 42%, Mozambique 53%, South Africa 4%, Tanzania 31%, Uganda 34%, Zambia 29%, and Zimbabwe 34%.<sup>60</sup>

As stated above, only four of the ten countries outlaw child marriage with no allowance for third party consent exceptions. The remaining countries allow third parties to consent to

18] . . . or any other cultural or religious rite, custom or practice that is likely to negatively affect the child's [wellbeing]," in which the term "child marriage" substituted for "early marriage," the term used in the previous Children Act, No. 8 of 2001); Counter Domestic Violence Act 14 of 2022 §§ 2, 3(i) (Lesotho) (interpreting domestic violence as inclusive of "abusive practices" such as forced and child marriages); Children's Protection and Welfare Act 7 of 2011 §§ 3, 76(1)(b) (Lesotho) (protecting children defined as those under 18 years old from forced marriage, similar to Eswatini's equivalent provision, as "[a] child is in need of urgent protection if there is reasonable cause to believe that . . . the child is being forced to marry"); Child Care, Protection and Justice Act, 2010, Cap. 26:03 (2010) § 81 (Malawi) ("No person shall force a child into marriage[] or force a child to be betrothed."); Lei No. 19/2019 Lei de Prevenção e Combate às Uniões Prematuras [Act No. 19/2019 Law on Preventing and Combating Premature Unions], de 22 de Outubro de 2019, B.D.R. arts. 2, 7 (Mozam.) (prohibiting a premature union to be formed between two people in which at least one is a child below the 18 years old with the immediate purpose of constituting a family); Lei No. 7/2008 Lei de Promoção e Protecção dos Direitos da Criança [Act No. 7/2008 Law on the Promotion and Protection of the Rights of the Child], de 9 de Julho de 2008, B.D.R. art. 64 (Mozam.) (providing for, but without direct reference to child marriage, the government's obligation to protect children against any form of abuse by the parent or third person, providing further for sanctions as applied to perpetrators of child abuse); Children's Act 38 of 2005 § 12(2)(a) (S. Afr.) ("A child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement . . ."); Children's Amendment Bill (B18–2020) cl. 6, GN 928 of GG 43656 (26 Aug. 2020) (S. Afr.) (amending the Children's Act 38 of 2005 section 12(2)(a), *supra*, to substitute "must" for "may" to strictly prohibit any marriage of a child, but was removed from the enacted Children's Amendment Act 17 of 2022); Children Act (2016) Cap. 59 § 1 (Uganda) (defining "child marriage" as any union involving any person below the age of 18 years for the purpose of living as husband and wife); *id.* § 42A(1) ("Every child has a right to be protected against all forms of violence including sexual abuse . . . child marriage . . ."); Sexual Offences Bill, No. 32 (2019) Bills Supp. No. 13 to UGANDA GAZETTE VOL. 112, No. 54 §§ 1, 22 (banning marrying a child below 18 years, "including participation in formal or informal marital rites and initiation practices with a child," but yet to be enacted as of 2022); Anti-Gender-Based Violence Act No. 1 (2011) § 3(1) (Zam.) (defining "physical, mental, social or economic abuse" in the GBV context as inclusive of forced marriage and child marriage under any law, custom or religion); Children's Code Act No. 12 (2022) GOV'T GAZETTE (Acts) §§ 2, 18(2) (Zam.) ("A person shall not subject a child to child marriage or cultural rites, and religious or traditional practices, that are likely to negatively affect the child's life, health, social welfare, dignity, and physical or psychological development."); Domestic Violence Act [Chapter 5:16] (2006) § 3(1)(iv)–(v) (Zim.) (including in the scope of "domestic violence" "abuse derived from . . . cultural or customary rites or practices that discriminate against or degrade women . . . forced marriage[] or child marriage"); Children's Amendment Bill, H.B. 12, 2021 cl. 3 (Zim.) (broadening the definition of "child in need of care" under the Children's Act [Chapter 5:06] (1971) to "child in need of care or protection or both" being inclusive of a child who is pregnant or purported to be married or pledged in marriage or is at risk of being unlawfully married or pledged in marriage); *Kawenda v. Minister of Justice*, CCZ (3 of 21) [2022] ZWCC 3 (May 24, 2022) (Zim.) (declaring unconstitutional the definition of "young person" as a boy or girl under the age of 16 years in section 61 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (2004) as well as term "extra-marital" in section 70(1), which previously permitted sexual exploitation of a child under 18 years in child marriage). *But see* Law of the Child Act, Cap. 13 (2009) § 9(3)(a) (Tanz.) (permitting child marriage under customary law as "[e]very parent shall have duties . . . towards his child which include the duty to protect the child from . . . violence, abuse . . . except where the parent has surrendered his rights and responsibilities in accordance with a written law or any traditional or customary arrangement."); *id.* § 83(2)(a) (prohibiting sexual exploitation of a child, but without reference to child marriage, "it shall be unlawful for any person to use inducement or coercion in the encouragement of a child to engage in any sexual activity . . .").

<sup>58</sup>*See, e.g., Gyumi*, [2019] TZCA 348, 1 T.L.R. 114 (affirming the Tanzania High Court's holding, Misc. Civil Cause No. 5 of 2016 declaring provisions permitting child marriage, sections 13 and 17 of the Law of Marriage Act, Cap. 29 unconstitutional); *Aboneka*, [2023] UGCC\_ (Uganda) (declaring the Customary Marriage (Registration) Act, Cap. 248, section 11(a), Marriage and Divorce of Mohammedans Act, Cap. 252, section 5(1)(a), and Hindu Marriage and Divorce Act, Cap. 250, sections 2(1)(c)-(d) and 3, null and void as these provisions contravene the Constitution of Uganda article 31(1) as amended by the Constitution (Amendment) Act, 2005, which sets the minimum age for marriage at 18 years); *Mudzuru*, [2016] ZWCC 12 (Zim.) (declaring the Marriage Act [Chapter 5:11] (1964) section 22(1) unconstitutional, resulting in the enactment of the Marriages Act [Chapter 5:17] in 2022); *Kawenda*, [2022] ZWCC 3 (Zim.) (suspending and ordering amendments to provisions of Criminal Law (Codification and Reform) Act [Chapter 9:23] (2004), which were declared unconstitutional as they permit sexual exploitation of a child under 18 years in child marriage).

<sup>59</sup>*See* Andrea J. Melnikas et al., *Perceptions of Minimum Age at Marriage Laws and Their Enforcement: Qualitative Evidence from Malawi*, 21 BMC PUB. HEALTH 1350 (2021) (illustrating how enforcement of underage marriage laws may have unintended consequences such as driving child marriage practices underground).

<sup>60</sup>U.N. DEP'T OF ECON. & SOC. AFFAIRS, STATISTICS DIV., SDG INDICATORS GLOBAL DATABASE, <https://unstats.un.org/sdgs/dataportal/database> (last visited Apr. 8, 2023).



marriage on behalf of a minor. Studies have found that girl child marriage is associated with increased maternal and child morbidity and mortality.<sup>61</sup> Although the association between early marriage and risk for HIV is unclear in the scientific literature, child marriage could indirectly affect risk for HIV infection. Emerging evidence supports that HIV risk is elevated during pregnancy and the postpartum period.<sup>62</sup> Girls who marry young, therefore, may be at risk for HIV due to earlier sexual initiation and childbearing. Further, as in the case of Eswatini, Lesotho, Uganda, Zambia, and Zimbabwe, any inconsistency within the pieces of national legislation providing the legal definition of child in reference to the marriageable age and age of majority should be harmonized.<sup>63</sup>

#### D. Rape

Rape is a criminal offence in all ten countries. Having moved away from the purely common law regime, the crime of rape is either codified as one of the offences against morality in the Penal Code<sup>64</sup> or is provided for under a standalone piece of legislation such as

<sup>61</sup> See Anita Raj & Ulrike Boehmer, *Girl Child Marriage and Its Association with National Rates of HIV, Maternal Health, and Infant Mortality Across 97 Countries*, 19 VIOLENCE AGAINST WOMEN 536 (2013); Suiqiong Fan & Alissa Koski, *The Health Consequences of Child Marriage: A Systematic Review of the Evidence*, 22 BMC PUB. HEALTH 309 (2022).

<sup>62</sup> Lynne M. Mofenson, *Risk of HIV Acquisition During Pregnancy and Postpartum: A Call for Action*, 218 J. INFECTIOUS DISEASES 1 (2018); Kerry A. Thomson et al., *Increased Risk of HIV Acquisition Among Women Throughout Pregnancy and During the Postpartum Period: A Prospective Per-Coital-Act Analysis Among Women With HIV-Infected Partners*, 218 J. INFECTIOUS DISEASES 16 (2018).

<sup>63</sup> See Sexual Offences and Domestic Violence Act No. 15 of 2018 § 2 (Eswatini) (defining “child” as “notwithstanding any other law to the contrary, a person under the age of eighteen years”); *id.* § 43 (“A person shall not marry a child in contravention of the Marriage Act No. 47 of 1964 . . . .”); *id.* § 196(1) (“All laws . . . inconsistent with the provisions of this Act are repealed . . . accordingly to the extent that they conflict with this Act.”); *but see* Marriage Act, No. 47 of 1964 § 3(2) (Eswatini) (“Minors below the age of twenty-one years but above the ages specified [male 18 and female 16 years] may marry with the consent of their legal guardian . . . .”); The Age of Majority Ordinance 62 of 1829 § 2 (Lesotho) (prescribing the legal age for attaining majority as 21 years old); Marriage Act 10 of 1974 § 25(1) (Lesotho) (“No marriage officer shall solemnize a marriage [of a minor] . . . .”); *but see* Sexual Offences Act 3 of 2003 § 2 (Lesotho) (defining “child” for the purpose of sexual offences against children as a person below 16 years, and for the purpose of commercial sexual exploitation of children, a person below 18 years); Children’s Protection and Welfare Act 7 of 2011 § 3 (Lesotho) (defining “child” as under 18 years old); *id.* § 2(4) (“Where there is anything to the contrary or less protective or less promotive in any law, the provisions of this Act shall apply.”); Constitution (Amendment) Act, No. 11 (2005) § 10 (Uganda) (amending the 1995 Uganda Constitution, article 31(1) as “[a] man and a woman are entitled to marry only if they are each of the age of eighteen years and above”); *but see* Marriage Act (1904) Cap. 251 § 17 (Uganda) (containing an inconsistent age threshold, such as “[i]f either party to an intended marriage . . . is under twenty-one years of age, the written consent . . . must be produced”); Marriage Act, Cap. 50 (1964) § 17 (Zam.) (providing for the minimum age with capacity to marry without third party consent as 21 years); *but see* Anti-Gender-Based Violence Act No. 1 (2011) § 3(1) (Zam.) (defining “child” as a person below 16 years); Juveniles Act, Cap. 53 (2011) § 2 (Zam.) (defining “child” as below 16 years while “juvenile” as below 19 years, but the Act was repealed in its entirety by the Children’s Code Act No. 12 (2022)); Children’s Code Act No. 12 (2022) § 2 (Zam.) (interpreting “child” as the meaning assigned in the Constitution); CONST. OF ZAMBIA (2016) art. 266 (defining “child” as a person who has attained, or is below, the age of eighteen years); Marriages Act [Chapter 5:17] (2022) § 3(1) (Zim.) (repealing the provision on marriage of minors with third party consent under the Marriage Act [Chapter 5:11] (1964) and providing instead that “[n]o person under the age of eighteen years may contract a marriage or enter into an unregistered customary law marriage or a civil partnership.”); *but see* Children’s Act [Chapter 5:06] (1971) § 2 (Zim.) (defining “child” as a person under 16 years old while “young person” as a person of the age 16 and above and under 18); Children’s Amendment Bill, 2021 cl. 3 (Zim.) (amending the definition of child under the Children’s Act [Chapter 5:06], *supra*, to be under 18 years old while eliminating the definition of “young person”). See also *supra* note 54.

<sup>64</sup> See PENAL CODE, Cap. 7:01 (2015) § 132 (Malawi) (“Any person who has unlawful carnal knowledge of a woman or a girl . . . shall be guilty of the felony termed rape.”); *id.* §§ 2(1)(a), 3(b) (recognizing the common law and comparable English criminal law along with the Penal Code, Cap. 7:01, which does not affect offences against common law); Lei No. 24/2019 Lei de Revisão do Código Penal e revoga . . . o Código Penal aprovado pela Lei No. 35/2014, de 31 de Dezembro 2014 [Act No. 24/2019 Revised Penal Code revoking . . . the Penal Code approved by the Act No. 35/2014 of 31 December 2014], 24 de Dezembro de 2019 B.D.R. art. 201 (Mozam.) (expanding the ambit of the offence of rape from the 2014 Penal Code, article 218); PENAL CODE, Cap. 16 (2022) § 130(2) (Tanz.) (“A male person commits the offence of rape if he has sexual intercourse with a girl or woman under circumstances . . . .”); *id.* § 138 (providing for the offence of defilement of a married girl under 18 years by her husband, whether with or without her consent); Sexual Offences Special Provisions Act No. 4 (1998) § 5 (Tanz.) (repealing the definition of rape under the previous edition of the Penal Code, Cap. 16 (1930), section 130, “[a]ny person who has unlawful carnal knowledge of a woman or girl . . . .”); Penal Code Act (1950) Cap. 120 § 123 (Uganda) (“Any person who has unlawful carnal knowledge of a woman or girl . . . .”); Penal Code (Amendment) Act, No. 8 (2007) Acts Supp. No. 4 to UGANDA GAZETTE VOL. 100, No. 43 § 2 (revising the Penal Code, section 129 on “defilement” as “[a]ny person who performs a sexual act with another person who is below [18 years] . . . .”); Sexual Offences Bill, No. 32 (2019) § 2 (Uganda) (attempting to strengthen sexual offences legislation including the rape provision in the Penal Code



the Sexual Offences Acts.<sup>65</sup> The legal elements of sexual offences including rape vary considerably from jurisdiction to jurisdiction with respect to the terminology, the scope of sexual acts, gender neutrality, age of the victim and the accused, consent and other defenses, and the range of criminal penalties, among others, but marital rape, i.e., rape of one spouse by the other within marriage, is explicitly criminalized in Eswatini, Mozambique, and South Africa,<sup>66</sup> and conditionally in Lesotho and Zimbabwe.<sup>67</sup> Notably, Eswatini in 2018 enacted the Sexual Offences and Domestic Violence Act and made marital rape unlawful for the first time.<sup>68</sup> In the other five countries, marital status remains a defense against the criminal offence of rape, meaning that non-consensual sex during marriage is exempted from criminal prosecution as a common law marital exemption to rape in Kenya, Malawi, Tanzania, Uganda, and Zambia.<sup>69</sup> This is so even where sexual violence within marriage

Act, Cap 120, but yet to be enacted); Penal Code Act, Cap. 87 (2012) § 132 (Zam.) (“Any person who has unlawful carnal knowledge of a woman or girl . . . .”); *id.* § 138 (providing for the offence of defilement of a child along with a defense of mistaken belief as to the victim’s age below 16 years); Criminal Law (Codification and Reform) Act [Chapter 9:23] (2004) § 65(1) (Zim.) (repealing the Sexual Offences Act [Chapter 9:21] (2001) and codifying sexual crimes including rape as “[i]f a male person knowingly has sexual intercourse or anal sexual intercourse with a female person . . . .”); *id.* § 3 (repealing the non-statutory Roman-Dutch criminal law to the extent of the Criminal Law Code in effect).

<sup>65</sup>Sexual Offences and Domestic Violence Act, No. 15 of 2018 §§ 3, 196 (Eswatini) (repealing the common law crime of rape and the Girls’ and Women’s Protection Act, 1920, No. 39 of 1920, including the offence of “unlawful carnal connection” with girls); Sexual Offences Act, No. 3 (2006) KENYA GAZETTE SUPP. NO. 52 §§ 3, 49, 2nd sched. (repealing most provisions for “offences against morality” of the Penal Code (1930) Cap. 63, including rape provisions); Sexual Offences Act 3 of 2003 § 37 (Lesotho) (repealing the offence of rape at common law and related Women and Girls Protection Proclamation, No. 14 of 1949); *id.* § 3 (providing for the offence of “unlawful sexual act” in place of “rape”); Penal Code Act 6 of 2012 § 52 (Lesotho) (providing for the offence of “unlawful sexual act” in place of “rape”); *id.* § 2 (providing that the Penal Code does not repeal or supersede other legislation including the Sexual Offences Act, 2003 as “nothing in this Code shall affect the liability . . . for an offence against any other written law in force in Lesotho other than this Code” but leaving some inconsistency between the Penal Code and the Sexual Offences Act); Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 §§ 3, 68(1)(b) (S. Afr.) (repealing the common law crimes of rape).

<sup>66</sup>Sexual Offences and Domestic Violence Act, No. 15 of 2018 § 151 (Eswatini) (“A marital or other relationship, previous or existing, shall not provide a defence to any offence under this Act.”); Lei No. 29/2009 Lei sobre a Violência Doméstica praticada contra a Mulher [Act No. 29/2009 Law on Domestic Violence Perpetrated Against Women], de 29 de Setembro de 2009, B.D.R. art. 17 (Mozam.) (providing that non-consensual intercourse with one’s spouse is punishable with penalty); Lei No. 24/2019 Lei de Revisão do Código Penal [Act No. 24/2019 Revised Penal Code], 24 de Dezembro de 2019 B.D.R. (Mozam.) (eliminating articles 218–228 of the 2014 Penal Code on crimes against sexual freedom, thereby making the Law on Domestic Violence Perpetrated Against Women stand as the only provisions in effect for offences of sexual violence); Lei No. 19/2019 Lei de Prevenção e Combate às Uniões Prematuras [Act No. 19/2019 Law on Preventing and Combating Premature Unions] de 22 de Outubro de 2019, B.D.R. arts. 2, 39 (Mozam.) (providing for a criminal penalty for rape committed against a child within a premature union); Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 § 56(1) (S. Afr.) (providing that “[w]henever an accused person is charged with an offence [of rape or sexual assault] it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant,” replacing the Prevention of Family Violence Act 133 of 1993, section 5 “a husband may be convicted of the rape of his wife”).

<sup>67</sup>*Compare* Sexual Offences Act 3 of 2003 § 3(1) (Lesotho) (“[A] sexual act is a prima facie unlawful if it takes place in any coercive circumstances.”), and *id.* § 2 (interpreting “coercive circumstances” without reference to consent), and *id.* § 3(3) (providing that “[m]arriage or any other relationship shall not be a defence against a charge under this Act where it is shown that . . . and listing sickness, carrying a sexually transmissible disease, use of violence or threats, judicial order of restraint or separation, and desertion as a condition), with Penal Code Act 6 of 2012 § 52(2) (Lesotho) (providing that “[a] sexual act is unlawful if committed under the following circumstances . . . . A person does not consent to sexual intercourse if . . . he or she withholds consent from an act of sexual intercourse with a person to whom he or she is currently married, and one of the following conditions is satisfied . . .” and listing sickness, use of abusive language, violence or threats, judicial order of restraint or separation as such conditions); Criminal Law (Codification and Reform) Act [Chapter 9:23] (2004) § 68(a) (Zim.) (“It shall not be a defence to a charge of rape, aggravated indecent assault or indecent assault that the female person was the spouse of the accused person . . . [p]rovided that no prosecution shall be instituted against any husband for raping or indecently assaulting his wife in contravention of [sections 66 or 67 on aggravated indecent assault or indecent assault, respectively] unless the Attorney-General has authorised such a prosecution . . .”).

<sup>68</sup>Sexual Offences and Domestic Violence Act, No. 15 of 2018 § 151 (Eswatini).

<sup>69</sup>*See* Sexual Offences Act, No. 3 (2006) §§ 3(1), 43(1), 43(5) (Kenya) (exempting lawfully married spouses from the ambit of “intentional and unlawful acts” of rape committed against them as implied consent given); *id.* § 49 & 2nd sched. 3(2) (revising a provision on rape in the Criminal Procedure Code, Cap. 75, section 184 as “[w]here a person is charged with rape and the court [finds] that he is not guilty of that offence but that he is guilty of [another offence under] the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.”); PENAL CODE, Cap. 7:01 (2015) § 132 (Malawi) (implying that rape of a spouse with her implied consent is exempted from the offence of rape as “[a]ny person who has unlawful carnal knowledge of a woman . . . with her consent if the consent is obtained . . . in the case of a married woman, by personating her husband, shall be guilty of . . . rape.”); PENAL CODE, Cap. 16 (2022) § 130(2)(a), (d), (e) (Tanz.) (providing for the circumstances in relation to the marital relationship and

constitutes an offence of domestic violence.<sup>70</sup> Those who experience marital rape may suffer poor maternal health, repeat-infections with sexually transmitted infections, and long-term exposure to the risk of HIV infection.<sup>71</sup> Marital rape prevents individuals from being able to take control of their own sexual and reproductive health and can result in mental health impacts including depression and suicidal thoughts.<sup>72</sup>

## E. Reporting

With respect to rights and duties concerning initial reporting of alleged GBV, legal provisions facilitating or mandating health workers, service providers or witnesses to report cases of GBV committed against adults to law enforcement are found for all countries except Tanzania and Zimbabwe.<sup>73</sup> For example, Uganda's Domestic Violence Act requires that clinicians with a reasonable suspicion of domestic violence against a patient inform

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age of the wife under which rape is committed such as “not being his wife, or being his wife who is separated from him without her consenting” and “with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married,” and with or without her consent when the woman is under 18 years “unless the woman is his wife who is fifteen or more years of age and is not separated from the man.”); *id.* § 138(1) (“Any person who, being married to a woman under [18 years] has or attempts to have sexual intercourse with her, whether with or without her consent, before she has attained [18 years] is guilty of an offence [of defilement instead of rape] . . . .”); *id.* § 20 (providing for a gender-specific defence to criminal liability as “on a charge against a [married] wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence and under the coercion of the husband.”); Penal Code Act (1950) Cap. 120 § 123 (Uganda) (implying, similar to Malawi's Penal Code, Cap. 7:01, that marital rape with implied consent is exempted from rape as “[a]ny person who has unlawful carnal knowledge of a woman . . . with her consent if the consent is obtained . . . in the case of a married woman, by personating her husband, commits the felony termed rape.”); Sexual Offences Bill, No. 35 (2015) Bills Supp. No. 19 to UGANDA GAZETTE VOL. 108, No. 73 § 2(2) (permitting a cohabiting spouse to refuse consent to a sexual act to recognize an offence of marital rape, but yet to be enacted as of 2022); *id.* § 2(3) (providing for a criminal offence of marital sexual assault); Penal Code Act, Cap. 87 (1930) § 132 (Zam.) (exempting, similar to Uganda and Malawi's penal codes, *supra*, marital rape with implied spousal consent from the offence of rape as “[a]ny person who has unlawful carnal knowledge of a woman . . . with her consent, if the consent is obtained . . . in the case of a married woman, by personating her husband, is guilty of the felony termed ‘rape.’”).

<sup>70</sup>See Protection Against Domestic Violence Act, No. 2 (2015) § 3(1)(a)(vi) (including “sexual violence within marriage” in the meaning of domestic violence as a civil offence); The Marriage Act, No. 4 (2014) § 84(1) (Kenya) (“The court may order a party to refrain from molesting a spouse or former spouse.”); Prevention of Domestic Violence Act, Cap. 7:05 (2006) § 2 (Malawi) (defining “domestic violence” as any criminal offence arising out of various types of abuse such as sexual abuse committed within marriage, listed under “offences against morality” of the Penal Code, Cap. 7:01); Domestic Violence Act, No. 3 (2010) §§ 2–4 (Uganda) (defining “domestic violence” as inclusive of “sexual abuse” and imposing criminal and civil liability); *id.* § 5 (“The consent of the victim shall not be a defence to a charge of domestic violence under this Act.”); Anti-Gender-Based Violence Act No. 1 (2011) § 3 (Zam.) (defining “sexual abuse” as, whether married or not, the engagement of a person in sexual contact, including sexual conduct that . . . violates the person's sexual integrity); *id.* § 2(1) (providing that the Criminal Procedure Code, the Penal Code and other written law apply to inquire into and try GBV cases, although corresponding provisions for marital rape are missing therein). See *also* COMM. ON NAT'L GUIDANCE & GENDER MATTERS, NAT'L ASSEMBLY OF ZAMBIA, REPORT ON THE PERFORMANCE AUDIT REPORT OF THE AUDITOR GENERAL ON THE MANAGEMENT AND DISPOSAL OF GENDER BASED VIOLENCE CASES IN ZAMBIA FROM 2017 TO 2022, at 15 (2022) [hereinafter NAT'L ASSEMBLY OF ZAMBIA REPORT] (recognizing the need to create a direct link between acts of GBV and offences that can be prosecuted in accordance with the Penal Code Act, Cap. 87 and the Criminal Procedure Code Act, Cap. 88).

<sup>71</sup>See Ruth L. Fischback & Barbara Herbert, *Domestic Violence and Mental Health: Correlates and Conundrums Within and Across Cultures*, 45 SOC. SCI. & MED. 1161 (1997); Joanna Crichton, Celestine Nyamu Musembi & Anne Ngugi, *Painful Tradeoffs: Intimate-Partner Violence and Sexual and Reproductive Health Rights in Kenya* (Inst. of Dev. Stud., Working Paper No. 312, 2008); Esther Mugweni et al., *Traditional Gender Roles, Forced Sex and HIV in Zimbabwean Marriages*, 14 CULTURE, HEALTH & SEXUALITY 577 (2012).

<sup>72</sup>See Fischback & Herbert, *supra* note 71; Crichton et al., *supra* note 71.

<sup>73</sup>Tanzania lacks GBV or domestic violence-specific legislation in force as of 2022, other than criminal provisions for assaults and “offences against morality” in the Penal Code, Cap. 16, and related provisions found in the Law of Marriage Act, Cap. 29 § 66 (“[f]or the avoidance of doubt, . . . notwithstanding any custom to the contrary, no person has any right to inflict corporal punishment on his or her spouse”) and the HIV and AIDS (Prevention and Control) Act, Cap. 431 (2008) § 21(3) (“[a]ny person who abuse [sic] his spouse or sexual partner either verbally, physically or by conduct in connection with compliance with the provisions of this Act commits an offence”). However, Tanzania provides for child protection mandating reporting of violence committed against a child under the Law of the Child Act, Cap. 13 (2009) § 95(1). In contrast, Zimbabwe has domestic violence legislation in effect but lacks an initial reporting provision other than prescribing who may apply for a court's protection order on behalf of the victim. See Domestic Violence Act [Chapter 5:16] (2006) §§ 2, 7 (Zim.) (providing that any person acting with the consent of the complainant or any person acting as the “complainant's representative” [e.g., a police officer, social welfare officer, employer, religious institution, private voluntary organization, relative, neighbor, fellow employee, counselor] with the leave of the court may apply for a protection order).

said patient of their legal options to seek protection and other remedy and requires that the clinician testify in court should there be a court case. However, it does not mandate that the clinician report the suspected case of domestic violence.<sup>74</sup> Mozambique's Law on Domestic Violence Against Women makes it voluntary for any person with knowledge of a domestic violence incident to file a complaint to the authority, with the exception of health or medicolegal service providers, who are required to submit a patient's clinical report to the police or prosecutor's office whenever they receive a suspected case of domestic violence.<sup>75</sup> Medical practitioners and nurses in South Africa have similar obligations to conduct medicolegal examination of the victim under its criminal sexual offences regulations instead of domestic violence provisions, but they are not required to report the incident directly to police on behalf of the patient but are only required to inform the victim to lay a charge with police.<sup>76</sup> Likewise, Kenya, Malawi, and Zambia have laws authorizing but not requiring report of GBV to police or other public officials.<sup>77</sup> In contrast to these, as of 2022 Eswatini is the only country of the ten that has a sweeping mandatory reporting provision in relation to domestic violence and sexual offences committed against adult survivors. Eswatini under its Sexual Offences and Domestic Violence Act expands the scope of such reporting duty to "[a]ny person who witnesses or receives any information of an offence . . . or has reasonable grounds to believe that an offence . . . has taken place or is about to take place,"<sup>78</sup> and imposes criminal liability on any person who fails to meet this reporting obligation, including those who coerce the victim not to report.<sup>79</sup> Finally, Lesotho's Counter Domestic Violence Act enacted in 2022 creates a similar general reporting requirement for alleged acts of domestic violence, but without imposing criminal liability in its enforcement.<sup>80</sup>

With respect to violence or sexual abuse committed against children, all the countries except Kenya generally require referral of cases to the police or other officers on the part of service providers or community members,<sup>81</sup> whereas the reporting is voluntary in Kenya.<sup>82</sup>

<sup>74</sup>See Domestic Violence Act, No. 3 (2010) §§ 2, 8 (Uganda) (providing for the duty of medical practitioners and clinical officers to assist the victim by informing of options available within the judicial system or by testifying in court, but not mandating the initial reporting); *see also* Domestic Violence Regulations, No. 59 (2011) Statutory Instruments Supp. No. 34 to UGANDA GAZETTE VOL. 104, No. 67 reg. 46(1)(g) (providing for a medical practitioner's duty to advise the victim to report the matter to the police).

<sup>75</sup>See Lei No. 29/2009 Lei sobre a Violência Doméstica praticada contra a Mulher [Act No. 29/2009 Law on Domestic Violence Perpetrated Against Women], de 29 de Setembro de 2009, B.D.R. art. 23 (Mozam.) (providing for voluntary submission of a complaint to the police or prosecutor on behalf of a victim by members of the victim's family, health agents, social security agents, members of civil society organizations or anyone who has knowledge of the fact of domestic violence); *id.* art. 25 (requiring that health or medicolegal services prepare a detailed report based on assessment of the victim and send it to the police or prosecutor whenever they receive cases of domestic violence).

<sup>76</sup>See Criminal Law (Sexual Offences and Related Matters) Regulations, GN R. 561 of GG 31076 (22 May 2018) reg. 2(1), (3) (S. Afr.).

<sup>77</sup>See Protection Against Domestic Violence Act, No. 2 (2015) § 7(1) (Kenya) ("Any person who reasonably suspects that [domestic violence has been committed] may give such information to the police officers or any other person in authority."); *id.* at § 6(1) ("A person to whom a complaint of domestic violence is made [whether a police officer or not] . . . shall advise the complainant of all relief measures available . . . [their right to apply for such relief] . . . and how the complainant may lodge a criminal complaint."); Prevention of Domestic Violence Act, Cap. 7:05 (2006) §§ 31, 33, 42 (Malawi) ("Any person who witnesses . . . or has reason to believe that [domestic violence has been committed] may report to the police or give information to an enforcement officer [public officers designated within the Ministry of Gender, Children, Disability and Social Welfare], who shall then report the matter to the police."); *id.* §§ 2, 33(4), 43 (authorizing "service providers" including community policing forums, faith-based organizations, government institutions, non-governmental, voluntary or charitable organizations, to render necessary assistance and inform the victim of the right to available legal remedies, but not mandating such assistance or initial reporting); Anti-Gender-Based Violence Act No. 1 (2011) § 6(3) (Zam.) ("[A] complaint of [GBV] may be filed [with the police] by any other person or institution with information about the [GBV] where the intervention is in the interest of the victim.").

<sup>78</sup>Sexual Offences and Domestic Violence Act, No. 15 of 2018 § 70(1) (Eswatini).

<sup>79</sup>*Id.* §§ 70(2), 71.

<sup>80</sup>Counter Domestic Violence Act 14 of 2022 § 10(7) (Lesotho) ("A person who suspects that an offence of domestic violence is being or has been committed shall give such information to a police officer or any other person in authority.").

South Africa previously limited the third party's reporting obligations for sexual violence to those offences committed against a child and a person with a mental disability,<sup>83</sup> but in 2021 expanded the classes of sexual offence victims triggering mandatory reporting to adult survivors that meet the definition of a "person who is vulnerable."<sup>84</sup> Alongside these reinforced criminal sexual offences provisions, South Africa amended its Domestic Violence Act to enlarge the scope of "domestic violence" and create differential reporting duties in connection with domestic violence against a child, a person with mental disability or an "older person," depending on whether persons reporting an incident are "functionaries" or other ordinary adult persons,<sup>85</sup> while protecting these informants from civil and criminal liability.<sup>86</sup>

<sup>81</sup> See Children's Protection and Welfare Act, 2012, No. 6 of 2012 §§ 23(1)(a)–(b), 23(2), 33–36 (Eswatini) (providing for the reporting duty on the part of medical officer, member of the family, child care provider, and member of the community to inform immediately either a social worker or police officer of a child in need of care and protection if the child has been physically, psychologically or emotionally injured or sexually abused); Sexual Offences Act 3 of 2003 §§ 8(3), 9 (Lesotho) (providing for the mandatory reporting concerning a child case of molestation or persistent sexual abuse as "[a] person who fails to report . . . commits an offence" but lacking corresponding provisions on the reporting of adult cases); Child Care, Protection and Justice Act, Cap. 26:03 (2010) §§ 33–36 (Malawi) (providing for reporting duty of medical officers, members of the child's family, child care providers and members of the community such as "[i]f a member of the community believes on reasonable grounds that a child is physically . . . injured . . . or is sexually abused, he/she shall immediately inform a chief, a police officer or a social welfare officer"); *id.* §§ 23–26 (defining the scope of children in need of care and protection and authorizing a police officer, social welfare officer, a chief or any member of the community to place such vulnerable children into temporary custody or a place of safety); Lei No. 7/2008 Lei de Promoção e Protecção dos Direitos da Criança [Act No. 7/2008 Law on the Promotion and Protection of the Rights of the Child], de 9 de Julho de 2008, B.D.R. art. 20 (Mozam.) (providing for health, social and educational service units' duty to report suspected or confirmed cases of abuse or violence against a child to the nearest police); Lei No. 19/2019 Lei de Prevenção e Combate às Uniões Prematuras [Act No. 19/2019 Law on Preventing and Combating Premature Unions], de 22 de Outubro de 2019, B.D.R. art. 27 (Mozam.) (providing for a public servant or religious, traditional, or local authority's duty to report a child marriage celebration); Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 § 54 (S. Afr.); Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021 § 26 (S. Afr.); Domestic Violence Amendment Act 14 of 2021 § 4 (S. Afr.); Law of the Child Act, Cap. 13 (2009) § 95(1) (Tanz.) (providing that "any member of the community who has evidence or information" has the duty to report a matter of infringement of a child's rights to the local authority); Children Act (2016) Cap. 59 § 42A(3) (Uganda) ("[I]t shall be mandatory for [medical practitioners, social workers or teachers] to report on any matter which affects the well being of a child under their charge . . ."); *id.* § 42A(2) ("A person who on reasonable grounds believes that a child has been abused or is in imminent danger which may result in physical injury, sexual abuse . . . may report to a designated child protection organization or authority."); Domestic Violence Regulations, No. 59 (2011) reg. 46(1)(j)–46(2) (Uganda) (creating a medical practitioner's duty to prepare a report on a child victim case for the police); Children's Code Act No. 12 (2022) §§ 167(1), 168(4) (Zam.) ("A person who, or an institution that, has reasonable grounds to believe that a child is in need of care and protection [such as when a child is exposed to GBV or likely to be subjected to child marriage] shall report the matter to an authorised officer."); *id.* § 172(3) (requiring on the part of a health facility or health practitioner that they immediately report to an authorised officer if it appears to them a serious offence is committed against a child and that they take necessary measures to record and preserve evidence regarding the condition of the child); Children's Act [Chapter 5:06] (2001) §§ 2, 14(1)(b) & 1st sched. (Zim.) ("Any police officer, health officer . . . may remove a child . . . from any place to a place of safety [including police station or hospital] . . . if there are reasonable grounds for believing that an offence [of assault, sexual offence or offence involving bodily injury] is being or has been committed [against] that child . . ."); *id.* § 14(3) ("A police officer, education officer or health officer . . . shall notify a probation officer . . . of such removal or reception [of a child] as soon as possible . . .). *But see* Children's Amendment Bill, 2021 cl. 9 (Zim.) (inserting a new section (9A) under the Children's Act [Chapter 5:06], *supra*, providing that "any person who is required or likely to interact with children in his or her professional or vocational capacity [such as teachers, medical practitioners, legal practitioners and ministers of religion] . . . shall have a duty to report . . . abuse or suspected abuse [including sexual abuse] to a police officer or child protection officer.");

<sup>82</sup> The Children Act, No. 29 (2022) §§ 2, 144–45 (Kenya) ("Any person who has reasonable cause to believe that a child is in need of care and protection [such as the one exposed to any form of violence or sexual abuse] may report the matter to the nearest authorised officer [including a police officer, chief, medical practitioner and teacher] . . .").

<sup>83</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 § 54 (S. Afr.).

<sup>84</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021 cl. 12(c) (S. Afr.) (adding definition of "person who is vulnerable," encompassing "female under [25 years] who receives tuition at a higher education . . . as defined in . . . Higher Education Act, 1997); *id.* cl. 26 (amending section 54 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, with enhanced obligations of any person to report to police of known and suspected sexual offences committed against a "person who is vulnerable," *supra*).

<sup>85</sup> Domestic Violence Amendment Act 14 of 2021 cls. 2, 4 (S. Afr.) (inserting new section 2A on reporting obligations of "functionaries," i.e., medical practitioners, health care personnel, social workers, public health officials, educators, or care givers, as "[a] functionary[] who . . . obtains information which . . . causes them to believe or suspect . . . that a child, a person with disability or an older person [male 65 or older and female 60 or older] may be a complainant [of domestic violence] . . . must . . . submit the



As illustrated above, reporting of GBV to law enforcement varies from Eswatini's strict mandatory reporting to Uganda and Zambia's approach wherein officials must notify survivors of their rights but need not report GBV cases, allowing women to receive medical care without fear of reporting. Kenya's approach is to encourage reporting while protecting witnesses, instead of imposing reporting obligations on them.<sup>87</sup>

Laws governing the third party referral of suspected GBV may contribute indirectly to improved access to justice. Empirical data on whether women experiencing violence have sought help and from whom is available for most of the ten countries through the Demographic and Health Surveys.<sup>88</sup> A majority of the women surveyed report asking their family for help to stop the violence, whereas the percentage of women seeking help from the police was significantly low, ranging from 9% in Tanzania to 33% in South Africa. These data reveal the survivor's inability or unwillingness to contact the police, which may be due to perceived or real lack of enforcement of laws and protection for survivors once assistance is sought.

In reality, a multiplicity of barriers likely exist to reporting GBV including gendered shame and stigma, cost associated with transport or a fee for police forms, perceived impunity for perpetrators, lack of awareness of and access to available legal services, corruption and lack of trust in police, cultural beliefs and norms, social alienation, threat of losing children, fear of getting the perpetrator in trouble, and the belief that violence is normal or not serious enough to report.<sup>89</sup> Mandated reporting laws, while usually put in place to protect the victim and reduce harm from the perpetrator, may have unintended, harmful consequences including retaliation and additional violence toward the victim or person reporting the abuse. Both mandatory and voluntary reporting could cause further trauma by engaging police, teachers, or family members, particularly if the perpetrator is a close contact. Women may be reluctant to seek medical services or report experiences of violence to a clinical care provider if they know their partners will be reported or if the provider has misconception, judgments, unaccepting attitudes, or stereotypes.<sup>90</sup> They may particularly fear the report will result in further violence and victimization if appropriate justice systems are not in place to successfully prosecute domestic violence and provide them with adequate protection and care that are needed. For these reasons, as a matter of public health policy it

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report to a social worker or [police]" while inserting new section 2B imposing similar reporting obligations on ordinary adult persons other than functionaries).

<sup>86</sup>See *id.* cl. 4 (providing that a functionary or person who makes the report in good faith is not liable to civil, criminal, or disciplinary action and is entitled to have their identity kept confidential).

<sup>87</sup>See Protection Against Domestic Violence Act, No. 2 (2015) § 7(2)–(6) (Kenya) (protecting a person assisting, reporting and disclosing information about domestic violence other than those who provide false information maliciously intended to injure another person); *id.* § 6(4)(b) ("The Inspector-General of Police shall ensure the development of procedures regarding matters [on domestic violence] including . . . facilitating the reporting process so that complainants may report to the police without fear or otherwise . . ."); Sexual Offences Act, No. 3 (2006) § 38 (Kenya)(criminalizing "[a]ny person who makes false allegations against another person to the effect that the person has committed [a sexual] offence," making it difficult for a victim or witness to come forward to report cases); The Statute Law (Miscellaneous Amendments) Act, No. 12 (2012) KENYA GAZETTE SUPP. NO. 72 § 2 sched., at 32 (lowering the barrier to reporting by removing the section 38 of the 2006 Sexual Offences Act, *supra*).

<sup>88</sup>Trevor N. Croft et al., *Help Seeking to Stop the Violence*, in GUIDE TO DEMOGRAPHIC AND HEALTH SURVEYS [DHS] STATISTICS DHS-7 (VER. 2)17.44–17.45 (2020).

<sup>89</sup>See, e.g., Lucy R. Mgopa et al., *Clinical Care of Victims of Interpersonal Violence and Rape in Tanzania: A Qualitative Investigation*, 13 INT'L J. WOMEN'S HEALTH 727 (2021); Ellen Turner et al., *Referral of Sexual Violence Against Children: How Do Children and Caregivers Use a Formal Child Protection Mechanism*, in Harare, Zimbabwe?, 2 SSM – QUALITATIVE RSCH.IN HEALTH 1 (2022).

<sup>90</sup>See Mgopa et al., *supra* note 89, at 728.



may be preferable to afford discretion to individual GBV survivors in deciding whether to report acts of GBV voluntarily to the authority. However, this comes at the cost of overall underreporting of GBV incidents, and fewer number of investigations and prosecutions, which would substantially hamper evidence-based policy making and also weaken the criminal and civil justice system. A counterbalancing area for improvement is to strengthen the initial reporting pathways so that victims as well as community members who encounter a GBV incident can be sufficiently protected from further exposure to the threat of violence and intimidation while seeking medical care, shelter, safety, support, and justice for the survivors in a timely and effective manner.<sup>91</sup> It is equally important to strengthen judicial enforcement mechanisms so that survivors may be more inclined to access institutional services and report to the authority, believing that perpetrators would face serious and enforceable consequences, while survivors themselves would receive needed protections. Furthermore, allegations that result in convictions could set a precedent and serve as a deterrent for potential perpetrators.<sup>92</sup>

## F. Medical and Police Response

Legal provisions addressing GBV response articulate rights and duties associated with the provision of health, legal, and other social services to survivors of GBV in addition to mandatory or voluntary reporting of incidents as discussed in the previous section. Various GBV response mechanisms have been established under law. These include timely provision of post-exposure prophylaxis (PEP) to prevent HIV acquisition from rape,<sup>93</sup> legal complaint and redress procedures, protocols for documenting evidence, and others.<sup>94</sup> For example, consistent with government policies with or without statutory grounds, most of the countries

<sup>91</sup> See, e.g., Victim Support Services Bill, 2019, GN 791 of GG 43528 (17 July 2020) (S. Afr.) (seeking to protect the rights of victims and direct that all service providers dealing with a victim treat such victim with dignity and respect regardless of their citizenship, race, gender, culture, religious and personal circumstances).

<sup>92</sup> See, e.g., Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 13 of 2021 (S. Afr.) (expanding the scope of the National Register for Sex Offenders).

<sup>93</sup> See generally WHO, RESPONDING TO CHILDREN AND ADOLESCENTS WHO HAVE BEEN SEXUALLY ABUSED: WHO CLINICAL GUIDELINES 23 (2017).

<sup>94</sup> See, e.g., Protection Against Domestic Violence Act, No. 2 (2015) § 6 (Kenya) (requiring that police inform complainants of available relief including access to shelter, medical and other assistance, and their rights to apply for judicial relief and lodge a criminal complaint); Sexual Offences (Medical Treatment) Regulations, Legal Notice No. 133 (2012) reg. 4 (Kenya) (requiring that police who receives a report of sexual offence notify a medical practitioner and refer the victim to them at any health facility); Counter Domestic Violence Act 14 of 2022 § 10(6) (Lesotho) (creating police's duties to advise a victim of their legal rights and to obtain access to shelter, counselling or medical treatment); Prevention of Domestic Violence Act, Cap. 7:05 (2006) §§ 34, 47 (Malawi) (providing for duties on the part of police officers including duty to respond to every complaint or report alleging domestic violence whether the complainant is the victim or not); *id.* §§ 2, 43 (authorizing service providers, including community policing forums and non-governmental organizations to assist the victim upon notice of an incident); Lei No. 29/2009, Lei sobre a Violência Doméstica praticada contra a Mulher [Act No. 29/2009 Law on Domestic Violence Perpetrated Against Women], de 29 de Setembro de 2009, B.D.R. art. 22 (Mozam.) (requiring that police and health service organizations provide urgent care to the domestic violence victim); Domestic Violence Act, No. 3 (2010) § 7 (Uganda) (requiring that police officers assist the victim in obtaining shelter, a medical examination and treatment, if necessary, and in advising them of the right to lodge a criminal complaint and offering procedural guidance); *id.* § 8 (providing for duties on the part of health practitioners and clinical officers to assist the victim); Uganda Police Notice, GN No. 143 (2012) UGANDA GAZETTE VOL. 105, No. 11, at 90–102 (publishing amended Police Form 3 (Medical Examination of an Injured Person) and Police Form 3A (Medical Examination of a Victim of Sexual Assault) with improved content, which authorize not only medical officers but also clinical officers and registered midwives to examine a survivor, document evidence, and testify in court); Anti-Gender-Based Violence Act No. 1 (2011) § 5 (Zam.) (establishing duties on the part of “police officer, labour inspector, social worker, counselor, medical practitioner, legal practitioner, nurse, religious leader, traditional leader, teacher, employer ... with information” of a GBV incident to inform a victim of their rights to basic support and services available such as shelter, medical treatment, legal services and counseling, and of their right to lodge a complaint against the respondent); *id.* §§ 7–8 (requiring that the police respond promptly to a case of GBV reported by the victim or any other person and offer protection before and after filing of a complaint); Children's Code Act No. 12 (2022) § 172(1) (Zam.) (requiring that an officer responsible for a place of safety or an authorized officer, if it appears that a child in a place of safety is in need of medical care, take the child to a health facility for appropriate treatment and care of the child); Domestic Violence Act [Chapter 5:16] (2006) § 5(2) (Zim.) (requiring that

have established special police units to effectively implement and enforce sexual offences and domestic violence laws on the ground,<sup>95</sup> as well as one-stop service facilities that provide comprehensive multi-sectoral coordinated services to victims of sexual and domestic violence.<sup>96</sup> As illustrated by case studies in Kenya and Tanzania,<sup>97</sup> these community-based multi-sectoral coordination facilities are designed to provide clinical, police and legal support services for improved reporting of and response to GBV including violence against

police officers obtain shelter or medical treatment for the complainant or assist them in any other suitable way and advise them of the right to apply for legal relief and to lodge a criminal complaint).

<sup>95</sup>See, e.g., Sexual Offences and Domestic Violence Act, No. 15 of 2018 §§ 190–91 (Eswatini) (establishing Domestic Violence, Child Protection and Sexual Offences Unit within the Royal Swaziland Police Service); NAT'L POLICE SERV., POLICARE POLICY JUNE 2021, at ix (2021) (Kenya) ("The establishment of POLICARE as a component of the [National Police Service] where members of the public can receive and record complaints relating to [GBV] is . . . statutory."); THE KINGDOM OF LESOTHO, COMBINED SECOND TO EIGHTH PERIODIC REPORT UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS AND INITIAL REPORT UNDER THE PROTOCOL TO THE AFRICAN CHARTER ON THE RIGHTS OF WOMEN IN AFRICA ¶ 225 (2018) ("[E]stablished within the Lesotho Mounted Police Service, the Child and Gender Protection Unit (CGPU) . . . deals mainly with protection of children, women and men who have suffered GBV . . ."); Counter Domestic Violence Act 14 of 2022 § 10(1)(b) (Lesotho) (mandating that every police station establish a unit staffed with officers with relevant expertise and training in domestic violence); UNICEF MALAWI, CHILD PROTECTION AND VICTIMS SUPPORT SERVICES (2018) (discussing Victim Support Units (VSU) established within the Malawi Police Service across the country to support its community policing); FABIO SAINI ET AL., POST-RAPE CARE FOR CHILDREN IN MOZAMBIQUE: ASSESSMENT REPORT, at viii, 10 (2013) (discussing "Gabinete de Atendimento a Mulher e Criança Vitima de Violência Doméstica" [Office to Assist Women and Children Victims of Domestic Violence], police units in all districts of Mozambique with the specific mandate to respond to sexual and gender-based violence); COMM'N FOR GENDER EQUALITY, GOVERNMENT'S EMERGENCY RESPONSE ACTION PLAN (ERAP) ON GENDER-BASED VIOLENCE AND FEMICIDE 15 (2020) (S. Afr.) (discussing strengthening of Family Violence, Child Protection and Sexual Offences (FCS) Units of the South African Police Services); MINISTRY OF HEALTH, COMTY. DEV., GENDER, ELDERLY & CHILD., NATIONAL PLAN OF ACTION TO END VIOLENCE AGAINST WOMEN AND CHILDREN IN TANZANIA 2017/18 – 2021/22, at 4 (2016) ("The Tanzanian Police Force has embarked on an effort to establish Police Gender and Children's Desk (PGCD) throughout the country, as well as train officers in child abuse and [GBV] . . ."); Zambia Police Act, Cap. 107 (1999) § 53 (providing that a Victim Support Unit be established at all police stations); Domestic Violence Act [Chapter 5:16] (2006) § 5(1) (Zim.) ("There shall be a section at every police station which shall . . . be staffed by at least one police officer with relevant expertise in domestic violence, victim friendly or other family-related matters."); JUD. SERV. COMM'N, PROTOCOL ON THE MULTI-SECTORAL MANAGEMENT OF SEXUAL ABUSE AND VIOLENCE IN ZIMBABWE 33 (2012) (discussing the Zimbabwe Republic Police Victim Friendly Unit established in 1995 to police violence against women and children, particularly sexual offences and domestic violence).

<sup>96</sup>See, e.g., ESWATINI MINISTRY OF HEALTH, GEOGRAPHIC AND PROGRAMMATIC SCOPING FOR ADOLESCENT GIRLS AND YOUNG WOMEN: HIV PROGRAMMING IN ESWATINI 20 (2019) (discussing one-stop centres established for comprehensive service provision to survivors of GBV); NAT'L POLICE SERV., *supra* note 95, at ix (Kenya) (stating the vision of POLICARE as establishing one-stop centres of excellence in every county where victims of GBV can access justice easily and readily without suffering further indignity); KINGDOM OF LESOTHO, *supra* notes 95, ¶ 224 (2018) ("The Ministry of Gender has Lapeng Care Centre for Abused Women and Children . . . [which] provides temporary place of safety to women and children survivors of GBV . . ."); Yabwile Mulambia et al., *Are One-Stop Centres an Appropriate Model to Deliver Services to Sexually Abused Children in Urban Malawi?*, 18 BMC PEDIATRICS 145 (2018) (evaluating Malawi's country-wide system of 28 one-stop centres); Decreto No. 75/2020, Regulamento da Organização e Funcionamento dos Centros de Atendimento Integrado às Vítimas de Violência Doméstica e Baseada no Gênero [Regulations for the Organization and Operation of Integrated Assistance Centers for Victims of Domestic and Gender-Based Violence], de 21 de Agosto de 2020, B.D.R. (Mozam.); FOUND. FOR PRO. DEV., THUTHUZELA CARE CENTRES COMPLIANCE AUDIT AND GAP ANALYSIS 2016, at 23 (2016) (S. Afr.) ("[T]he National Prosecuting Authority's (NPA) Sexual Offences and Community Affairs (SOCA) unit developed the [Thuthuzela Care Centres] model to respond to the GBV crisis in a comprehensive and multi-sectoral way."); JANET FLEISCHMAN, TOGETHER FOR GIRLS, ACCELERATING ACTION TO ADDRESS VIOLENCE AGAINST WOMEN AND CHILDREN: KEY LESSONS FROM THE TOGETHER FOR GIRLS PARTNERSHIP IN TANZANIA 28 (2019) (discussing One Stop Centers designed to help survivors of violence navigate the reporting and referral process); *Rising Woman Shelter and Wellness Centre Provides Refuge to Survivors of Violence and Trafficking*, U.N. WOMEN AFR. (June 4, 2021), <https://africa.unwomen.org/en/news-and-events/stories/2021/06/feature-story—rising-woman-shelter-and-wellness-centre-provides-refuge-to-survivors> (introducing GBV shelters to Uganda through public-private partnership to provide survivors with temporary refuge and access to medical, legal, economic and psycho-social services); Anti-Gender-Based Violence Act No. 1 (2010) §§ 24–30 (Zam.) (establishing government-funded shelters for GBV victims); NAT'L ASSEMBLY OF ZAMBIA REPORT, *supra* note 70, at 20 (concluding that One-Stop Centres need improvement in managing GBV cases); Domestic Violence Act [Chapter 5:16] (2006) § 16(9)(f) (Zim.) (listing as one of the functions of the Anti-Domestic Violence Council promoting the establishment of safe-houses to shelter the victims of domestic violence); JUD. SERV. COMM'N, *supra* note 95 (Zim.); MANASE KUDZAI CHIWESHE ET AL., SPOTLIGHT INITIATIVE, AN ASSESSMENT OF THE FORMAL JUSTICE SYSTEM IN RESPONDING TO SEXUAL AND GENDER BASED VIOLENCE (SGBV), HARMFUL PRACTICES (HP) AND SEXUAL REPRODUCTIVE HEALTH RIGHTS (SRHR) IN ZIMBABWE 86 (2021) (discussing one stop centres in Zimbabwe designed to give GBV survivors access to holistic health, psychosocial support, legal and police services under one roof).

<sup>97</sup>Kizzie Shako & Myrna Kalsi, *Forensic Observations and Recommendations on Sexual and Gender Based Violence in Kenya*, 1 FORENSIC SCI. INT'L: SYNERGY 185 (2019); Susan K. Settergren et al., *Cluster Randomized Trial of Comprehensive Gender-Based Violence Programming Delivered Through the HIV/AIDS Program Platform in Mbeya Region, Tanzania: Tathmini GBV Study*, 13 PLOS ONE 1 (2018).

children, while delivering necessary care services to survivors. Although these GBV services integration programs can potentially contribute to increased prosecution of cases and overall reduction in GBV,<sup>98</sup> the approach may still exhibit fragmentation and imbalance furthering secondary victimization, partly due to lack of clinical forensic expertise.<sup>99</sup>

Regarding PEP, South Africa is one of the countries with the most proactive legislation among the ten countries concerned. Pursuant to South Africa's criminal sexual offences legislation enacted in 2007, police officials or health professionals to whom a sexual offence is reported must advise the victim of the importance of obtaining PEP within 72 hours after a possible exposure to HIV in addition to the availability of free of charge PEP and related medical assistance. The victim has a corresponding right to access PEP provided that the victim reports the assault within the 72-hour timeframe.<sup>100</sup> In Mozambique, the Law on the Protection of People, Workers and Job Seekers Living with HIV and AIDS mandates PEP provision for all victims of sexual crimes.<sup>101</sup> Eswatini and Kenya's laws also address emergency access to PEP for victims of sexual violence.<sup>102</sup> On the other hand, in the absence of legal provisions directly regulating PEP provision, Lesotho, Malawi, Tanzania, Uganda, Zambia, and Zimbabwe prescribe PEP for penetrative sexual abuse survivors in accordance with their national HIV prevention guidelines.<sup>103</sup>

<sup>98</sup>See Settergren et al., *supra* note 97; see also Sexual Offences (Amendment) Bill, Nat'l Assembly Bills No. 24 (2020) KENYA GAZETTE SUPP. NO. 149, at 731 (providing for use of forensic evidence for improved prosecution of sexual assault cases).

<sup>99</sup>See Shako & Kalsi, *supra* note 97; see also NAT'L ASSEMBLY OF ZAMBIA REPORT, *supra* note 70, at 7 (finding insufficient forensic equipment and multi-disciplinary personnel such as psychosocial counsellors and Victim Support Unit police officers to assist victims).

<sup>100</sup>Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 § 28 (S. Afr.); Criminal Law (Sexual Offences and Related Matters) Regulations, GN R. 561 of GG 31076 (22 May 2018) reg. 2(2) (S. Afr.).

<sup>101</sup>Lei No. 19/2014 Lei de Protecção da Pessoa, do Trabalhador e do Candidato a Emprego Vivendo com HIV e SIDA [Act No. 19/2014 Law on the Protection of People, Workers, and Job Seekers Living with HIV and AIDS], de 27 de Agosto de 2014, B.D.R. art. 41, para. 1 (Mozam.).

<sup>102</sup>See Sexual Offences and Domestic Violence Act, No. 15 of 2018 § 72 (Eswatini) (creating a duty on the part of police to inform the victim of the availability of PEP and counseling); *id.* § 76(2) (permitting a medical examiner to give PEP to a child victim of sexual offense if it is in the best interests of the child and if parental consent or court order is obtained); Sexual Offences (Medical Treatment) Regulations, Legal Notice No. 133 (2012) reg. 6(1)(a), (1)(c) & sched. (Kenya) (requiring that medical practitioners conduct a full medical-forensic examination on the victim, prescribe the appropriate medical treatment including PEP, and complete the Post Rape Care form including PEP dose data); Counter Domestic Violence Act 14 of 2022 § 14(2) (Lesotho) (providing, but without guaranteed access to PEP, "[a] victim of domestic violence may receive free medical treatment pending a complaint to the police station in a case of emergency or a life threatening situation."); HIV and AIDS (Prevention and Management) Act No. 9 (2018) § 31(2) (Malawi) (requiring that only employers in workplace with the risk of occupational exposure to HIV ensure their employees' free access to PEP and counseling); HIV and AIDS (Prevention and Control) Act, Cap. 431 (2008) § 26(a) (Tanz.) (guaranteeing provision of PEP to only health practitioners who were exposed to HIV in the course of rendering health care services); HIV and AIDS Prevention and Control Act, No. 1 (2015) Acts Supp. No. 1 to UGANDA GAZETTE Vol. 108, No. 7 § 32(3)(b) ("A health institution shall provide free of costs [PEP] to [only] persons [occupationally] exposed to HIV, with appropriate counseling services.");

<sup>103</sup>See MINISTRY OF HEALTH, NATIONAL GUIDELINES ON THE USE OF ANTIRETROVIRAL THERAPY FOR HIV PREVENTION AND TREATMENT<sup>9</sup> (5th ed. 2016) (Lesotho) (recommending to offer psychosocial support and counseling to children and sexual assault survivors along with PEP provision); MINISTRY OF HEALTH & POPULATION, MALAWI GUIDELINES FOR CLINICAL MANAGEMENT OF HIV IN CHILDREN AND ADULTS 73 (5th ed. 2022) (permitting non-health professionals such as trained police officers to timely dispense the initial dose of PEP to rape victims); MINISTRY OF HEALTH, COMTY. DEV., GENDER, ELDERLY & CHILD., NAT'L AIDS CONTROL PROGRAMME, NATIONAL GUIDELINES FOR THE MANAGEMENT OF HIV AND AIDS § 5.7.2 (7th ed. 2019) (Tanz.) ("[R]ape survivors should be [in addition to PEP provision] . . . referred to mental care, police and legal services, according to law and regulations."); MINISTRY OF HEALTH, CONSOLIDATED GUIDELINES FOR THE PREVENTION AND TREATMENT OF HIV AND AIDS IN UGANDA 44, 49 (2020) (recommending that health facilities provide rape victims with PEP as part of post-rape care services); MINISTRY OF HEALTH, ZAMBIA CONSOLIDATED GUIDELINES FOR TREATMENT AND PREVENTION OF HIV INFECTION 21–22 (2020) (recommending evaluation of substantial exposure risk behaviour before provision of non-occupational PEP); MINISTRY OF HEALTH & CHILD CARE, GUIDELINES FOR ANTIRETROVIRAL THERAPY FOR THE PREVENTION AND TREATMENT OF HIV IN ZIMBABWE 94, 97 (2016) (recommending that a victim of rape or sexual abuse be counselled and provided with PEP within 72 hours of exposure).

To highlight some other relevant provisions, under the Sexual Offences Act, the Kenya's Ministry of Health regulations entitle victims to receive medical treatment at any medical facility at the expense of the government regardless of whether they have reported the sexual offence to the police.<sup>104</sup> This approach allows for women to receive needed medical services without fear of reporting a partner if she is not willing to do so, or she believes that appropriate legal systems are not yet in place to provide protection and other assistance. In Malawi, under the Prevention of Domestic Violence Act, victim assistance services such as filing a complaint and arranging for medical assistance at the nearest health facility are delegated to "enforcement officers" designated by the Ministry of Gender, Community Development and Social Welfare, independent of police officers.<sup>105</sup>

### III. CONCLUSION

Adolescent girls and young women (AGYW) are uniquely vulnerable to violence and would benefit from strengthened gender-based violence (GBV) laws and their effective implementation. Effectively implementing reinforced GBV laws may serve to enhance AGYW's access to and ability to use criminal and civil justice systems on top of their timely access to HIV prophylaxis and treatment services. Such legal reforms can also contribute to the protection and promotion of human rights, gender equality, and the empowerment of AGYW. An increased understanding of GBV laws and their respective gaps can facilitate each jurisdiction's efforts in reinforcing their legal environments for improved GBV prevention and response. Our findings suggest that countries could prioritize addressing elements of GBV laws not adequately provided for in their laws and regulations, drawing inspiration and instruction from positive examples of progress being made in neighbouring countries, some of which are noted in our review. Particularly, some of these countries reviewed still legally permit child marriage through third party consent exceptions to a general ban, despite the evidence of its harm to girls and their children. Further, marital rape is tolerated in some of these countries. Although it is largely outside the scope of this article, an increased understanding of judicial enforcement, access to justice, and long-term monitoring of GBV laws and policies can equally promote effective coordination among different sectors to develop and expand the integration of public health and medico-legal programs to deter, prevent and respond to GBV.

It is worthy of note that legal reforms pertaining to GBV laws are still pending or ongoing across the ten countries at the time of our research monitored through 2022. Many countries have bills being drafted to specifically address domestic violence, sexual offences, children's rights, or marriages.<sup>106</sup> If the bills are enacted and given the full force of law, these

<sup>104</sup>Sexual Offences (Medical Treatment) Regulations, Legal Notice No. 133 (2012) reg. 3(1)–(3) (Kenya).

<sup>105</sup>Prevention of Domestic Violence Act, Cap. 7:05 (2006) §§ 2, 31–33 (Malawi) (providing for duties and powers of enforcement officers designated by the Ministry responsible for gender affairs in assisting the victim).

<sup>106</sup>*E.g.*, Marriages Bill, Bill No. 8 of 2022 §§ 8, 70(1) (Eswatini) (prohibiting explicitly child marriage below 18 years old under section 8 as "[a] person shall not have the capacity to marry unless that person has attained eighteen (18) years of age" and eliminating the third party consent exceptions for minors to marry by repealing the Marriage Act, 47 of 1964, *supra* notes 50–51); The Children Act, No. 29 (2022) § 249(1) (Kenya) (repealing the Children Act, 8 of 2001 and updating the provisions in alignment with the constitution); Sexual Offences (Amendment) Bill, Nat'l Assembly Bills No. 24 (2020) (Kenya) (regulating collection and access to forensic evidence for improved prosecution of sexual assault cases); Counter Domestic Violence Act 14 of 2022 (Lesotho); Children's Protection and Welfare Act Amendment Draft Bill 2019 (Lesotho) (repealing section 16(2) of the Children's Protection and Welfare Act, 7 of 2011, the provision that permits justifiable chastisement and corporal punishment of children); National Council on

reforms are expected to further improve GBV prevention and response together with their effective implementation, monitoring, and enforcement. Finally, laws and policies scorecards like those developed by the Joint United Nations Programme on HIV/AIDS<sup>107</sup> should include GBV laws as important data points to enable more holistic comparative analysis of international policy environments pertinent to HIV across Africa.

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Gender-Based Violence and Femicide Bill (B31–2022), GN 2558 of GG 46991 (30 Sept. 2022) (S. Afr.) (establishing a multisectoral, independent, and nonpartisan statutory body responsible for strategic leadership on the elimination of GBV and femicide); Victim Support Services Bill, GN 791 of GG 43528 (17 July 2020) (S. Afr.) (enhancing public services to victims of violent crimes including GBV); DEPT. OF HOME AFF., WHITE PAPER ON MARRIAGES IN SOUTH AFRICA 33–34 (2022) (recommending a consolidated statute, Omnibus Marriage Act, as a preferred new legal framework); *Gyumi*, [2019] TZCA 348, 1 T.L.R. 114 (Tanz.) (affirming the unconstitutional status of the Law of Marriage Act, Cap. 29 (2019) §§ 13, 17, which permit child marriage, though legislative amendments are pending as of 2022); Sexual Offences Bill, No. 32 (2019) (Uganda) (acknowledging defects in the Penal Code Act, Cap. 120 in prosecuting sexual offences and deterring sexual violence, but failing for enactment as of 2022); Marriage Bill, 2022 (Uganda); *Aboneka*, [2023] UGCC\_ (Uganda) (declaring several marriage provisions unconstitutional under article 31(1) as amended in 2005, which sets the minimum age for marriage at 18 years); Constitution of Zambia (Amendment) Bill No. 10 (2019) GOV'T GAZETTE (Bills) § 76 (harmonizing the definition of a child under the 2016 Constitution, article 266 as “a person below the age of eighteen years” replacing “a person who has attained or is below, the age of eighteen years”); Children’s Code Act No. 12 (2022) (Zam.) (domesticating the Convention on the Rights of the Child, *supra* note 17 and consolidating law reforms relating to children while repealing the Juveniles Act, Cap. 53 under section 297(1)); Children’s Amendment Bill, 2021 (Zim.) (amending the Children’s Act [Chapter 5:06] (1971) including the definition of a child in section 2 as a person under the age of 18 years, raised from 16 years); Marriages Act [Chapter 5:17] (2022) (Zim.) (consolidating law reforms relating to marriages while repealing the Customary Marriages Act [Chapter 5:07] and the Marriage Act [Chapter 5:11]); *Kawenda*, [2022] ZWCC 3 (Zim.) (ordering amendments to unconstitutional provisions of Criminal Law (Codification and Reform) Act [Chapter 9:23] (2004) as they tolerate sexual exploitation of a child under 18 years in child marriage). *Cf.* Michelle Xiao Liu, *Suffering in Silence: The Failure of Malawi’s Sexual Offense Laws to Protect Children—A Human Rights Report and Proposed Legislation*, 38 WIS. INT’L L.J. 555 (2021) (proposing amendments to sexual offences and children’s rights legislation of Malawi).

<sup>107</sup>See UNAIDS, UNAIDS DATA 2020, at 38–39 (2020); UNAIDS, IN DANGER: UNAIDS GLOBAL AIDS UPDATE 2022, at 265–66 tbl.6.2 (2022).