

International Human Rights Law and Abortion in Latin America

Latin America is home to some of the most restrictive abortion laws in the world. While only three countries—Chile, El Salvador, and the Dominican Republic—provide no exceptions or extenuating circumstances for the criminal sanctions on abortion, in most countries and jurisdictions, exceptions are provided only when necessary to save the pregnant woman's life and in certain other narrowly defined circumstances. Even where abortion is not punished by law, women often have severely limited access because of lack of proper regulation and political will.

Advancing access to safe and legal abortion can save women's lives and facilitate women's equality. Women's decisions about abortion are not just about their bodies in the abstract, but rather about their human rights relating to personhood, dignity, and privacy more broadly. Continuing barriers to such decisions in Latin America interfere with women's enjoyment of their rights, and fuel clandestine and unsafe practices, a major cause of maternal mortality in much of the region.

Latin American women's organizations have fought for the right to safe and legal abortion for decades. Increasingly, international human rights law supports their claims. In fact, international human rights legal instruments and interpretations of those instruments by authoritative U.N. expert bodies compel the conclusion that access to safe and legal abortion services is integral to the fulfillment of women's human rights generally, including their reproductive rights and rights relating to their full and equal personhood.

This paper offers (1) a brief overview of the status of abortion legislation in Latin America and (2) an in-depth analysis of international human rights law in this area. In addition to citing international treaty texts, it draws heavily from the work of United Nations treaty monitoring bodies.¹ Human Rights Watch hopes that this distillation of international law will support the efforts of women's rights activists in Latin America.

¹ The implementation of the main human rights treaties under the United Nations human rights system is supervised by committees—called treaty monitoring bodies—made up of independent experts selected from the states parties to the respective treaties. These committees receive periodic reports from states parties which they review in dialogue with the states. After such reviews, the committees issue conclusions and recommendations—generally called concluding remarks—regarding the fulfillment of the rights protected by the conventions in that specific country. The growing body of concluding remarks issued by the committees provides an important guide for the committees' thinking on the concrete status and scope of the rights protected under the United Nations system. The committees also sometimes issue conceptual guidelines on the implementation of a specific human right—called general comments or general recommendations.

I. Restrictions on Abortion in Latin America

In Latin America and the Caribbean, women face multiple barriers to free exercise of their reproductive rights, including restrictive abortion legislation.² In fact, many women struggle daily to gain even minimal autonomy over their intimate lives. Some are raped by their husbands or others, while many more are denied access to contraceptives and reproductive health services and refused the possibility to decide to terminate unwanted pregnancies with safe and legal abortions. Across the region, millions of abortions are performed every year, most of them under unsafe and clandestine conditions, and thousands of women die as a result.³ In many countries in the region, the consequences of illegal abortions constitute a leading cause of maternal mortality.⁴

Fortunately, the first few years of the twenty-first century have shown some encouraging signs due in large part to the tireless efforts of women's rights activists. Even though abortion is illegal in almost all countries in the region (except Cuba), most countries allow criminal penalties to be waived or lowered in specific circumstances, including—most often—where the life or health of the pregnant woman is in danger, or where the pregnancy is the result of rape or incest.⁵ In several countries in the region—in South America and parts of Mexico in particular—law and policy-makers, under heavy pressure from women's right activists, have amended restrictive abortion laws and put procedures in place that are meant to alleviate the disastrous health consequences of unsafe abortions. In Uruguay, a reproductive health bill, which included several positive steps on provision of contraceptives and related information, was approved by the House of Representatives in 2002 and lost in the Senate by only four votes in 2004.⁶ In Brazil, the government set up a committee in 2005 to propose legal reform related to abortion, and the Health Ministry passed a resolution meant to facilitate women's access to safe and decriminalized abortion when their pregnancies are the result of rape.⁷

In other countries in South America, positive developments also may be imminent. In Argentina and Venezuela as well as in other countries, bills seeking to decriminalize abortion

These general comments or recommendations provide evolving authoritative interpretation of the human rights in question.

² Human Rights Watch's webpage contains specific information on abortion legislation and history in several Latin American countries at <http://hrw.org/photos/2005/argentina0605/>.

³ "Situación legal y condiciones del aborto en América Latina" [The legal situation and conditions of abortion in Latin America], CIMAC Noticias, September 28, 2004.[online] <http://www.cimacnoticias.com/noticias/04sep/04092803.html> (retrieved May 2, 2005).

⁴ Ibid.

⁵ Only the penal codes of Chile, El Salvador, and the Dominican Republic do not contemplate any exceptions to the general criminal penalties leveled on women who have induced abortions. For Chile: Penal Code of 1874, articles 342-345; and Health Code of 1931, as amended in 1989, article 119. For El Salvador: Penal Code of 1973, as amended in 1997, articles 133-137. For the Dominican Republic: Penal Code of 1948, article 317.

⁶ "Senado rechaza despenalizar aborto en Uruguay" [Senate rejects the decriminalization of abortion in Uruguay], AP Spanish Worldstream, May 5, 2004.

⁷ "Ministra: Gobierno de Brasil no ha definido posición sobre aborto" [Minister: Brazil's government has not defined its position on abortion], AP Spanish Worldstream, December 12, 2004; and "Surge polémica en Brasil en torno a aborto legal por violación" [Polemic surfaces in Brazil regarding legal abortion in cases of rape], Agencia Mexicana de Noticias (NOTIMEX) March 18, 2005.

in some or all cases are pending in the respective congresses.⁸ And in Colombia in April 2005, a lawyer challenged the penal code provisions on abortion before Colombia's constitutional court, charging that the law should explicitly provide for exemptions from punishment where the woman's life or health is in danger and where the pregnancy is the result of rape.⁹

In other parts of the region, however, developments are less encouraging. In 1997, El Salvador's congress amended the penal code to eliminate the possibility of waiving criminal punishment where the pregnant woman's life is in danger, where the pregnancy is the result of rape, or where the fetus suffers severe and predictable deformities.¹⁰ As a result, women who have abortions in El Salvador risk criminal penalties even if their life is threatened by the pregnancy. In other countries in Central America and the Caribbean, legislators and policy makers have proposed further restricting already restrictive laws. In 2004 in Nicaragua, for example, the congress debated removing the possibility of waiving criminal penalties for abortion where the woman's life is in danger, but the debate was suspended because of the uproar it created on both sides of the issue.¹¹

Despite differences in national abortion laws, women have severely limited access to legal abortion in most countries in Latin America. Across the region, lack of proper regulations and fear of legal prosecution on the part of both doctors and women limit women's options. Women's rights activists have long insisted that while reform of abortion laws is essential for women's full enjoyment of their human rights, the full and effective implementation of existing penal code provisions that permit access to safe and legal abortion in limited cases would be a positive initial step.

II. Overview of International Human Rights Law on Abortion

International standards on the link between access to abortion and women's exercise of their human rights have undergone significant development over the past decade. Evidence of this development is clear in the work of U.N. treaty bodies, one regional human rights protocol, and consensus documents from international conferences on women's rights and reproductive rights and health.

⁸ Gioconda Espina, "Aborto en Venezuela: Pasando agachadas, de nuevo..." [Abortion in Venezuela: crouching again ...], *Mujeres Hoy* (Chile), October 13, 2004 [online]

<http://www.mujereshoy.com/secciones/2498.shtml> (retrieved April 14, 2005); "Polémica en Argentina por intento de ampliar causas de aborto legal" [Polemic in Argentina due to effort to expand causes for legal abortion], *CIMAC Noticias* (Mexico), November 18, 2002.

⁹ "Landmark constitutional challenge in Colombia seeks to loosen one of World's Most Restrictive Abortion Laws," *Women's Link Worldwide* press release, April 14, 2005 [online] http://www.womenslinkworldwide.org/pdf/co_lat_col_pressrelease.pdf (retrieved April 14, 2005). For full text of the case online, see http://www.womenslinkworldwide.org/pdf/sp_co_lat_col_lademanda.pdf (retrieved May 2, 2005).

¹⁰ "Negocian cambios en Constitución en legislatura salvadoreña" [Changes negotiated to the Constitution in the Salvadorean legislature], *Reuters*, April 30, 1997.

¹¹ "Congreso de Nicaragua suspende discusión del aborto en medio de protestas" [Nicaraguan Congress suspends discussion on abortion in the midst of protests], *Agence France Presse*, July 8, 2004.

Authoritative interpretations of international law recognize that abortion is vitally important to women’s exercise of their human rights. U.N. treaty bodies, which take a measured approach to interpreting international human rights law, have consistently and extensively opined on abortion access and restrictions. By our count, as of early 2005, at least 122 concluding observations on ninety-three countries spanning more than a decade by U.N. treaty bodies have substantively addressed how abortion relates to fundamental human rights. These bodies reason that firmly established human rights are jeopardized by restrictive or punitive abortion laws and practices. Their jurisprudence on specific human rights and their relevance to abortion are described below.

Although the text of most international treaties is silent on the topic of abortion, a new protocol on women’s rights under the African human rights system explicitly addresses abortion. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the African Union in 2003, provides that member states must take all appropriate measures to “protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.” Although the protocol only calls on governments to permit abortion under particular circumstances, it is a significant step in the development of international law on abortion.

Even without more explicit treaty language on abortion, it is clear that international human rights law supports women’s right to decide independently in matters related to abortion, without interference from the state or third parties. The sections below describe how the following human rights have been interpreted to pertain to abortion:

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A. Rights to health and health care

Legal Sources

The rights to health and health care are recognized in a number of international instruments. For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides in article 12(1) that states must recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also provides in article 12(1) that “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning” and in article 14(2)(b) that states must ensure that women in rural areas “have access to adequate health care facilities, including information, counselling and services in family planning.” Article 24(d) of the Convention on the Rights of the Child (CRC) also provides that states must take measures to “ensure appropriate pre- and post-natal health care for expectant mothers” as part of the obligation to recognize children’s right to the highest attainable standard of health. Finally, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) provides in article 10: “Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.”

Application and Interpretation

Unsafe abortions are a grave threat to women’s health; between 10 and 50 percent of women who undergo unsafe abortions require post-abortion medical attention for complications such as incomplete abortion, infection, uterine perforation, pelvic inflammatory disease, hemorrhage, or other injury to internal organs. These may result in death, permanent injury, or infertility.

The Committee on Economic, Social and Cultural Rights (CESCR) provided its most comprehensive assessment of the right to health in its General Comment 14, which explains that this right contains both freedoms, such as “the right to control one’s health and body, including sexual and reproductive freedom,” and entitlements, such as “the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”¹² It also calls on states to adopt measures to “improve . . . sexual and reproductive health services, including access to family planning, pre-and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information.”¹³ It recommends that states remove all barriers to women’s access to health services, education, and information, including in the area of sexual and reproductive health.¹⁴ Its concluding observations have addressed risks to women’s health

¹² CESCR, General Comment 14, The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (2000) (hereinafter General Comment 14), para. 8.

¹³ *Ibid.*, para. 14.

¹⁴ *Ibid.*, para. 21. The full text of this paragraph reads: “To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women’s right to health

resulting from restrictive abortion laws, and have recommended improving medical and sanitary conditions for carrying out abortions.¹⁵ Citing concern about the negative consequences of restrictive abortion laws on women's health, the CESCR has recommended that states legalize abortion in some circumstances, such as when the pregnancy is the result of rape or incest, and when the life of the pregnant women is endangered.¹⁶

General Recommendation 24 of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) on women and health affirms states' obligation to respect women's access to reproductive health services and to "refrain from obstructing action taken by women in pursuit of their health goals."¹⁷ It explains that "barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures."¹⁸ It recommends that "[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion."¹⁹ In a number of concluding observations, the CEDAW Committee has expressed concern over women's limited access to reproductive health services and information, and has criticized factors that impede women's health care, such as religious influences, privatization of health care, and budgetary restrictions.²⁰ In at least one instance, it recommended that the state party provide public funding to women needing abortions.²¹

throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights. "

¹⁵ See, e.g., the CESCR's concluding observations on Azerbaijan, U.N. Doc. E/C.12/1/Add.104 (2004), para. 56; Chile, U.N. Doc. E/C.12/1/Add.105 (2004), para. 25; Kuwait, U.N. Doc. E/C.12/1/Add.98 (2004), para. 43; Poland, U.N. Doc. E/C.12/1/Add.82, (2002), para. 29; and Russia, U.N. Doc. E/C.12/1/Add.94 (2003), para. 63.

¹⁶ CESCR, concluding observations on Chile, U.N. Doc. E/C.12/1/Add.105 (2004), para. 25 and Kuwait, U.N. Doc. E/C.12/1/Add.98 (2004), para. 43

¹⁷ CEDAW Committee, General Recommendation 24, Women and Health (Article 12), U.N. Doc. No. A/54/38/Rev.1 (1999) (hereinafter General Recommendation 24), para. 14.

¹⁸ *Ibid.*, para. 14.

¹⁹ *Ibid.*, para. 31(c).

²⁰ See, e.g., the CEDAW Committee's concluding comments on Antigua and Barbuda, U.N. Doc. A/52/38/Rev.1, Part II (1997), para. 258; Argentina, UN Doc. A/59/38, Part II (2004), paras. 380-381; Bangladesh, U.N. Doc. A/52/38/Rev.1, Part II (1997), para. 438; Belize, U.N. Doc. A/54/38, Part II (1999), paras. 56-57; Burkina Faso, U.N. Doc. A/55/38, Part I (2000), para. 274; Croatia, U.N. Doc. A/53/38, Part I (1998), para. 109; Cuba, U.N. Doc. A/51/38 (1996), para. 219; Dominican Republic, UN Doc. A/59/38, Part II (2004), paras. 308-309; Ethiopia, U.N. Doc. A/51/38 (1996), para. 160; Ethiopia, UN Doc. A/59/38, Part I (2004), paras. 257-258; Georgia, U.N. Doc. A/54/38, Part II (1999), para. 111; Greece, U.N. Doc. A/54/38, Part I (1999), paras. 207-208; Guinea, U.N. Doc. A/56/38, Part II (2001), paras. 128-129; Guyana, U.N. Doc. A/50/38 (1995), para. 621; Hungary, U.N. Doc. A/51/38 (1996), para. 254; Iraq, U.N. Doc. A/55/38, Part II (2000), paras. 203-204; Kazakhstan, U.N. Doc. A/56/38, Part I (2001), paras. 105-106; Lithuania, U.N. Doc. A/55/38, Part II (2000), paras. 158-159; Mongolia, U.N. Doc. A/56/38, Part I (2001), para. 269; Morocco, U.N. Doc. A/52/38/Rev.1, Part I (1997), para. 68; Nicaragua, U.N. Doc. A/56/38, Part II (2001), paras. 300-301 and 303; Nigeria, U.N. Doc. A/53/38/Rev.1, Part II (1998), paras. 170-71; Nigeria, UN Doc. A/59/38, Part I (2004), paras. 307-308; Paraguay, U.N. Doc. A/51/38 (1996), para. 123; Peru, U.N. Doc. A/53/38/Rev.1, Part II (1998), paras. 337 and 341; Republic of Moldova, U.N. Doc. A/55/38, Part II (2000), paras. 109-110; Romania, U.N. Doc. A/55/38, Part II (2000), paras. 314-315; South Africa, U.N. Doc. A/53/38/Rev.1, Part II (1998), para. 134; Venezuela, U.N. Doc. A/52/38/Rev.1, Part I (1997), para. 236;

The Committee on the Rights of the Child has, in its concluding observations, asked governments to review legislation prohibiting abortion where unsafe abortions contribute to high rates of maternal mortality, and in some cases to undertake studies to understand the negative impact of illegal abortion.²² In other cases, it has simply expressed concern about high maternal mortality rates from abortion for teenagers without recommending any particular remedy.²³ It has requested that governments increase access to reproductive health care services and education, particularly for adolescents, and in at least one case recommended that a government ensure that abortions be conducted with due attention to minimum standards of health safety.²⁴

B. Right to Life

Legal Sources

In addition to being recognized as a part of customary international law, the right to life is protected in a number of human rights treaties. Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) provides: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Article 6 of the CRC provides that that “every child has the inherent right to life.” The American Convention on Human Rights provides in article 4(1): “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

Application and Interpretation

With approximately 1,400 maternal deaths worldwide each day, 13 percent of which are attributable to unsafe abortion, and with evidence showing that maternal mortality increases when countries criminalize abortion, restrictive abortion laws can have a devastating impact on the right to life. Governments could save tens of thousands of women’s lives every year by ensuring access to safe abortion services.²⁵

Vietnam, U.N. Doc. A/56/38, Part II (2001), para. 266; and Zimbabwe, U.N. Doc. A/53/38, Part I (1998), para. 148.

²¹ CEDAW Committee, concluding observations on Burkina Faso, U.N. Doc. A/55/38, Part I (2000), para. 276.

²² Committee on the Rights of the Child, concluding observations on Chad, U.N. Doc. CRC/C/15/Add.107 (1999), para. 30.

²³ See, e.g., the Committee on the Rights of the Child’s concluding observations on Colombia, U.N. Doc. CRC/C/100 (2000), para. 370.

²⁴ See, e.g., the Committee on the Rights of the Child’s concluding observations on Angola, U.N. Doc. CRC/C/15/Add.246 (2004), para. 45; Benin, U.N. Doc. CRC/C/15/Add.106 (1999), para. 25; Botswana, U.N. Doc. CRC/C/15/Add.242 (2004), para. 53; Brazil, U.N. Doc. CRC/C/15/Add.241 (2004), para. 55; El Salvador, U.N. Doc. CRC/C/15/Add.232 (2004), para. 52; Grenada, U.N. Doc. CRC/C/15/Add.121 (2000), para. 22; Liberia, U.N. Doc. CRC/C/15/Add.236 (2004), para. 49(c); Mozambique, U.N. Doc. CRC/C/15/Add.172 (2002), para. 47(b) (recommending improvements in health care for adolescents, including “ensuring that abortions can be conducted with all due attention to minimum standards of health safety”); Nicaragua, U.N. Doc. CRC/C/15/Add.108 (1999), para. 35; and Sao Tome and Principe, U.N. Doc. CRC/C/15/Add.235 (2004), para. 47(d).

²⁵ World Health Organization (WHO), *Unsafe Abortion: Global and Regional Estimates of Incidence of and Mortality Due to Unsafe Abortion with a Listing of Available Country Data* (Geneva: WHO, 1997).

The U.N. Human Rights Committee (HRC) has explained that the right to life should not be understood in a restrictive manner, and that states must adopt positive measures to protect this right.²⁶ Under its General Comment 28, the HRC requires states to report on pregnancy and childbirth-related deaths of women.²⁷ Moreover, it has noted with concern the relationship between restrictive abortion laws, clandestine abortions, and threats to women's lives.²⁸ In the case of Chile, where abortion has been illegal in all circumstances since 1986, the HRC noted that:

The criminalization of all abortions, without exception, raises serious issues, especially in the light of unrefuted reports that many women undergo illegal abortions that pose a threat to their lives. ... The State party is under a duty to take measures to ensure the right to life of all persons, including pregnant women whose pregnancies are terminated. The Committee recommends that the law be amended so as to introduce exceptions to the general prohibition of all abortions.²⁹

In the case of Peru, the HRC went further to note that the penal code provisions of that country—which subject women to criminal penalties even when the pregnancy is the result of rape—are incompatible with the rights to equal enjoyment of other rights protected by the ICCPR:

It is a matter of concern that abortion continues to be subject to criminal penalties, even when pregnancy is the result of rape. Clandestine abortion continues to be the main cause of maternal mortality in Peru. ... The Committee once again states that these provisions are incompatible with articles 3 [equal enjoyment of rights], 6 [right to life], and 7 [freedom from torture and other cruel, inhuman, or degrading treatment] of the Covenant and recommends that the legislation be amended to establish exceptions to the prohibition and punishment of abortion.³⁰

In 2004, it noted with regard to Colombia:

²⁶ HRC, General Comment 6, article 6 (sixteenth session, 1982), para. 5.

²⁷ HRC, General Comment 28, Equality of Rights between Men and Women (article 3), U.N. Doc. CCPR/C.21/Rev.1/Add.10 (2000) (hereinafter General Comment 28), para. 10.

²⁸ See, e.g., the HRC's concluding observations on Bolivia, U.N. Doc. CCPR/C/79/Add.74 (1997), para. 22; Cameroon, U.N. Doc. CCPR/C/79/Add.116 (1999), para. 13; Chile, U.N. Doc. CCPR/C/79/Add.104 (1999), para. 15; Colombia, U.N. Doc. CCPR/CO/80/COL (2004), para. 13; Costa Rica, U.N. Doc. CCPR/C/79/Add.107 (1999), para. 11; Ecuador, U.N. Doc. CCPR/C/79/Add.92 (1998), para. 11; Guatemala, U.N. Doc. CCPR/CO/72/GTM (2001), para. 19; Mali, U.N. Doc. CCPR/CO/77/MLI (2003), para. 14; Morocco, U.N. Doc. CCPR/CO/82/MAR (2004), para. 29; Peru, U.N. Doc. CCPR/CO/70/PER (2000), para. 20; Poland, U.N. Doc. CCPR/C/79/Add.110 (1999), para. 11; Poland, U.N. Doc. CCPR/CO/82/POL (2004), para. 8; Senegal, U.N. Doc. CCPR/C/79/Add.82 (1997), para. 12; Sri Lanka, U.N. Doc. CCPR/CO/79/LKA (2003), para. 12; and Venezuela, U.N. Doc. CCPR/CO/71/VEN, (2001), para. 19.

²⁹ HRC, concluding observations on Chile, U.N. Doc. CCPR/C/79/Add.104 (1999), para. 15.

³⁰ HRC, concluding observations on Peru, U.N. Doc. CCPR/CO/70/PER (2000), para. 20.

The Committee notes with concern that the existence of legislation criminalizing all abortions under the law can lead to situations in which women are obliged to undergo high-risk clandestine abortions. It is especially concerned that women who have been victims of rape or incest or whose lives are in danger as a result of their pregnancy may be prosecuted for resorting to such measures (art. 6) [the right to life]. The State party should ensure that the legislation applicable to abortion is revised so that no criminal offences are involved in the cases described above.³¹

Finally, in its 1999 concluding observations on Guatemala, the HRC noted:

[t]he State has the duty to adopt the necessary measures to guarantee the right to life (art. 6) of pregnant women who decide to interrupt their pregnancy by providing the necessary information and resources to guarantee their rights and amending the legislation to provide for exceptions for the general prohibition of all abortions except where the mother's life is in danger.³²

The CEDAW Committee has also expressed concern in dozens of concluding observations about high rates of maternal mortality, including due to the unavailability of safe abortion services. In some cases, it has explicitly asserted that such deaths indicate that governments may not be respecting women's right to life.³³

The Committee on Economic, Social and Cultural Rights (CESCR) has asked a state party to legalize abortion on at least three occasions, specifically when a pregnancy threatens the woman's life or is the result of rape or incest.³⁴

Although the right to life clearly protects the interests of pregnant women, opponents of abortion rights also vocally argue that the "right to life" of a fetus should predominate. There is debate as to when "legal personhood" commences and when the right to life should apply, with many arguing that it should only apply as a legal concept after birth. There has been scholarly and judicial analysis of three situations (described in more detail below): (1) where legal instruments are silent as to when the right to life commences, (2) where there is ambiguous language, and (3) where legal instruments clearly state that the right to life commences from conception.

³¹ HRC, concluding observations on Colombia, U.N. Doc. CCPR/CO/80/COL (2004), para. 13.

³² HRC, concluding observations on Guatemala, U.N. Doc. CCPR/CO/72/GTM (1999), para. 19.

³³ See, e.g., the CEDAW Committee's concluding observations on Belize, U.N. Doc. A/54/38, Part II (1999), para. 56; Colombia, U.N. Doc. A/54/38/Rev.1, Part I (1999), para. 393; and the Dominican Republic, U.N. Doc. A/53/38/Rev.1, Part I (1998), para. 337.

³⁴ CESCR, concluding observations on Chile, U.N. Doc. E/C.12/1/Add.105 (2004), para. 52; Kuwait, U.N. Doc. E/C.12/1/Add.98 (2004), para. 43; and Nepal, U.N. Doc. E/C.12/1/Add.66 (2001), para. 55.

The silence of certain legal instruments concerning the starting point for the right to life has been understood by bodies charged with interpreting them and by human rights scholars to imply that the right to life does not apply before the birth of a human being. In the 1980 *Paton v. United Kingdom* case, the European Commission ruled that **for purposes of limitations on the right to life**, the term “everyone” in article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (which protects “everyone’s right to life”) did not include the unborn.³⁵ It further held that even if a fetus were entitled to some protection, article 2 could not prevent a woman from obtaining an abortion at an early stage of pregnancy to protect her physical and mental health.³⁶

The legislative history of the ICCPR also provides some insight into this matter. Proposals during debates over the ICCPR to add language protecting the right to life from the time of conception were rejected, and scholars say that article 6(1) of the ICCPR conferring the right to life on “human beings” is understood to mean human beings after birth.³⁷ ICCPR expert Manfred Nowak points out that various countries (Lebanon, Belgium, Brazil, El Salvador, Mexico, and Morocco) proposed language between the years 1950 and 1957 that would have protected the right to life from the moment of conception, but these proposals were voted down. He notes that the discussions preceding such votes left “no doubt that, for a variety of reasons, the majority of delegates decided that it would not be sensible to adopt such a provision.”³⁸ He notes that some interpretations of the right to life would apply this right to a fetus from the point of viability, but that the right of the unborn child would have to be balanced against other basic rights, including the rights of the pregnant woman to life and privacy.³⁹

Some international human rights instruments are ambiguous concerning the right to life, leading to disparate interpretations. For example, writer James Bohan argues that ambiguous language in the Convention on the Rights of the Child can be interpreted as constituting a right to life of the fetus. Article 6 of the CRC provides that “every child has the inherent right to life.” Article 1 defines “child” as every human being below the age of 18 years. The preamble states that the convention was drafted “bearing in mind” that the Declaration on the Rights of the Child provided that children need “appropriate legal protection before as well as after birth.” Taken together, Bohan asserts that these provisions establish a legal right to life of a fetus.⁴⁰

This perspective is countered by legal experts such as Professors Rebecca Cook and Bernard Dickens. They point out that when the CRC was being drafted in the 1980s, a similar proposal concerning the right to life from conception to that made during ICCPR negotiations

³⁵ *Paton v. United Kingdom* (1981), 3 E.H.R.R. 408 (European Commission on Human Rights), para. 17.

³⁶ *Ibid.*, para. 23.

³⁷ Rebecca J. Cook and Bernard M. Dickens, “Human Rights Dynamics of Abortion Law Reform,” *Human Rights Quarterly*, vol. 25 (2003), p. 24.

³⁸ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel: Kehl am Rhein, 1993), p. 123.

³⁹ *Ibid.*, p. 124.

⁴⁰ See James F. Bohan, *The House of Atreus: Abortion as a Human Rights Issue* (Westport, Conn.: Praeger, 1999), p. 65.

was debated and rejected. While the CRC's preamble refers to appropriate legal protection before birth, the operative language defining the term "child" refers to "human beings" below the age of eighteen. Thus, the enforceable provisions of the CRC are widely understood to retain the historical understanding that legally protected status as a human being begins at live birth.⁴¹

The American Convention on Human Rights is the only international human rights instrument that contemplates that the right to life can apply from the moment of conception, though not in absolute terms.⁴² The American Declaration on the Rights and Duties of Man, the predecessor instrument to the ACHR, does not mention conception, guaranteeing instead that "every human being has the right to life, liberty, and the security of his person."⁴³

In 1981, the body that monitors the implementation of the human rights provisions in the American regional system—the Inter-American Commission on Human Rights—was asked to establish whether or not the right-to-life provisions in these documents are compatible with a woman's right to access safe and legal abortions. The commission concluded that they are. The question reached the commission through a petition brought against the United States government by individuals related to a group called Catholics for Christian Political Action when a medical doctor was acquitted of manslaughter after performing an abortion in 1973—the "Baby Boy" case.⁴⁴ The petitioners asked the commission to declare the United States in violation of the right to life under the American Declaration on the Rights and Duties of Man, using the American Convention on Human Rights as an interpretative tool.⁴⁵ In the deliberation on the Baby Boy case, the Commission went to great pains to examine the provisions on the right to life in both the declaration and the convention, looking to the preparatory work for both documents to clarify the intended object and purpose of the wording of the provisions.⁴⁶

In the case of the declaration, the commission explained:

⁴¹ Cook and Dickens, "Human Rights Dynamics of Abortion Law Reform," p. 24. See also Berta E. Hernández, "To Bear or Not to Bear: Reproductive Freedom as an International Human Right," *Brooklyn J. of Int'l L.*, Vol. XVII (1991), p. 334 ("Because the terms "everyone" and "human being" have been interpreted consistently in national and international tribunals as referring only to human beings born alive, such language in the Children's Convention does not, and cannot, include protection of fetal life.")

⁴² ACHR, article 4.

⁴³ American Declaration on the Rights and Duties of Man, article I.

⁴⁴ Inter-American Court of Human Rights, White and Potter ("Baby Boy Case"), Resolution No. 23/81, Case 2141, United States, March 6, 1981, OAS/Ser.L/V/II.54, Doc. 9 Rev. 1, 16 October 1981.

⁴⁵ The American Convention on Human Rights was not directly applicable, since the United States had not ratified this convention. However, as a member of the Organization of American States, the United States is bound by the American Declaration on the Rights and Duties of Man.

⁴⁶ The 1969 Vienna Convention on the Law of Treaties, which guides public international treaty law, establishes as a general rule of interpretation of international treaties that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," and notes that the preparatory works of a treaty can be used as a supplementary means of interpretation. Vienna Convention on the Law of Treaties, articles 31 and 32.

[I]t is important to note that the conferees in Bogotá in 1948 rejected language which would have extended that right to the unborn ... [and] ... adopted a simple statement on the right to life, without reference to the unborn, and linked it to the liberty and security of the person. Thus it would appear incorrect to read the Declaration as incorporating the notion that the right to life exists from the moment of conception. The conferees faced this question and chose not to adopt language which would clearly have stated that principle.⁴⁷

With regard to the convention—which, as noted above, protects the right to life, in general, from the moment of conception—the commission found that the wording of the right to life in article 4 was very deliberate and that the convention’s founders specifically intended the “in general” clause to allow for non-restrictive domestic abortion legislation. As the commission phrased it: “it was recognized in the drafting session in San José that this phrase left open the possibility that states parties to a future Convention could include in their domestic legislation ‘the most diverse cases of abortion,’⁴⁸ allowing for legal abortion under this article. The commission went on to correct the petitioners in their selective reading of the ACHR:

[I]t is clear that the petitioners’ interpretation of the definition given by the American Convention on the right of life is incorrect. The addition of the phrase “in general, from the moment of conception” does not mean that the drafters of the Convention intended to modify the concept of the right to life that prevailed in Bogotá, when they approved the American Declaration. The legal implications of the clause “in general, from the moment of conception” are substantially different from the shorter clause “from the moment of conception” as appears repeatedly in the petitioners’ briefs.⁴⁹

The commission also cited several countries, including the United States and Brazil, for having clarified during the negotiations that, notwithstanding any language contained in article 4(1) of the convention, they retained the right to “preserv[e their] discretion with respect to the content of legislation in the light of their own social development, experience and similar factors.”⁵⁰

C. Right to nondiscrimination; Right to equality

Legal Sources

The rights to nondiscrimination and equality are set forth in a number of international human rights instruments. In addition to the basic provisions in articles 2(1) and 3 of the ICCPR, articles 2(2) and 3 of the ICESCR, and article 1 of the ACHR, CEDAW comprehensively

⁴⁷ Baby Boy Case, para. 14 (a).

⁴⁸ *Ibid.*, para. 14(c).

⁴⁹ *Ibid.*, para. 30.

⁵⁰ *Ibid.*, para. 14(c).

addresses discrimination against women. CEDAW defines discrimination against women in article 1 as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

CEDAW obliges states to eliminate discrimination against women in all matters regarding marriage and family relations (article 16). Article 10(h) of CEDAW requires states parties to provide women equal access to educational materials and advice on health issues, including on family planning. As noted under the right to health above, CEDAW also prohibits discrimination against women in the field of health care and in access to health care services, and calls for special efforts to eliminate discrimination against rural women in their access to health care services and information. Article 2(f) requires that states “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women,” and article 5(a) requires that states take appropriate measures “[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” More generally, article 3 provides that states must take “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

All of these provisions are aimed at achieving substantive equality and not mere formal equality. As explained by the CEDAW Committee: “It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account.”⁵¹

Application and Interpretation

Access to safe and legal abortion services is essential to the protection of women’s rights to nondiscrimination and substantive equality. Abortion is a medical procedure that only women need. In its General Recommendation on women and health, the CEDAW Committee has implied that the denial of medical procedures only women need is a form of discrimination against women. The General Recommendation affirms states’ obligation to respect access for all women to reproductive health services and to “refrain from obstructing

⁵¹ CEDAW Committee, General Recommendation 25, on article 4, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, Temporary Special Measures, U.N. Doc. No. CEDAW/C/2004/I/WP.1/Rev.1 (2004), para. 8.

action taken by women in pursuit of their health goals.”⁵² It explains that “barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo these procedures.”⁵³ The committee recommended that “[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion.”⁵⁴

In addition, in its concluding remarks on Colombia in 1999, the CEDAW Committee was quite clear that it considered restrictive abortion laws as contrary to the right to nondiscrimination in access to health care:

The Committee notes with great concern that abortion, which is the second cause of maternal deaths in Colombia, is punishable as an illegal act. ... The Committee believes that legal provisions on abortion constitute a violation of the rights of women to health and life and of article 12 of the Convention [the right to health care without discrimination].⁵⁵

Likewise, in 1998, the CEDAW Committee recommended to Mexico “that all states of Mexico should review their legislation so that, where necessary, women are granted access to rapid and easy abortion.”⁵⁶

Women are in practice more likely than men to experience personal hardship as well social disadvantage flowing from economic, career, and other *de facto* life changes when they have children. Where women are compelled to continue unwanted pregnancies, such consequences forcibly put women at a disadvantage.

In several concluding observations on country reports from the Latin American region, including Argentina, Ecuador, Colombia, and Guatemala, the U.N. Human Rights Committee has established a clear link between women’s equality and the availability of reproductive health information and services, including abortion.⁵⁷ In the case of Argentina, the Committee noted:

The Committee is concerned that the criminalization of abortion deters medical professionals from providing this procedure without judicial order, even when they are permitted to do so by law, inter alia when there are clear health risks for the mother or when pregnancy results from rape of mentally

⁵² CEDAW Committee, General Recommendation 24, on article 12 of the Convention on the Elimination of All Forms of Discrimination against Women, Women and Health, U.N. Doc. No. A/54/38/Rev.1, Part I (1999), para. 14.

⁵³ *Ibid.*, para. 14.

⁵⁴ *Ibid.*, para. 31(c).

⁵⁵ CEDAW Committee, concluding comments on Colombia, U.N. Doc. A/54/38/Rev.1, Part I (1999), para. 393.

⁵⁶ CEDAW Committee, concluding comments on Mexico, U.N. Doc. A/53/38/Rev.1, Part I (1998), para. 426.

⁵⁷ See the HRC’s concluding observations on Argentina, U.N. Doc. CCPR/CO.70/ARG (2000), para. 14; Colombia, U.N. Doc. CCPR/C/79/Add.76 (1997), para. 24; Ecuador, U.N. Doc. CPR/C/79/Add.92 (1998), para. 11; and Guatemala, U.N. Doc. CCPR/CO/72/GTM (2001), para. 19.

disabled women. The Committee also expresses concern over discriminatory aspects of the laws and policies in force, which result in disproportionate resort to illegal, unsafe abortions by poor and rural women.⁵⁸

On Colombia, it said:

The Committee expresses its concern over the situation of women who, despite some improvements, continue to be subject of de jure and de facto discrimination in all spheres of economic, social and public life. It notes in this regard that ... [i]t is ... concerned at the high mortality rate of women resulting from clandestine abortions.⁵⁹

In its General Comment on the right to equal enjoyment of civil and political rights, the Human Rights Committee also requested that governments provide information in their periodic reports about access to safe abortion for women who have become pregnant as a result of rape, as relevant to its evaluation of the implementation of this right.⁶⁰

D. Right to security of person

Legal Sources

Article 9(1) of the ICCPR provides, “Everyone has the right to liberty and security of person. ... No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” The ACHR also protects security of person in article 5: “Every person has the right to have his physical, mental, and moral integrity respected” and article 7: “Every person has the right to personal liberty and security.”

Application and Interpretation

The right to security of person, which includes a dimension of the concept of physical integrity, is central to the abortion debate and to reproductive health. Considering the health consequences and high rates of maternal mortality associated with unsafe abortion, this right has been interpreted to require governments to take preventive action, such as liberalizing laws on access to contraceptives and safe abortion services. In addition, when a pregnancy is unwanted, a legal requirement to continue the pregnancy arguably constitutes a government intrusion upon a woman’s body in violation of this right.

The Inter-American Commission on Human Rights has recognized a right to fulfillment of basic health needs as part of the right to security of person. In its 1980-81 annual report, it stated that governments must “strive to attain the economic and social aspirations of its

⁵⁸ HRC, concluding observations on Argentina, U.N. Doc. CCPR/CO.70/ARG (2000), para. 14.

⁵⁹ HRC, concluding observations on Colombia, U.N. Doc. CCPR/C/79/Add.76 (1997), para. 24.

⁶⁰ HRC, General Comment 28, Equality of Rights between Men and Women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 11.

people by following an order that assigns priority to the basic needs of health, nutrition and education. The priority of the ‘right to survival’ and ‘basic needs’ is a natural consequence of the right to personal security.”⁶¹

E. Right to liberty

Legal Sources

As noted above, article 9(1) of the ICCPR protects the right to “liberty” as well security of person, and specifically provides, “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Article 7 of the American Convention on Human Rights contains similar language.

Application and Interpretation

The enforcement of criminal sanctions for abortion constitutes an assault on women’s right to liberty by arbitrarily imprisoning women for seeking to fulfill their health needs. The right to liberty is also threatened when women are deterred from seeking medical care if they fear being reported to police or other authorities by doctors or other medical professionals when they suspect the women of unlawful behavior.

The CEDAW Committee has expressed concern in several concluding observations about women being imprisoned for undergoing illegal abortions, and has urged governments to review their laws to suspend penalties and imprisonment for abortion.⁶²

F. Right to privacy

Legal Sources

Article 17(1) of the ICCPR provides: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” Article 11 of the ACHR states: “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. Everyone has the right to the protection of the law against such interference or attacks.”

⁶¹ Inter-American Commission on Human Rights, *1980-1981 Annual Report*, 125, cited in Cook, Dickens, and Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law*, p. 164.

⁶² See the CEDAW Committee’s concluding comments on Colombia, U.N. Doc. A/54/38/Rev.1, Part I (1999), para. 393; the Dominican Republic, U.N. Doc. A/59/38, Part II (2004), paras. 284-285; Namibia, U.N. Doc. A/52/38/Rev.1, Part II (1997), para. 127; Nepal, U.N. Doc. A/54/38/Rev.1, Part II (1999), para. 147; Paraguay, U.N. Doc. A/51/38 (1996), para. 131; and Peru, U.N. Doc. A/50/38 (1995), para. 446. See also the HRC’s concluding observations on Colombia, U.N. Doc. CCPR/CO/80/COL (2004), para. 13.

Application and Interpretation

Decisions about one's reproductive capacity are precisely the type of interest that privacy rights should protect. A pregnant woman's right to privacy entitles her to decide whether or not to undergo an abortion without undue government interference.

In addition, breaches of confidentiality by health care providers and some third-party consent requirements for abortion also infringe the right to privacy. The CEDAW Committee has expressed concern about both of these situations. In terms of confidentiality, the CEDAW Committee noted in General Recommendation 24 that while breaches of patient confidentiality affect both men and women, they may deter women from seeking advice and treatment for diseases of the genital tract, contraception, incomplete abortion, and in cases where they have suffered sexual or physical violence.⁶³ General Recommendation 24 also notes that conditioning women's access to health services on the authorization of husbands, partners, parents, or health authorities is a significant barrier to women's pursuit of their health goals.⁶⁴ The CEDAW Committee has also noted that policies that require spousal authorization for abortion impinge on women's right to privacy.⁶⁵

The HRC has remarked that "where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion," this may constitute a violation of a woman's privacy.⁶⁶ In its concluding observations on Chile, the HRC recommended that the law be amended to protect the confidentiality of medical information.⁶⁷

The Committee on the Rights of the Child has noted that parental consent requirements and a general lack of confidentiality can be barriers to adolescents' access to accurate reproductive health information, services and counseling, particularly in the context of abortion and HIV/AIDS.⁶⁸ It has recommended that governments ensure adolescents confidential reproductive health services without parental consent when in the adolescent's best interests, and that laws stipulate the minimum age for medical counseling and treatment without parental consent.⁶⁹

⁶³ CEDAW Committee, General Recommendation 24, para. 12(d).

⁶⁴ *Ibid.*, para. 14.

⁶⁵ See, e.g., the CEDAW Committee's concluding comments on Indonesia, U.N. Doc. A/53/38/Rev.1, Part I (1998), para. 284(c) and Turkey, U.N. Doc. A/52/38/Rev.1, Part I (1998), paras. 184 and 196.

⁶⁶ HRC, General Comment 28, Equality of Rights between Men and Women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 20.

⁶⁷ HRC, concluding observations on Chile, U.N. Doc. CCPR/C/79/Add.104 (1999), para. 15.

⁶⁸ See, e.g., the CRC's concluding observations on Djibouti, U.N. Doc. CRC/C/15/Add.131 (2000), paras. 45-46; Kyrgyzstan, U.N. Doc. CRC/C/15/Add.127 (2000), para. 46; and Netherlands, U.N. Doc.

CRC/C/15/Add.114 (1999), para. 19. See also CRR and the University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear*, p. 113.

⁶⁹ See, e.g. the CRC's concluding observations on Austria, U.N. Doc. CRC/C/15/Add.98 (1999), para. 15; Barbados, U.N. Doc. CRC/C/15/Add.103 (1999), para. 25; Benin, U.N. Doc. CRC/C/15/Add.106 (1999), para. 25; Bhutan, U.N. Doc. CRC/C/15/Add.157 (2001), para. 45; Djibouti, U.N. Doc. CRC/C/15/Add.127 (2000), para. 46; France, U.N. Doc. CRC/C/15/Add.240 (2004), para. 45; Georgia, U.N. Doc. CRC/C/15/Add.124 (2000), paras. 22-23; Guatemala, U.N. Doc. CRC/C/15/Add.154 (2001), para. 45; Latvia, U.N. Doc. CRC/C/15/Add.142 (2001), para. 40; Lesotho, U.N. Doc. CRC/C/15/Add.147 (2001), paras. 23-24 and 46; Lithuania, U.N. Doc. CRC/C/15/Add.146 (2001), para. 40; Mali, U.N. Doc. CRC/C/15/Add.113

G. Right to information

Legal Sources

Article 19(2) of the ICCPR states: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Article 13 of the ACHR provides: “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds... .”

Application and Interpretation

Advocates of the right to abortion argue that the right to information, certainly as it relates to the right to health, includes both the negative obligation for a state to refrain from interference with the provision of information by private parties and a positive responsibility to provide complete and accurate information necessary for the protection and promotion of reproductive health and rights, including information about abortion.⁷⁰ Human rights law further recognizes the right to nondiscrimination in access to information and health services, as in all other services.⁷¹ Women stand to suffer disproportionately when information concerning safe and legal abortion is withheld.

H. Right to be free from cruel, inhuman or degrading treatment

Legal Sources

The right to be free from cruel, inhuman or degrading treatment is protected by international customary law as well as by several international and regional human rights treaties. Article 7 of the ICCPR states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 5 of the ACHR contains identical language.

Application and Interpretation

Various treaty monitoring bodies have, through their interpretations and application of this right, implied that it has a wider application than the traditional context of government-imposed or tolerated torture or ill treatment. The HRC in concluding observations on Peru expressed concern that under Peru’s laws, abortion gave rise to penalty even if the woman was pregnant as a result of rape. It found, repeatedly, that the criminal code restrictions on abortion subjected women to inhuman treatment possibly incompatible with article 7 of the

(1999), para. 27; Malta, U.N. Doc. CRC/C/15/Add.129 (2000), paras. 21-22; Marshall Islands, U.N. Doc. CRC/C/15/Add.139 (2000), para. 51; Netherlands, U.N. Doc. CRC/C/15/Add.114 (1999), para. 19; South Africa, U.N. Doc. CRC/C/15/Add.122 (2000), para. 31; Turkey, U.N. Doc. CRC/C/15/Add.152 (2001), para. 54; and Vanuatu, U.N. Doc. CRC/C/15/Add.111 (1999), para. 20. See also CRR and the University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear*, p. 113.

⁷⁰ Article 19, *The Right to Know: Human Rights and Access to Reproductive Health Information* (Philadelphia: University of Pennsylvania Press, 1995), pp. 39 and 61-72.

⁷¹ See ICESCR, article 2(2) as well as CESCR, General Comment 14, paras. 12(b), and 18-19.

ICCPR.⁷² In its concluding observations on Morocco, the HRC expressed concern that Moroccan law criminalizes abortion unless carried out to save the mother's life. It found that the legislative provision may be incompatible with Article 7 of the ICCPR in some cases in which women are forced to carry a pregnancy to full term.⁷³

The denial of access to abortions or abusive treatment in connection with abortions in other circumstances may also violate the right to be free from cruel, inhuman, or degrading treatment. For example, this right is arguably violated where abortions are performed but available pain medications are denied, where women are arbitrarily denied treatment for incomplete abortions, and when a woman is forced against her will to continue a pregnancy of a deformed fetus that will almost certainly die in utero or shortly after birth.

The U.N. Committee against Torture, which monitors the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has also recently expressed concern with situations where post-abortion care is conditioned upon women testifying against themselves in criminal proceedings, implying that the criminalization of abortion may lead to situations incompatible with the right to freedom from torture.⁷⁴

I. Right to decide the number and spacing of children

Legal Sources

Article 16(1) of CEDAW provides, "States Parties shall ... ensure, on a basis of equality of men and women . . . (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."

Application and Interpretation

The right of women to decide on the number and spacing of their children without discrimination can only be fully implemented where women have access to all safe, effective means of controlling their family size, including abortion. The CEDAW Committee has repeatedly insisted that abortion must not be used as a method of family planning.⁷⁵ At the same time, by insisting on the decriminalization of abortion in specific circumstances, the Committee has implicitly recognized that abortion, in certain contexts, may be the only way for a woman to exercise this right, particularly if she became pregnant through rape or incest, or where her life or health is in danger.

⁷² HRC, concluding observations on Peru, U.N. Doc. CCPR/C/79/Add.72 (1996), para. 15; and concluding observations on Peru, U.N. Doc. CCPR/CO/70/PER (2000), para. 20.

⁷³ HRC, concluding observations on Morocco, U.N. Doc. CCPR/CO/82/CAR (2004), para. 29.

⁷⁴ Committee against Torture, "Conclusion and Recommendations of the Committee against Torture: Chile," U.N. Doc. CAT/C/CR/32/5 (2004), para. 6(j).

⁷⁵ See e.g., the CEDAW Committee's concluding comments on Belarus, U.N. Doc. A/59/38, Part I (2004), paras. 355-56; Burundi, U.N. Doc. A/56/38, Part I (2001), para. 62; Kazakhstan, U.N. Doc. A/56/38, Part I (2001), para. 105; and Uzbekistan, para. 185.

The CEDAW Committee's General Recommendation No. 21 on equality notes:

The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women's lives and also affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children.⁷⁶

This right is reiterated and elaborated in international consensus documents. For example, paragraph 7.2 of the ICPD Programme of Action explains that the concept of reproductive health implies that people have the freedom to decide if, when, and how often to reproduce. Paragraph 7.3 also refers to the basic right of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children and to have the information and means to do so. The Beijing Platform for Action contains similar language in paragraphs 95 and 223, which add that people have the right to make decisions concerning reproduction free of discrimination, coercion, and violence.

J. Right to enjoy the benefits of scientific progress

Legal Sources

Article 15(1) of the ICESCR provides, "The States Parties to the present Covenant recognize the right of everyone . . . (b) To enjoy the benefits of scientific progress and its applications." Article 14 of the Protocol of San Salvador states that everyone has the right to "enjoy the benefits of scientific and technological progress."

Application and Interpretation

The right to enjoy the benefits of scientific progress can be interpreted to apply to reproductive rights, for example where women are denied access to antiprogestin drugs that are effective for non-surgical abortions (e.g., mifepristone or RU 486).⁷⁷ To our knowledge, this has not been the subject of any treaty body documents.

K. Right to freedom of conscience and religion

Legal Sources

Article 18(1) of the ICCPR provides, "Everyone shall have the right to freedom of thought, conscience and religion." Article 12 of the ACHR states: "Everyone has the right to freedom

⁷⁶ CEDAW Committee, General Recommendation 21, Equality in Marriage and Family Relations (1992), para. 21.

of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.”

Application and Interpretation

Freedom of religion includes freedom from being compelled to comply with laws designed solely or principally to uphold doctrines of religious faith. It includes the freedom to follow one's own conscience regarding doctrines of faiths one does not hold. In terms of abortion, women should not be compelled to comply with laws based solely or principally on restrictive religious doctrines, which many abortion restrictions are.

Freedom of religion and conscience is often invoked by health practitioners opposed to abortion. In fact, opponents of the right to abortion are increasingly using this to deny access to abortion, and have mobilized to lobby for “protection of conscience” legislation around the world.⁷⁸ While the human rights framework accommodates conscientious objection, there are limits. For example, conscience cannot justify a refusal to perform a life-saving abortion when no other suitable alternatives exist for a woman to obtain the abortion. Governments have a responsibility to ensure that women can obtain the health care they need and that reasonable alternatives exist when practitioners refuse a service on the basis of conscience.

The CEDAW Committee has explicitly stated in concluding observations that women's human rights are infringed where hospitals refuse to provide abortions due to the conscientious objection of doctors and has expressed concern about the limited access women have to abortion due to conscientious objections of practitioners.⁷⁹ The committee has also expressly recommended that public hospitals provide abortion services.⁸⁰ In its concluding observations on Poland, the HRC expressed concern about the unavailability of abortion in practice even when the law permits it, and about the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions.⁸¹

III. Conclusion

Advancing access to safe and legal abortion can save women's lives and facilitate women's equality. Women's decisions about abortion are not just about their bodies in the abstract, but rather about their human rights relating to personhood, dignity, and privacy more broadly. Such decisions belong to a pregnant woman alone, without interference by the state or others.

⁷⁷ Cook, Dickens, and Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law*, p. 194.

⁷⁸ See the website of the “Protection of Conscience Project” at <http://www.consciencelaws.org>.

⁷⁹ See the CEDAW Committee's concluding comments on Croatia, U.N. Doc. A/53/38, Part I (1998), para. 109 and Italy, U.N. Doc. A/52/38/Rev.1, Part II (1997), para. 353.

⁸⁰ See the CEDAW Committee's concluding observations on Croatia, U.N. Doc. A/53/38, Part I (1998), para. 117 and Italy, U.N. Doc. A/52/38/Rev.1, Part II (1997), para. 360.

⁸¹ HRC, concluding observations on Poland, U.N. Doc. CCPR/CO/82/POL (2004), para. 8.

Any restrictions on abortion that unreasonably interfere with a woman's exercise of her full range of human rights should be rejected. Governments should take all necessary steps, both immediate and incremental, to ensure that women have informed and un-coerced access to safe and legal abortion services as an element of women's exercise of their reproductive and other human rights. Abortion services should be in conformity with international human rights standards, including those on the adequacy of health services. For all women, it is a matter of equality. For some, it is a matter of life and death.

For more information on the work of Human Rights Watch's Women's Rights Division, please visit <http://www.hrw.org/women/>
To download free of charge the text of Human Rights Watch's full-length report on access to abortion in Argentina, "Decisions Denied," please visit <http://hrw.org/reports/2005/argentina0605/>

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