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Testimony

by

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## Introduction

A ruling by the Supreme Federal Tribunal of Brazil to suspend Articles 124 and 126 of the Penal Code, and to recognize the constitutional right of women to terminate pregnancy during the first twelve weeks of pregnancy, and thereafter on specified indications, and of health professionals to assist them, would be consistent with the transnational consensus to decriminalize early abortion. This Court has the opportunity to acknowledge the harms of the criminalization of abortion as detrimental to women's health and wellbeing, and to society at large. In so doing, this Court would uphold the legality principle, a general principle of law recognized by civilized nations. Moreover, this Court would ensure compliance with Brazil's obligations under international human rights law to respect, protect and fulfill the human rights of women. A ruling for decriminalization during the first twelve weeks of pregnancy would facilitate the range of positive measures necessary to protect prenatal life consistently with women's rights.

### **1. The transnational consensus to decriminalize abortion in the first twelve weeks of pregnancy is evident at the domestic, regional and international levels.**

This transnational consensus is based on domestic constitutional court decisions, international and regional human rights treaties and their authoritative interpretation in General Comments and Recommendations, Concluding Observations, Individual Decisions on Communications and Inquiry Reports in the United Nations (UN) system, and their elaboration in reports to the UN Human Rights Council.<sup>1</sup>

At the domestic level, laws that criminalize termination of pregnancy, with exemptions only on specified narrow indications, have been declared unconstitutional by several supreme courts, including the Canadian Supreme Court,<sup>2</sup> and the US Supreme Court.<sup>3</sup> Constitutional courts, including those in Austria,<sup>4</sup> Croatia,<sup>5</sup> France,<sup>6</sup> Mexico,<sup>7</sup> Nepal,<sup>8</sup> Portugal<sup>9</sup> and Slovakia,<sup>10</sup> have declared the constitutionality of laws decriminalizing abortion during the first trimester of pregnancy. As of 2018, more than a third of countries of the world allow the decriminalization of abortion without restriction as to reason, on request, usually during the first 12 weeks of pregnancy or some period thereafter.<sup>11</sup> These constitutional court rulings<sup>12</sup> and legislative

enactments ensure states' compliance with their countries' obligations under international human rights law.<sup>13</sup>

Within Latin America, the Montevideo Consensus calls on states "to consider amending their laws ... to protect the lives and health of women and adolescent girls, [and] to improve their quality of life,"<sup>14</sup> to which decriminalization would greatly contribute such as by reducing the incidence of maternal mortality and morbidity associated with unsafe abortion and lack of post-abortion care.<sup>15</sup>

Within the European region, the Parliamentary Assembly of the Council of Europe calls on member states to decriminalize abortion where they have not done so.<sup>16</sup> The Commissioner of Human Rights for the Council of Europe has also called on member states to "decriminalize abortion and remove residual procedural requirements applicable to legal abortion services that contravene public health guidelines..." to ensure women's access to safe legal abortion care.<sup>17</sup>

International human rights law repeatedly calls for the reform and repeal of criminal abortion laws, also referred to as abortion decriminalization and liberalization. An early consensus called for the de-penalization of abortion, including the repeal or reduction of criminal penalties for women.<sup>18</sup> The international consensus has since moved to abortion decriminalization and liberalization, including the repeal or reform of criminal laws. This is evident in the work of the UN treaty bodies,<sup>19</sup> including the Committee on the Elimination of Discrimination against Women,<sup>20</sup> the Committee on Economic, Social and Cultural Rights,<sup>21</sup> the Human Rights Committee,<sup>22</sup> the Committee on the Rights of the Child,<sup>23</sup> and the Committee against Torture.<sup>24</sup> This consensus is also evident in the work of mandates of the UN Special Rapporteurs<sup>25</sup> and Working Groups.<sup>26</sup>

## **2. Criminalization of abortion is harmful to women's health and wellbeing.**

Criminalization causes multiple harms, including the following:

- a. Criminalization is a key factor in the prevalence of unsafe abortion, which risks the lives, health and well-being of women, and those of their dependent children.

The World Health Organization (WHO) in its *Safe Abortion: Technical and Policy Guidance for Health Systems (WHO Safe Abortion Guidance)* explains that

"Restricting legal access to abortion does not decrease the need for abortion, but it is likely to increase the number of women seeking illegal and unsafe abortions, leading to increased morbidity and mortality. ... Evidence increasingly shows that, where abortion is legal on broad socioeconomic grounds and on a woman's request, and where safe services are accessible, both unsafe abortion and abortion-related mortality and morbidity are reduced".<sup>27</sup>

In referencing this *WHO Safe Abortion Guidance*, the Committee on the Elimination of Discrimination against Women explained that: "Whereas the Committee acknowledges that the State may have a legitimate interest in "prenatal life", criminalizing abortion does not further that purpose. World Health Organization data indicates

(a) a direct correlation between restrictive abortion laws and high rates of unsafe abortion, leading to high mortality and morbidity; and,

(b) that bans or very restrictive abortion laws have no deterrent effect,”<sup>28</sup>

as this Court has acknowledged.<sup>29</sup>

b. Criminalization adversely and disproportionately impacts vulnerable and marginalized women and girls.

International treaty bodies have acknowledged the discriminatory effects of criminal abortion laws on marginalized women and girls including poor, rural, less-educated women and girls, migrant and refugee women and girls unable to travel, or those unable to access clandestine but safe services.<sup>30</sup> WHO has recognized that in

“countries where abortion is legally highly restricted, unequal access to safe abortion may result. In such contexts, abortions that meet safety requirements can become the privilege of the rich, while poor women have little choice but to resort to unsafe providers ... Women [may] have access to safe or relatively safe abortion through seeking care from neighboring countries, [and] through provision of safe, but illegal abortion care domestically.”<sup>31</sup>

It is generally recognized that when marginalized women are subjected to criminal abortion law, they are adversely and disproportionately affected by arbitrary denials of legal services, as well as higher prosecution rates and heavier penalties due to lack of competent legal representation.<sup>32</sup>

c. Criminalization instrumentalizes a woman’s body and her capacity to reproduce.

A harm of criminalization arises when the state ignores wishes of women, and denies them their ability to make free and informed decisions. The UN Working Group on the issue of discrimination against women in law and practice explains that

“[c]riminalization of termination of pregnancy is one of the most damaging ways of instrumentalizing and politicizing women’s bodies and lives ... depriving them of autonomy in decision-making about their own bodies.”<sup>33</sup>

To gestate and to give birth to a child is a profound human act, enlisting the whole of a person and the full faculties of mind and body. It is an act that has serious lifelong consequences for a woman. It influences the way she thinks about herself, and her relationship to others and to society.

Criminalization of abortion negatively impacts a woman’s physical and mental health because it often forces maternity on women. As the National Supreme Court of Argentina has explained, it also offends the dignity principle requiring a woman to be treated as an end in herself, and not as an instrument to serve other purpose,<sup>34</sup> as this Court has acknowledged.<sup>35</sup> An egregious example of instrumentalization of women’s was in Nazi Germany. The Nuremberg Military Tribunal held Nazi officials criminally responsible for, among other matters, deliberately forcing continuation of “racially pure” pregnancies, and forcing abortion of mixed-race and other “impure”

pregnancies, where the consent of pregnant women was legally irrelevant since forced pregnancy and compelled abortion were instruments of state policy.<sup>36</sup>

### **3. Decriminalization of abortion during the first twelve weeks of pregnancy would comply with the legality principle.**

The legality principle, also understood as the principle of fundamental justice, is a “general principle of law recognized by civilized nations.”<sup>37</sup> One aspect of the legality principle entails the uniform, non-arbitrary application of the law. That is, the law has to be transparent, accessible and consistently and fairly applied by governments, including by their health ministries. This principle requires that states provide lawful abortion services in a non-arbitrary and fair manner. Fair application of a law serves justice, when like cases, such as pregnant women’s needs for safe abortion services, are treated according to those same health needs.

Biases and prejudices against women often contribute to unjust differences in treatment due to, for example, women’s age, poverty, race or ethnicity, thus denying them fair access to abortion services.<sup>38</sup> In the criminal justice system, biases and prejudices against women often result in differential access to legal services and the arbitrary enforcement of the law. A study on the application of criminal abortion laws in several Latin American countries, including Brazil, revealed the selective enforcement of the laws by prosecution of poor, Afro-descendant, young and indigenous women because they often have no recourse to competent legal defense.<sup>39</sup>

At the domestic level, the National Supreme Court of Argentina explained that a restrictive interpretation of a ground for an abortion, resulting in the denial of women’s access to services to which they are legally entitled, offends the legality principle.<sup>40</sup>

In order to comply with the principles of fundamental justice, which is comparable in the Common law system to the legality principle in the Civil law system, the Supreme Court of Canada held that

“Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman’s body and thus a violation of security of the person. [Criminal Code] Section 251, therefore, is required by the Charter [Canadian Charter of Rights and Freedoms] to comport with the principles of fundamental justice.”<sup>41</sup>

As a result of this decision, abortion in Canada is decriminalized, and is now regulated like any other medical procedure.

At the regional level, the European Court of Human Rights has found that the arbitrary application of abortion law in Poland violates women’s rights under the European Convention on Human Rights.<sup>42</sup>

#### **4. Decriminalization of abortion during the first twelve weeks of pregnancy would accommodate women’s sex- and gender-based reproductive health differences, and ensure women’s substantive equality.**

International human rights law requires states to accommodate women’s sex- and gender-based reproductive health differences. In order to comply with its obligations to ensure women’s substantive equality, states have to treat different cases according to their sex-specific differences in reproduction. Several UN bodies, including the Committee on the Elimination of Discrimination against Women,<sup>43</sup> and the Committee on Economic, Social and Cultural Rights,<sup>44</sup> and the Working Group on Discrimination against Women,<sup>45</sup> have explained that where states fail to provide adequate sex-specific health care that only women need, that failure is a form of discrimination that states are obligated to remedy.

Experiences from many countries show that accommodating women’s sex-specific needs requires the decriminalization of abortion. The harms of criminalization cannot be adequately addressed through abortion laws that provide only for narrow exemptions from punishment for abortion. This is due in part to the arbitrary and unfair application of exemptions from punishment, disproportionately burdening marginalized women. Multiple discrimination occurs where the health of subgroups groups of women are disproportionately impacted by the criminal law, because of their poverty and, for example, age.<sup>46</sup> This disproportionate impact of the criminal law denies women the equal exercise of rights relating to their life, health and dignity.

An essential element of the right to health is nondiscrimination, which requires that health services, including those related to pregnancy, be accessible to all, especially the most vulnerable or marginalized sections of the population, without discrimination.<sup>47</sup> Human rights authorities thus support decriminalization during the first twelve weeks of pregnancy to ensure women equal exercise of their right to health by enabling equal access to safe abortion for all women.<sup>48</sup>

Decriminalization allows the state to regulate abortion in a positive manner to ensure safe abortion services are available, accessible, acceptable, and of reasonable quality.<sup>49</sup> Ensuring conditions for the safe provision of abortion includes enabling abortion services to be provided in public hospitals or state funded clinics, facilitating the provisions of legal information about services, and for example the training of service providers.<sup>50</sup>

Decriminalization of abortion serves women’s interest in the equal exercise of their rights relating to their dignity. Such rights include their rights to integrity, private life, liberty, security, and to be free from torture, inhuman and degrading treatment including freedom from violence, and, for example, their equal exercise of their right of conscience. UN treaty bodies and UN working groups recognize that a restriction excluding only women from exercising reproductive choice, and resulting in women being forced to carry a pregnancy to full term, involves mental or physical suffering constituting violence against women, and, in certain circumstances, amounting to torture or cruel, inhuman or degrading treatment. For example, the CEDAW Committee explained that

“... discrimination against women includes gender-based violence, defined as: ‘violence which is directed against a woman because she is a woman or that affects women disproportionately.’ A restriction affecting only women from exercising reproductive

choice, and resulting in women being forced to carry almost every pregnancy to full term, involves mental or physical suffering constituting violence against women and potentially amounting to torture or cruel, inhuman and degrading treatment, in violation articles 2 and 5, read with article 1. It affronts women's freedom of choice and autonomy, and their right to self-determination.”<sup>51</sup>

Decriminalization empowers women to make free and informed decisions whether or not to terminate pregnancy without fear of criminal liability. It also allows women to overcome negative stereotypes of women as incapable of acts of judgment and conscience.

Decriminalization is necessary to ensure that women are free of demeaning stereotypes in order to exercise their freedom of conscience on an equal basis with men. That is, the freedom of women “to call their souls their own”.<sup>52</sup>

### **5. Decriminalization of abortion during the first twelve weeks of pregnancy would facilitate positive measures necessary to protect prenatal life consistently with women's rights.**

Courts and treaty bodies underscore the need to address abortion non-criminally to facilitate the protection of prenatal life consistently with women's rights. The threat of criminality leads women, who for instance are protective of their existing and prospective families, to resort to clandestine abortion service providers. The threat of criminality deters women from seeking conscientious professionals who could counsel them on options for continuation of pregnancy, such as maternity and infant care services. Criminal law has a chilling effect on the delivery of services relating to reproduction and maternity and on women's abilities to make informed decisions free of coercion and stigma.<sup>53</sup>

Judicial scrutiny is desirable to determine whether a state protects life comprehensively across a spectrum of women-supportive policies that address the risk factors for unwanted pregnancy and that provide the means to facilitate wanted pregnancies.<sup>54</sup> Determining whether states give priority to choice-supporting means over choice-restricting provides insight how protective they are of women's rights. For example, the US Supreme Court<sup>55</sup> has questioned why a state, in claiming to protect women, had “singled out abortion for health regulation that it did not impose on [medical] procedures of equal or greater risk.”<sup>56</sup>

Means that are protective of prenatal life but that are also consistent with women's rights include the following positive measures to:

- Reduce the risk factors for unintended pregnancy: In upholding a law allowing women to decide whether to have an abortion early in pregnancy, the Constitutional Court of Portugal explained that it “falls on the state to fight against ‘risk factors’ ... through education and to adopt social policies favoring responsible conception as well as willingness to continue pregnancy.”<sup>57</sup> Risk factors are those that are modifiable by appropriate interventions. They include: addressing risk factors for unintended pregnancy such as support of sex education, provision of reproductive health information, distribution of means of contraception, and implementing policies that facilitate motherhood, family life and child-friendly environments.<sup>58</sup> This Court has acknowledged the importance of addressing risk factors for unintended pregnancy.<sup>59</sup>

- Provide counselling and social assistance for women: In upholding a law allowing women to decide whether to have an abortion early in pregnancy, the Constitutional Court of Portugal considered non-directive counselling as sufficiently protective of unborn life.<sup>60</sup> The Court clarified that the purpose of counseling is to “explain, in a climate of tranquility and utter respect for the decisional autonomy of the pregnant woman, the existence of assistance measures which may lead, from her own initiative, to consider an alternative solution to that of the interruption of pregnancy”.<sup>61</sup> This Court has also affirmed the need to provide counselling.<sup>62</sup>
- Facilitate a reproductive-friendly environment to enable healthy wanted pregnancies with healthy birth outcomes: Such measures include the provision of contraceptive means to space pregnancies to promote the health of women and their children, the provision of folic acid food supplements during pregnancy,<sup>63</sup> the reduction of stillbirths,<sup>64</sup> and initiatives to protect safety of the mother<sup>65</sup> and the infant in childbirth.<sup>66</sup>

## Conclusion

This Court can serve reproductive justice by deciding that decriminalization of abortion in the first twelve weeks of pregnancy is necessary to serve the legality principle by guaranteeing the fair and transparent application of the abortion law, and to serve the human rights of women, including their rights to substantive equality, and their equal exercise of their rights relating to their life, health, dignity and conscience. Decriminalization would facilitate a range of positive measures necessary to protect prenatal life consistently with women’s rights.

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<sup>1</sup> This testimony concentrates on recent developments at the domestic and international levels. For past developments see C. Zampas and J. Gher, “Abortion as a Human Right - International and Regional Standards” (2008) 8:2 *Human Rights Law Review* 249-294 [Zampas & Gher. –Abortion as a Human Right – International and Regional Standards](#).

For developments across the Latin American region and in regional human rights systems see:

Latin America: P. Bergallo and A.R. Michel, “Constitutional developments in Latin American abortion law” (2016) 135 *Int'l J Gynecol Obstet.* 228-31 [Bergallo & Michel –Constitutional developments Latin America](#) P. Bergallo and A.R. Michel, “Shifting Frames and Latin American Constitutional Debate,” in Juan Gonzalez-Bertomeu and Roberto Gargarella, eds., *The Latin American Casebook: Courts, Constitutions and Rights*. (Farnham, UK: Ashgate, 2016), 36-59’ IPPF/WHO, *Legal Abortion: A Comparative Analysis of Health Regulations* (IPPF/WHO: New York, 2012), [IPPF/WHO Legal Abortion](#); Disponible en Español como: *Aborto legal: un análisis comparativo de las regulaciones sanitarias* [IPPF/WHO Aborto Legal](#).

For developments in the regional human rights systems of Latin America and Europe see:

InterAmerican Commission on Human Rights, *Access to information on reproductive health from a human rights perspective*, OAS/Ser.L/V/II., doc. 61 (Nov. 22, 2011) [IACHR -Access to information on Reproductive Health](#); Inter-American Commission of Women, Follow-up Mechanism to the Belém do Pará Convention/Mecanismo de Seguimiento de la Convención de Belém do Pará (MESECVI), *Hemispheric Report on Child Pregnancy in the States Party to the Belém do Pará Convention*, at pp. 45-50 [Hemispheric Report on Child Pregnancy](#). Disponible en Español como: *Informe hemisférico sobre violencia sexual y embarazo infantil en los Estados Parte de la Convención de Belém do Pará* (OAS. Documentos oficiales, OEA/Ser.L/II.7.10 MESECVI/CEVI/doc.234/16 Rev.1 OEA/Ser.L/II), 2016, pp. 47-53 [Informe hemisferico- en Español](#).

Council of Europe, Commissioner for Human Rights, 2017 Report on Women’s Sexual and Reproductive Health and Rights in Europe (France: Council of Europe, 2017), [hereinafter [Women’s sexual and reproductive health and rights in Europe](#)]; Liiri Oja and Alicia Ely Yamin “Women” in the European Human Rights System: How is the Reproductive Rights Jurisprudence of the European Court of Human Rights Constructing Narratives of Women’s Citizenship? *Columbia J of Gender and Law*, 32.1, 62-95, 2016. [Oja & Yamin – “Women in the European Human Rights System](#). Accessed June 28, 2018.

<sup>2</sup> Supreme Court of Canada, *R. v. Morgentaler*. [1988] 1 SCR 30. Judgment n° 19556. Jan. 28, 1988. [Morgentaler 1988 decision](#) Accessed June 26, 2018.

<sup>3</sup> Supreme Court of the United States, *Roe v. Wade*, 410 U.S. 113 (1973). [Roe v Wade 1973 decision](#). Accessed June 26, 2018.

<sup>4</sup> Constitutional Court of Austria, Erklärungen des Verfassungsgerichtshofs 221, October 11, 1974.

<sup>5</sup> Constitutional Court of the Republic of Croatia, *Decision No. U-I-60/1991*, 20 March 2017. Section Vi, VII, VIII (3), (4) [Croatian 2017 decision](#) Accessed June 26, 2018.

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<sup>6</sup> Conseil Constitutionnel [Constitutional Court] January 15, 1975, Decision No. 74054 DC. D.S. Jur. 529 [1975] A.J.D.A. 134. [France 1975 decision](#). [France 1975 decision -official English translation](#). Accessed June 26, 2018 (decriminalized abortion within 10 weeks' gestation; Conseil Constitutionnel [Constitutional Court] June 27, 2001, Decision No. 2001-446 DC. [France 2001 decision](#). [France 2001 decision –official English translation](#). Accessed June 26, 2018 (upheld extension of the period of decriminalization to 12 weeks.)

<sup>7</sup> Suprema Corte de Justicia de la Nación 2008, Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007 (Supreme Court of Mexico) [Mexican 2008 decisión](#). Accessed June 26, 2018.

<sup>8</sup> Supreme Court of Nepal, *Lakshmi Dhikta v. Government of Nepal*, Writ No. 0757, 2067, Nepal Kanoon Patrika, para. 25 (2009). [Nepal 2009 decision – English translation / summary](#) Accessed June 26, 2018.

<sup>9</sup> Constitutional Court of Portugal, Tribunal Constitucional *Acórdão No. 75/2010*, Diário da Republica vol. 60, Sections II, 11.2; 11.9.1, [hereinafter [PORTUGAL – Sentencia no. 75/2010](#). Accessed June 26, 2018].

<sup>10</sup> Ústavný Súd [Constitutional Court of Slovakia,] *PL. ÚS 12/01-297*, Collection of Laws of the Slovak Republic. No.14/2008, vol. 8 at II.A Pt (3, 4) December 4, 2007.

<sup>11</sup> Center for Reproductive Rights. The World's Abortion Laws 2018. [World's Abortion Laws Interactive Map](#). Accessed June 26, 2018. (61 countries allow for abortion without restriction as to reason. The time period for decriminalization ranges from a minimum of 10 weeks to 18 weeks, or to further in pregnancy. The calculation of fetal age also varies across countries, some countries calculating fetal age from the date of the last menstrual period or the presumed date of conception. See: World Health Organization, Global Abortion Policies Database. [Global Abortion Policies Database](#). United Nations, Department for Economic and Social Affairs. *Abortion Policies and Reproductive Health around the World* (New York, Population Division, UN, 2014) p. 4. [Abortion Policies and Reproductive Health around the World](#). Accessed June 26, 2018.

<sup>12</sup> These and other abortion-related decisions are online at International Reproductive and Sexual Health Law Program, Faculty of Law, University of Toronto, **Abortion Law Decisions: Table of Cases**. [Abortion Law Decisions website](#). [Tabla de Casos/Jurisprudencia](#). Accessed June 26, 2018.

<sup>13</sup> *International Covenant on Economic, Social and Cultural Rights*, adopted December 16, 1966, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316, 993 U.N.T.S. 3 (entered into force January 3, 1976), and monitored by the Committee on Economic, Social and Cultural Rights (hereinafter **CESCR**). **(ratified by Brazil Jan. 24, 1992); Brazilian implementation:** Decreto No. 591, de 6 de Julho de 1992. [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#). Accessed June 28, 2018.

*International Covenant on Civil and Political Rights*, adopted December 16 1966, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (entered into force March 23, 1976) [International Covenant on Civil and Political Rights \(ICCPR\)](#) **(ratified by Brazil Jan. 24, 1992);** Brazilian implementation: Decreto No. 592, de 6 de Julho de 1992; Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 19, 1966, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316, 999 U.N.T.S. 171 (entered into force March 23, 1976) and monitored by the Human Rights Committee (hereinafter **HRC**). **(ratified by Brazil Sept. 29, 2009)**. [Optional Protocol to the ICCPR](#). Accessed June 28, 2018.

*Convention on the Elimination of All Forms of Discrimination against Women*, (CEDAW) adopted December 18, 1979, G.A. Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13 [CEDAW Women's Convention](#) . Accessed June 26, 2018. (entered into force September 3, 1981) (ratified by Brazil Feb. 1, 1984); Brazilian implementation: Decreto No. 89.460, de 20 de Março de 1984, and monitored by the Committee on the Elimination of Discrimination against Women (hereinafter **CEDAW Committee**.); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted October 6, 1999, G.A. Res. 54/4, UN GAOR, 54th Sess., Supp. No. 49, at 5, U.N. Doc. A/54/49, 2131 U.N.T.S. 83 (entered into force December 22, 2000) (ratified by Brazil Jun. 28, 2002); Brazilian implementation: Decreto No. 4.316, de 30 de Julho de 2002.

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*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted December 10, 1984, G.A. Res. 39/46, UN GAOR, 29th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51, 1465 U.N.T.S. 85 (entered into force June 26, 1987) (ratified by Brazil Sept. 28, 1989); Brazilian implementation: [Decreto No. 40, de 15 de Fevereiro de 1991](#) and monitored by the Committee against Torture (hereinafter **CAT**); [Convention against Torture](#). Accessed June 28, 2018.

*Convention on the Rights of the Child*, adopted November 20, 1989, G.A. Res.44/25, UN GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49, 1577 U.N.T.S. 3 (entered into force September 2, 1990) and monitored by Committee on the Rights of the Child (hereinafter **CRC**). (ratified by Brazil Sept. 24, 1990); Brazilian implementation: Decreto No. 99.710, de 21 de Novembro de 1990, [Convention on the Rights of the Child](#). Accessed June 28, 2018.

<sup>14</sup> Economic Commission for Latin America and the Caribbean and United Nations, *Montevideo Consensus on Population and Development, Priority Action 42*, 2013, Doc. PLE-1. [Montevideo Consensus 2013 in English](#). [Montevideo Consensus 2013 in Spanish](#). Accessed June 26, 2018.

<sup>15</sup> S. Singh, L. Remez, G. Sedgh, L. Kwok and T. Onda, *Abortion Worldwide 2017: Uneven Progress and Unequal Access*, New York: Guttmacher Institute, 2018 at 28-30. [Abortion Worldwide 2017](#). Accessed June 26, 2018.

<sup>16</sup> Parliamentary Assembly of the Council of Europe, Res 1607 (2008). [Council of Europe, Resolution 1607 of 2008](#). Accessed June 26, 2018

<sup>17</sup> Council of Europe, Commissioner for Human Rights, [Women's sexual and reproductive health and rights in Europe](#), p. 11.

<sup>18</sup> United Nations. *Beijing Declaration and Platform for Action. Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20/Rev.1, Annex I (1995), para. 106(k) (called on states to “consider reviewing laws containing punitive measures against women who have undergone illegal abortions”) [Beijing Declaration 1994](#).

<sup>19</sup> Treaty bodies in their Concluding Observations (COs) have called upon countries around the world to decriminalize abortion. However for reasons of space, references 20-24 include only recent COs from selected treaty bodies on Latin American and European countries, their General Recommendations and General Comments, and in the case of the CEDAW Committee one Inquiry Report, but not their decisions under the individual communications. For an overview on the work on reproductive rights of all treaty bodies for 2016-2017, see Center for Reproductive Rights. *Breaking Ground 2018: Treaty Monitoring Bodies on Reproductive Rights* (New York, USA: CRR, 2018) [Breaking Ground 2018](#). Accessed June 28, 2018.

<sup>20</sup> CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, U.N. Doc. A/54/38/Rev.1 (1999) [hereinafter [CEDAW Gen. Rec. 24](#). Accessed June 28, 2018].

CEDAW Committee, *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Feb. 23, 2018. UN Doc. CEDAW/C/OP.8/GBR/1, (hereinafter [CEDAW Northern Ireland Inquiry Report](#) Accessed June 26, 2018.)

*Concluding Observations* (since 2013):

*Chile* CEDAW/C/CHL/CO/7 (2018), para. 39; *Costa Rica*, CEDAW/C/CRI/CO/7(2017), para. 31; *Dominican Republic*, CEDAW/C/DOM/CO/6-7 (2013), para. 37; *Guatemala*, CEDAW/C/GTM/CO/8-9 (2017), para. 37; *Honduras*, CEDAW/C/HND/CO/7-8 (2016), para. 37; *Ireland*, CEDAW/C/IRL/6-7 (2017), para. 43; *Paraguay*, CEDAW/C/PRY/CO/7(2017), para. 37; *United Kingdom of Great Britain & Northern Ireland*, CEDAW/C/GBR/CO/7 (2013), para. 51.

<sup>21</sup> CESCR *General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C/12/GC/22, para 49(a) (call on

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states to “repeal laws ... that criminalize ... access to sexual and reproductive health facilities, services, goods and information.”) [CESCR Gen. Comment 22](#). Accessed June 28, 2018.

*Concluding Observations* (since 2012):

*Chile*, E/C.12/CHL/CO/4 (2015), para. 29; *Dominican Republic*, E/C.12/DOM/CO/4 (2016), para. 60; *Ecuador*, E/C.12/ECU/CO/3 (2012), para. 29; *El Salvador*, E/C.12/SLV/CO/3-5 (2014), para. 22; *Guatemala*, E/C.12/GTM/CO/3 (2014), para. 23; *Honduras* E/C.12/HND/CO/2 (2016), para.53-54; *Mexico* E/C.12/MEX/CO/5 2018, para 63; *Nicaragua*, E/C.12/NIC/CO/4 (2008), para. 26; *Paraguay* E/C.12/PRY/CO/4 (2015), para 29;

<sup>22</sup> HRC *Concluding Observations* (since 2012):

*Argentina*, CCPR/C/ARG/CO/5 (2016), paras. 11-12; *Chile*, CCPR/C/CHL/CO/6 (2014), para. 15; *Costa Rica*, CCPR/C/CRI/CO/6 (2016), paras. 17-18; *Dominican Republic*, CCPR/C/DOM/CO/5 (2012), para. 15; *Guatemala*, CCPR/C/GTM/CO/3 (2012), para. 20; *Honduras*, CCPR/C/HND/CO/2 (2017), para. 17; *Paraguay*, CCPR/C/PRY/CO/3 (2013), para. 13; *Peru*, CCPR/C/PER/CO/5 (2013), para. 14; *United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7 (2015), para. 17.

<sup>23</sup> CRC *General Comment No. 20* (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para 60 (“The Committee urges States to decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislation with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected.” [Committee on the Rights of the Child - General Comment 20](#). Accessed June 28, 2018.

*Concluding Observations* (since 2010):

*Brazil* CRC/C/BRA/CO/2-4 (2015) para 60: “Decriminalize abortions in all circumstances and review its legislation with a view to ensuring access to safe abortion and post-abortion care services; Ensure that the views of the child are heard and respected in abortion decisions.”

*Chile*, CRC/C/CHL/CO/4-5 (2015), para. 61; *Dominican Republic*, CRC/C/DOM/CO/3-5 (2015), para. 52; *Haiti*, CRC/C/HTI/CO/2-3 (2016), para. 51; *Honduras*, CRC/C/HND/CO/4-5 (2015), para. 65; *Ireland*, CRC/C/IRL/CO/3-4 (2016), para. 58; *Nicaragua*, CRC/C/NIC/CO/4 (2010), para. 59; *Panama* CRC/C/PAN/CO/5-6 (2018) para 31; *Peru*, CRC/C/PER/CO/4-5 (2016), para. 56; *Venezuela*, CRC/C/VEN/CO/3-5 (2014), para. 57.

<sup>24</sup> CAT *Concluding Observations: Nicaragua*, CAT/C/NIC/CO/1 (2009), para. 16; *Paraguay*, CAT/C/PRY/CO/4-6 (2011), para. 22; *Peru*, CAT/C/PER/CO/5-6 (2013), para. 15.

<sup>25</sup> UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. A/HRC/32/32, April 4, 2016 [Report of the Special Rapporteur on everyone's right to physical and mental health](#). Accessed June 26, 2018: para 92. “States are strongly encouraged to decriminalize abortion, in accordance with international human rights norms, and adopt measures to ensure access to legal and safe abortion services. Criminal laws with respect to abortion result in a high number of deaths, poor mental and physical health outcomes, infringement of dignity and amount to violations of the obligations of States to guarantee the right to health of adolescent girls.”

<sup>26</sup> UN Human Rights Council, *Report of the Working Group on the issue of discrimination against women in law and in practice*, A/HRC/32/44, 8 April 2016, paras 79-82. (hereinafter [UN HRC -Report of Working Group on Discrimination against Women](#)) Accessed June 28, 2018.

<sup>27</sup> World Health Organization (WHO), *Safe Abortion: Technical and Policy Guidance for Health Systems*, 2nd ed. (Geneva: WHO, 2012), at 90. [hereinafter [WHO Safe Abortion -Guidance](#) . Accessed June 26, 2018].

<sup>28</sup> [CEDAW Northern Ireland Inquiry Report](#), at para 68.

<sup>29</sup> BRASIL, Supremo Tribunal Federal. Habeas Corpus nº 124.306/RJ. Relator: Justice Marco Aurélio. Brasília, DF, Redator: Luís Roberto Barroso. Nov. 29, 2016. [hereinafter: [BRAZIL. Habeas Corpus - Sentencia em Portugues](#). Accessed June 28, 2018].

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<sup>30</sup> [Committee on Economic, Social and Cultural Rights \(CESCR\)](#), *Concluding Observations*: El Salvador, E/C.12/SLV/CO/3-5 (2014), para. 22 (poor and less educated women); Ireland, E/C.12/IRL/CO/3 (2015), para. 30 (women unable to afford an abortion abroad or access the necessary information).

[CEDAW Committee](#), *Concluding Observations*: Ireland, CEDAW/C/IRL/6-7 (2017), para. 42, 43 (poor women, asylum seekers and migrant women and girls without means to travel outside to obtain abortion services).

[Human Rights Committee](#), *Concluding Observations*: Ireland, CCPR/C/IRL/CO/4 (2014), para. 9 (women unable to travel abroad for accessing safe legal abortion).

<sup>31</sup> [WHO Safe Abortion -Guidance](#), pp. 18, 23, 90.

<sup>32</sup> G. Kane, B. Galli, and P. Skuster. *Cuando el aborto es un crimen: La amenaza para mujeres vulnerables en América Latina* (Chapel Hill, Carolina del Norte: Ipas, 2013) (A study on the application of criminal abortion laws in Argentina, Bolivia and Brazil between 2011 and 2013 revealed the selective application of the laws against poor, Afro-descendants, young people and indigenous peoples, who often have no recourse to competent legal defence.) [hereinafter [KANE et al.- Cuando Aborto es un crimen](#). Accessed June 25, 2018].

<sup>33</sup> [UN HRC -Report of Working Group on Discrimination against Women](#), para 79.

<sup>34</sup> ARGENTINA. Corte Suprema de Justicia de la Nación 2012, *F., A.L.*, Expediente Letra “F,” No. 259, Libro XLVI, (Arg.), para. 16 [hereinafter [ARGENTINA 2012 Sentencia F.AL. Argentina 2012 F.AL Sentencia in English](#). Accessed June 28, 2018.]

<sup>35</sup> BRAZIL. Supreme Court. Sentence. Claim of Non Compliance with Fundamental Precept nº 54. Judge-Rapporteur: Justice Marco Aurélio. Vote: Justice Marco Aurélio. Brasília, DF, April 30, 2013. p. 52 [hereinafter [BRAZIL, Sentencia ADPF 54](#). Accessed June 28, 2018.] [BRAZIL, Habeas Corpus - Sentencia em Portugues](#).

<sup>36</sup> Trial of Ulrich Greifelt and Others, *Law Reports of Trials of War Criminals*, Vol XIII, 1, 3,10, 13-14, 28-29,32-33, 36 (London: Published for the UN War Crimes Commission by His Majesty’s Stationery Office, 1949).

<sup>37</sup> The Statute of the International Court of Justice, 18 April 1946, Article 38(1)(c). [Statute of the International Court of Justice](#). Accessed June 26, 2018.

<sup>38</sup> [WHO Safe Abortion -Guidance](#): “Protection of persons with special needs: Depending upon the context, unmarried women, adolescents, those living in extreme poverty, women from ethnic minorities, refugees and other displaced persons, women with disabilities, and those facing violence in the home, may be vulnerable to inequitable access to safe abortion services.” (p. 68) . . . “Negotiating authorization procedures disproportionately burdens poor women, adolescents, those with little education, and those subjected to, or at risk of, domestic conflict and violence, creating inequality in access.” (p. 95). See also, B. Galli and A.P. Viana, O Caso Elineide: Reflexões Sobre as Barreiras Existentes Ao Acesso a Interrupção Legal Da Gravidez Por Risco a Saúde Da Mulher (The Case Elineide: Reflections on Existing Barriers to Women’s Access to Legal Pregnancy Termination Due to Health Risk) (October 1, 2013), [Galli et al.- O Caso Elineide](#) (accessed June 28, 2018).

<sup>39</sup> G. Kane, B. Galli, and P. Skuster. *Cuando el aborto es un crimen: La amenaza para mujeres vulnerables en América Latina* (Chapel Hill, Carolina del Norte: Ipas, 2013) [KANE et al.- Cuando Aborto es un crimen](#). Accessed June 26, 2018.

<sup>40</sup> [ARGENTINA 2012 Sentencia F.AL. Argentina 2012 F.AL Sentence in English](#), para 17.

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<sup>41</sup> [Supreme Court of Canada, Morgentaler 1988 decision](#), 1988 p. 56-57 (Chief Justice Dickson) (drawing on evidence from *The Report of the Committee on the Operation of the Abortion Law* (Ottawa: Minister of Supply and Services, Canada, 1977) showing that the then existing criminal law, allowing abortion on limited grounds, delayed access to services to the prejudice of some women’s physical and mental health was applied arbitrarily across the country.)

<sup>42</sup> European Court of Human Rights: *Tysiac v. Poland*, Application no. 5410/03, 45 E.H.R.R. 42 (2007) (violation of the right to private life). [Tysiac v Poland](#); *R.R. v. Poland*, App. No. 27617/04 (2011) (violation of the rights to be freedom from inhuman and degrading treatment and private life); [R.R. v Poland](#). *P. and S. v. Poland*, App. No. 57375/08 (2012) (violations of the rights to be freedom from inhuman and degrading treatment, liberty and security and private life). [P and S v Poland](#); Accessed June 26, 2018.

<sup>43</sup> [CEDAW Gen. Rec 24](#), at para 11; CEDAW General Recommendation No. 28, The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, forty-seventh session, UN Doc. CEDAW/C/GC/28, 2010, [hereinafter [CEDAW Gen. Rec. 28](#). Accessed June 26, 2018]; see Cook, Rebecca; Howard, Susannah. Accommodating Women’s Differences under the Women’s Anti-Discrimination Convention. *Emory Law Journal*, vol 56, n. 4, 1040-1092, 2007. [COOK & HOWARD, “Accommodating”](#) Accessed June 26, 2018; Cook, R.J. & V. Undurraga, “Article 12 [Health]” in M. Freeman, C. Chinkin and B. Rudolf (eds.), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 311-333.

<sup>44</sup> [CESCR Gen. Comm. 22](#), at paras 24-28

<sup>45</sup> [UN HRC -Report of Working Group on Discrimination against Women](#): “Denying women access to services which only they require and failing to address their specific health and safety, including their reproductive and sexual health needs, are inherently discriminatory and prevent women from exercising control over their own bodies and lives.” (para. 28); “Equality in reproductive health requires access, without discrimination ... to safe termination of pregnancy...” (para. 23).

<sup>46</sup> The CEDAW Committee, *L.C. v. Peru*, Communication No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009 (2011) [CEDAW: LC v Peru in English](#). [CEDAW: LC v Peru en Espanol](#). Accessed June 26, 2018. The Committee found a representative instance of the discriminatory application of the law through the refusal of physicians to operate on a pregnant impoverished adolescent girl who attempted suicide and injured her spine. Even though abortion is permissible where there is a serious and immediate risk to a pregnant woman’s health, the hospital denied her request for a therapeutic abortion. The adolescent eventually miscarried, after which she received spinal surgery, but because of the delay, she remains paralyzed from the neck down. The Committee found a violation of Peru’s obligations to ensure women’s equal access to health care services, and specifically recommended that the State implement measures to ensure equal access to abortion services.

<sup>47</sup> [CEDAW Gen. Rec. 24](#), at paras 2, 6, 9-17, 19-23, 31; [CESCR Gen. Comm. 22](#), at paras 28, 34.

<sup>48</sup> [CEDAW Gen. Rec. 24](#), (The CEDAW Committee explains that obligations to respect requires states to remove barriers, including “laws that criminalize medical procedures only needed by women,” to ensure equal access health care services (para 14)). [CEDAW Northern Ireland Inquiry Report](#) “Based on its expertise in interpreting articles 12(1) [health] and 16(1)(e) [right to decide the number and spacing of children as part of the right to family life], GR No. 24 (1999) [health] read with article 2(b), (d), (e) and (f), clarified by GR No. 28 (2010) and article 5, clarified by GRs No. 19 (1992) and 35 (2017) on violence against women and gender-based violence against women, the Committee systematically recommends the decriminalization of abortion in all cases.” para 58, see also paras 55, 56, 58, 64-66, 72(a)(b), 82. Selected Concluding Observations calling for decriminalization of UN treaty bodies are listed in notes 20-24 above.

<sup>49</sup> [CESCR Gen. Comm. 22](#), paras 11-21.

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<sup>50</sup> CEDAW Committee, *Concluding Observations on the combined sixth and seventh periodic reports of Ireland*, CEDAW/C/IRL/CO/6-7, 9 Mar 2017, paras. 42, 43.

<sup>51</sup> [CEDAW Northern Ireland Inquiry Report 2018](#): para 65; see also para 72(a).

<sup>52</sup> Enright, Máiréad, Julie McCandless & Aoife O’Donoghue eds., *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity* (Oxford: Hart, 2017), p. 95, citing Diarmaid Ferriter, *Occasions of Sin: Sex and Society in Modern Ireland* (London: Profile Books, 2009), p. 188.

<sup>53</sup> [Abortion Worldwide 2017](#) at 30 and 40.

<sup>54</sup> Siegel, Reva (2018) "ProChoiceLife: Asking Who Protects Life and How -- and Why it Matters in Law and Politics," *Indiana Law Journal*: Vol. 93: Iss. 1 (2017-2018), pp. 207-232. [hereinafter [SIEGEL ProChoice Life](#). Accessed June 28, 2018].

<sup>55</sup> United States Supreme Court. *Whole Woman's Health v. Hellerstedt*. Decision n° 136 S. Ct. 2292 at 2315, June 27, 2016. [Whole Woman's Health v. Hellerstedt](#) Accessed June 28, 2018.

<sup>56</sup> [SIEGEL- ProChoice Life](#) 207-232, at p. 225.

<sup>57</sup> [PORTUGAL – Sentencia no. 75/2010](#)., cfr. §11.4.18.

<sup>58</sup> [PORTUGAL – Sentencia no. 75/2010](#); See Rubio-Marin, Ruth. In Cook, Rebecca J.; Erdman, Joanna N.; Dickens, Bernard M. *Abortion Law in Transnational Perspective: Cases and Controversies*. Philadelphia: University of Pennsylvania Press, 2014, p. 36-54, translated as: Rubio-Marin, Ruth. Aborto em Portugal: novas tendências no constitucionalismo europeu. *Revista Direito GV*, São Paulo, vol. 13, n. 1, p. 356-379, jan./abr. 2017. [RUBIO-MARIN – Aborto em Portugal](#). Accessed June 28, 2018.

<sup>59</sup> [BRAZIL, Sentencia ADPF 54](#). Vote: Justice Gilmar Mendes, Brasília, DF, April 30, 2013. p. 285.

<sup>60</sup> [PORTUGAL – Sentencia no. 75/2010](#),

<sup>61</sup> [PORTUGAL – Sentencia no. 75/2010](#), cfr. §11.9.2.

<sup>62</sup> [BRAZIL, Sentencia ADPF 54](#), p. 285.

<sup>63</sup> Santos, Leonor Maria Pacheco; Lecca, Roberto Carlos Reyes; Cortez-Escalante, Juan Jose, Sanchez, Mauro Niskier; Rodriques, Humberto Gabriel. Prevention of neural tube defects by the fortification of flour with folic acid: a population-based retrospective study in Brazil. *Bulletin of the World Health Organization*, vol. 94, n. 1, p.22-24 Jan. 2016 (finding that if maternal intake of folic acid can be increased around the time of conception, the risk of fetal neural tube defects could be reduced by 60–70%). [SANTOS et al. Prevention](#).

<sup>64</sup> Carvalho, Talana Silva, et al., “Stillbirth Prevalence in Brazil: an exploration of regional differences. *Jornal de Pediatria (Rio J)*. 2018;94: 200-206 at p.200: “According to the most recent Brazilian Demographic and Health Survey (DHS/PNDS-2006/07) . . .the prevalence of stillbirth in Brazil was 14.82 per 1000 births, with great variation by region of the country, and a higher prevalence among the most deprived.” [CARVALHO et al. “Stillbirth Prevalence in Brazil](#). Accessed June 28, 2018.

<sup>65</sup> In Brazil, maternal mortality is estimated to be 44 maternal deaths per 100,000 live births, World Health Organization, et al. *Trends in maternal mortality 1990 to 2015 Estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division*. Annex 7: Estimates of maternal mortality ratio (MMR, maternal deaths per 100 000 live births), number of maternal deaths, lifetime, risk, percentage of AIDS-related

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indirect maternal deaths and proportion of deaths among women of reproductive age that are due to maternal causes (PM), by country, 2015a. (Geneva: World Health Organization, 2015) p. 51. [Trends 1990-2015 in English](#). [Trends 1990-2015 in Spanish](#). Accessed June 26 2018.

<sup>66</sup> The CEDAW Committee in the *Alyne* case held Brazil accountable for failure to prevent post-partum hemorrhage, resulting in the death of the mother and the neonate, *Alyne v. Brazil*, CEDAW/C/49/D/17/2008. [s.l.], 2011. [CEDAW- Alyne decision](#). Accessed June 26, 2018. Cook, R.J. “Human Rights and Maternal Health: Exploring the Effectiveness of the *Alyne* Decision,” 41(1) (2013) *Journal of Law, Medicine and Ethics* 103-123, 2013. [COOK article about Alyne decision](#); “Direitos Humanos e Mortalidade Materna: Explorando a eficácia da decisão do Caso Alyne,” *Interesse Publico* 86(2014): 145-178. [COOK –article in Portuguese](#). Accessed June 26, 2018.