

## Decisions Denied

### Women's Access to Contraceptives and Abortion in Argentina

I. Summary .....	1
II. Recommendations .....	5
To the Government of Argentina .....	5
To Donors .....	8
To the Federation of Argentine Societies of Gynecology and Obstetrics .....	8
III. Background .....	9
Women's Political, Economic, and Social Status .....	9
Nationalism and Women's Role as Childbearers .....	11
Catholic Church Opposition to Reproductive Rights .....	17
IV. Pervasive Barriers in Access to Contraceptives .....	21
Domestic and Sexual Violence .....	21
Misleading, Inaccurate, or Incomplete Information .....	26
Economic Constraints .....	31
V. Voluntary Tubal Ligation: A Case Study in Denial of Access to Contraceptives .....	34
Tubal Ligation and the Law .....	35
Women's Decisions Subject to Male Authority .....	38
Women's Decisions Subject to Arbitrary Veto by Medical Authorities .....	39
Economics Trumps Medical Need: Ready Access in Private Health Clinics .....	42
Requiring Judicial Authorization .....	43
VI. Obstacles to the Right to Decide in Matters Concerning Abortion .....	47
Failure to Implement the Existing Abortion Law .....	48
Illegal and Unsafe Abortions .....	50
Methods Commonly Used to Induce Abortion in Argentina .....	52
Health Consequences .....	53
Lack of Medical Accountability .....	55
Inadequate or Inhumane Post-Abortion Care .....	57
Obligation to Report Women to the Authorities .....	63
Sentenced to Prison for Punishable Abortion .....	65
VII. International Human Rights Law and Abortion .....	66
Rights to Nondiscrimination and Equality .....	68
Rights to Health and Health Care .....	71
Right to Life .....	74
Right to Liberty .....	80
Rights to Privacy and to Decide on the Number and Spacing of Children .....	81
Right to Freedom of Conscience and Religion .....	82

VIII. Conclusion .....	83
IX. Acknowledgments.....	84

## I. Summary

Decisions about contraception and abortion are difficult, deeply personal, and sometimes wrenching. In Argentina, women are routinely prevented from making such decisions. Despite important advances in the area of women's political participation and economic independence, doctors and spouses continue to exercise control over women's reproductive health through laws and policies that subject female decision-making to arbitrary extraneous interference. Historically, successive governments have legislated on matters related to contraception and abortion as if women were instruments of reproduction and not equal human beings, contributing to an underlying sense among service providers and policy makers that birth control and reproductive health care are somehow illegitimate, immoral, or even illegal. The consequences for women's health and lives are serious, sometimes literally fatal.

While Argentina's current government is making important strides toward addressing a number of the abuses exposed in this report, its efforts to date continue at times to be undermined by public health officials who are opposed to reform, or who fear retribution if they implement the needed reforms.

As detailed in this report, women who want to use contraceptives face a series of imposing, sometimes insurmountable restrictions and obstacles. These barriers include domestic and sexual violence at the hands of intimate partners which authorities are not moving aggressively enough to prevent and remedy. Another obstacle is blatantly inaccurate or misleading information, too often propagated by health care workers themselves. A third is that many poor women simply cannot afford contraceptives and government promises of assistance are often not reaching those who need it most.

Some women told us that their abusive partners or husbands deliberately sabotaged their access to contraceptives. "He always told me: 'I am going to fill you up with children so that you can't leave my side,'" said Gladis Morello, a thirty-two-year-old mother-of-eight from Buenos Aires Province. Others said that public health officials themselves at times provided inaccurate information or did too little to combat misinformation spread by opponents of contraception and abortion. Paola Méndez, a thirty-five-year-old mother-of-ten from Buenos Aires Province said: "I wanted to get an IUD, but ... [t]he doctor himself explained to me that the majority [of newborns of women who have used IUDs]...are born with the IUD in their heads." This warning is not supported by medical evidence and experience.

Women's access to the contraceptive method of their choice is also subject to legal restrictions. Under Argentine law, voluntary access to one of the most effective forms of contraception—sterilization—is severely limited. Many public hospitals require that women obtain their husband's consent for the operation, have at least three children, and be older than thirty-five to be eligible for the surgery. These regulations are in violation of international human rights standards on privacy, nondiscrimination, and health. Some physicians and hospitals, moreover, require women to seek judicial authorization for sterilization even when they fulfill all of the requirements.

When women are unable or unwilling to carry an unwanted pregnancy to term, the only option for many is an illegal and therefore unsafe abortion. The toll on women's health and lives is immense: unsafe abortion is the leading cause of maternal mortality in Argentina today.

"You get overwhelmed by desperation," said Paola Méndez, "You seek all the ways out, pills, anything. But if there is no way out, then you take a knife or a knitting needle." In Argentina, more than 40 percent of all pregnancies end in illegal abortions, indicating women's lack of opportunity to control their fertility and health.

Human Rights Watch also found that women in Argentina received inhumane and sometimes grossly inadequate treatment when they sought medical assistance for incomplete abortions or infections due to unsafe abortions. A social worker from Santa Fe Province told us: "A woman [we work with] went to the [public] hospital in a very bad state with an abortion and she was infected and hemorrhaging. A doctor started to examine her, and when he started to see her and realized, he threw down his instruments on the floor. He said: 'This is an abortion, you go ahead and die!'"

In 2003, the government began implementing a much-needed national program on reproductive health. This program is intended in particular to address poor women's economic obstacles to accessing contraceptives by distributing certain contraceptive methods for free in the public health sector. It is also meant to address regional differences in access to contraceptives, in that the national government, through the program, commits to providing all needed and publicly approved contraceptive devices to those provinces who wish to take part in the program.

After continued pressure from civil society and previous promises from the government, in April 2005 the national health ministry launched an information campaign to inform the general public about the reproductive health services available through the national program, including characterizing access to contraceptives and counseling as a legal

right. Previously, in October 2004, the health ministries from all the Argentine provinces had committed to reduce maternal mortality in the country, *inter alia* through the provision of humane, fast, and effective post-abortion care, and through guaranteeing access to safe abortions where they are not penalized by law. As this report went to press, in late May 2005, the national government was planning to publish a guide on how to provide humane post-abortion care and distribute it to heads of maternity wards in public hospitals.

The government's demonstrated resolve to realize women's right to make independent decisions about their reproduction and health, however, has so far failed to reach the women who most need assistance. This has happened for a number of reasons. First, authorities have not devoted sufficient attention to the barriers to accessing contraceptives faced by women who want to use them, such as for example domestic violence. Second, critical laws and policies are not being implemented. Public health officials continue to charge for contraceptive methods that, according to the law, should be free, and women have severely limited access to those abortion procedures that are not subject to criminal penalties: where the life or health of the pregnant woman is in danger, and where the pregnancy is the result of the rape of a mentally disabled woman. Third, current laws continue to arbitrarily limit women's control of their fertility and discourage necessary health care, including by restricting access to voluntary tubal ligation and abortion, and by requiring medical doctors to report to national authorities when women seek life-saving post-abortion care. While effective implementation of existing laws, policies, and programs could go a long way toward addressing the concrete harms described in this report, legal reform is essential in the long run.

Opponents of contraceptives and abortion in Argentina sometimes argue that international human rights law as integrated into Argentina's constitution protects the "right to life" of the fetus and therefore requires the criminalization of abortion. The law does no such thing. International human rights legal instruments ratified by Argentina guarantee women's rights to life, physical integrity, health, nondiscrimination, privacy, information, freedom of religion and conscience, equal protection under the law, and the right to make independent decisions about the number and spacing of children. Taken together, this body of law, including directly relevant interpretations of this law by authoritative U.N. expert bodies, compels the conclusion that women have a right to decide in matters relating to abortion. The only regional human rights instrument that explicitly contemplates the application of the right to life from the moment of conception—the American Convention on Human Rights—contains qualifying language specifically intended by the founders of the convention, including Argentina, to allow for non-restrictive domestic abortion legislation.

Safe and legal abortion is essential to women's health and autonomy and would be the most direct way to stop the loss of life and other preventable health effects of illegal, unregulated abortion in Argentina today. Even those who favor Argentina's restrictive legal regime on abortion, however, should be given pause by the cases described in this report. Given the extent of the harm and the number of women whose health and lives are destroyed as a result of current laws and practices, Human Rights Watch believes it is incumbent on all parties concerned, whatever their position on abortion, to give priority to ensuring women's independent control of their own fertility through the provision of accurate contraceptive information and full range of contraceptive methods. Priority should also be given to make sure that all women, including those suffering health consequences after an illegal abortion, receive humane and adequate health care.

In Argentina as in many other countries, the public debate on abortion and even contraceptives and sex education has sometimes included arguments and accusations that are unworthy of a democratic society. Decisions related to contraceptives and abortion are complicated and socially contested. They are, however, also a question of human rights. It is almost twenty years since Argentina joined the international community of democratic states after a painful military dictatorship and on that occasion ratified some of the most important international human rights treaties. It is more than ten years since these treaties gained constitutional force in Argentina. It is time to have a debate about contraceptives and abortion, and to have it in a civilized manner. Human Rights Watch intends this report to further such debate.

As this report was being finalized, in late May 2005, important reforms—such as the distribution and implementation of new guidelines on humane post-abortion care—were about to commence. This report illustrates the urgent need for these reforms, and the essential nature of further government action in the area of reproductive rights.

This report is based on field research in Argentina in September and October 2004, as well as prior and subsequent research. A Human Rights Watch staff member conducted in-depth interviews with more than forty women and one girl who had experienced problems in accessing contraceptives or who had undergone illegal and unsafe abortions. These interviews took place in the provinces of Buenos Aires, Tucumán, and Santa Fe. All names and identifying information of the women interviewed have been changed to protect their privacy.

These persons were identified largely with the assistance of Argentine NGOs and grassroots organizations providing services and support to low income women, women affected by domestic or sexual violence, and women living with HIV/AIDS.

Human Rights Watch also interviewed more than seventy representatives of government agencies, the United Nations, and NGOs specializing in women’s rights or reproductive health; academics; religious officials; and public healthcare workers and hospital administrators. Certain identifying information has been withheld for some respondents for privacy reasons. All documents cited in this report are either publicly available or on file with Human Rights Watch, as noted.

## **II. Recommendations**

### ***To the Government of Argentina***

Human Rights Watch calls on Argentina’s government to protect women’s human rights to life, physical integrity, health, nondiscrimination, privacy, liberty, information, freedom of religion and conscience, equal protection under the law, and the right to make decisions about the number and spacing of children. In the following, we identify some essential first steps.

### ***To the President of the Republic of Argentina***

- Continue to endorse publicly the National Program on Sexual Health and Responsible Procreation, and advocate for adequate financial support for this program within the government’s budget.
- Publicly support women’s rights to immediate unhindered access to safe abortion where the punishment is currently waived, and support legislative reform to facilitate women’s access to voluntary and safe abortion services.

### ***To the National Health and Environment Ministry (Ministerio de Salud y Ambiente de la Nación)***

- Until such time as the Argentine Congress decriminalizes access to abortion, the National Health and Environment Ministry should develop a regulatory framework to guarantee access to voluntary safe abortion where the pregnant women’s life or health is in danger, and where the pregnancy is the result of the rape of a mentally disabled woman, as provided by law. This regulatory framework should make

explicit reference to the internationally accepted definition of “health” as put forward by the World Health Organization.

- Continue to distribute the Guide on Better Post Abortion Care, and develop a mandatory regulatory framework for the provision of humane post-abortion care, and require all health care providers, public as well as private, to provide such care. The ministry should ensure that all women know and understand that they will be provided with humane post-abortion care at public and private health centers and hospitals.
- Continue and expand efforts to promote and disseminate full and accurate information on all safe contraceptive methods as identified by the World Health Organization, including through public information campaigns targeting the general population.
- Provide the full range of contraceptives in public health care centers as well as hospitals. Decisions on which methods to use should rest with the individual woman herself, on the basis of scientifically informed medical counseling. A full range of safe contraception would include surgical contraception, such as tubal ligation, and emergency contraception (the “morning-after pill”).
- Sustain and deepen the public information campaign on the contents of the National Law on Sexual Health and Responsible Procreation, and the services provided through the National Program on Sexual Health and Responsible Procreation.
- Proactively investigate and sanction all health personnel who willfully provide inaccurate or incomplete information on contraceptive methods, including those who withhold information on specific contraceptive methods, or who do not follow ministerial guidelines on the provision of care. Sanctions should include the suspension or revocation of medical licenses for repeat offenders.
- Eliminate all discriminatory preconditions for access to voluntary tubal ligation, including spousal consent. Develop a national regulatory framework for access to tubal ligations according to World Health Organization standards on this type of contraceptive method.

*To the Ministry of Education, Science and Technology (Ministerio de Educación, Ciencia y Tecnología)*

- Ensure access to accurate science-based sex education in primary and secondary schools, both private and public. Sex education—tailored appropriately to age level and capacity—should include information on the inequality between men and women that hampers women’s rights to health and to independent decision-making on reproductive and sexual health matters. It should also include accurate, science-based information about HIV prevention, including the use of condoms for this purpose.
- Ensure the inclusion of comprehensive information on reproductive and sexual rights in university and higher education curricula for medical doctors, nurses, obstetricians, and other health personnel.

*To Congress*

The Argentine congress should without delay:

- Legalize and ensure access to voluntary surgical contraception, including tubal ligation, including through the repeal of provisions in national law 17.132/67 (on the medical profession) and the penal code that limit such access. The law should clarify that women do not require spousal or judicial authorization to access any form of contraceptive method.
- Amend the penal code to explicitly criminalize marital rape.
- Require ministries and appropriate government agencies to train health personnel, judges, magistrates, lawyers, police, and relevant officials on the laws and regulations related to women’s reproductive and sexual health, including guidance on women’s access to “non-punishable” abortion and tubal ligation.
- Require all appropriate government agencies to provide training on preventing, investigating, and punishing violence against women, including domestic and sexual violence, especially for health personnel, judges, magistrates, police, and relevant public officials.

- Call for oversight hearings to examine shortcomings in the implementations of the National Law on Sexual Health and Responsible Procreation, and take immediate and effective steps to overcome any shortcomings.
- Enact laws that allow women to have access to voluntary and safe abortions. These measures should include the repeal of penal code provisions that criminalize abortion, especially those that punish women who have had an induced abortion.
- Expedite ratification of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

### ***To Donors***

Donors and international organizations that fund reproductive health work in Argentina should:

- Engage with Argentina to ensure that all women have access to information, sex education programs, and a full range of safe and effective contraception for all women.
- Advocate for Argentina to remove legal restrictions on abortion and to ensure women access to safe and legal abortions.
- Expand funding for reproductive health related programs in Argentina. Support the information campaigns of government and nongovernmental organizations (NGOs) seeking to educate women about their reproductive and sexual rights and right to access contraception and abortion.

### ***To the Federation of Argentine Societies of Gynecology and Obstetrics***

The Federation of Argentine Societies of Gynecology and Obstetrics (Federación Argentina de Sociedades de Ginecología y Obstetricia, FASGO) is a civil society organization of gynecologists and obstetricians that develops ethical standards and recommendations on good practices for its members. Since doctors and obstetricians are the main actors in the implementation of state policies and laws on reproductive and

sexual rights, their involvement and commitment to women’s welfare in this area is paramount. FASGO should:

- Develop and promote ethical guidelines on the provision of humane post-abortion care, including explicit condemnation of doctors who report women who have had abortions to the authorities. FASGO should investigate and discipline any members who perform curettage without anesthesia.
- Encourage its members to engage women in informed decision-making about their fertility and reproductive health by facilitating full and accurate information on available contraceptive methods.

Offer regular courses on women’s reproductive and sexual rights through the FASGO school of gynecology and obstetrics.

### **III. Background**

#### ***Women’s Political, Economic, and Social Status***

During the 1980s and 1990s, the women’s movement in Argentina fought for and won important advances in many areas linked to women’s status and participation in society on equal footing with men. In 1991, the Argentine congress—under pressure from women’s rights activists and strongly supported by women politicians—approved a “quota law” requiring political parties to present at least 30 percent women as candidates for seats they were likely to win.<sup>1</sup>

A 1994 constitutional reform reinforced these advances, establishing a constitutional right to equal opportunity in political participation for men and women, guaranteed by positive measures.<sup>2</sup> The constitutional reform also established a general duty of the national congress to “legislate and promote positive action measures that guarantee real equal opportunities and treatment and the full enjoyment and exercise of the [all] rights recognized in this Constitution and by the international human rights treaties in force, in

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<sup>1</sup> Ley 24.012: Ley de Cupo [Law 24.012: Quota Law], approved November 6, 1991, article 1.

<sup>2</sup> 1994 Constitution of the Republic of Argentina, article 37. The original article reads: “37. ... La igualdad real de oportunidades entre varones y mujeres para el acceso a cargos electivos y partidarios se garantizará por acciones positivas en la regulación de los partidos políticos y en el régimen electoral.” [37. ... Real equal opportunities between men and women with regard to access to elected and party office will be guaranteed through positive actions in the regulation of political parties and the electoral regime].

particular with regard to ... women....”<sup>3</sup> These reforms have been successful in ensuring the growing political representation of women. In 2003, women represented 31 percent of parliamentarians and 8 percent of government ministers, compared to 6 and 0 percent, respectively, in 1990.<sup>4</sup>

Women in Argentina have also entered the formal workforce in stronger numbers than, for example, their counterparts in neighboring Chile. In both Chile and Argentina, women represented little over 35 percent of salaried non-agriculture workers in 1991. However, in 2001, women in Argentina represented almost 43 percent of all salaried non-agriculture workers, compared with only a little over 35 percent in Chile.<sup>5</sup> By May 2003 there was little difference in average access to education in Argentina between men and women or boys and girls,<sup>6</sup> and United Nations statistics from 2001 set the literacy level for both men and women at over 98 percent.<sup>7</sup> Although many women in Argentina continue to work in temporary jobs without job security and to earn less than men for similar jobs, their increasing economic independence has been essential in advancing women’s rights in general.

A strong women’s movement in Argentina has been paramount to the advancement of women’s rights. For almost two decades, Argentine women from grassroots organizations, NGOs, political parties, and neighborhood groups of very diverse interests and ideologies have come together for an annual meeting of workshops, talks, and campaign coordination: the Annual Women’s Meeting. In 2004, this meeting drew

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<sup>3</sup> 1994 Constitution of the Republic of Argentina, article 75(23). The original article reads: “75. Corresponde al Congreso: ... 23. Legislar y promover medidas de acción positiva que garanticen la igualdad real de oportunidades y de trato, y el pleno goce y ejercicio de los derechos reconocidos por esta Constitución y por los tratados internacionales vigentes sobre los derechos humanos, en particular respecto de ... las mujeres ... ” [75. It falls to the Congress to: ... 23. Legislate and promote positive action measures that guarantee real equal opportunities and treatment and the full enjoyment and exercise of the rights recognized in this Constitution and by the international human rights treaties in force, in particular with regard to ... women...].

<sup>4</sup> Social Watch, *Informe 2004, Miedos y miseries: Obstáculos a la seguridad humana* [2004 Report, Fear and Misery: Obstacles to Human Security] (Montevideo, Uruguay: Social Watch, 2004), p. 101.

<sup>5</sup> *Ibid.*, pp. 98-99.

<sup>6</sup> Committee on the Elimination of Discrimination against Women, “Consideration of reports submitted under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Follow-up to the Fourth and Fifth Periodic Reports of State Parties: Argentina,” *U.N. Doc. CEDAW/C/ARG/5/Add. 1*, January 29, 2004, p. 35.

<sup>7</sup> United Nations Educational, Scientific, and Cultural Organisation (UNESCO) Institute for Statistics, “UNESCO Institute for Statistics, Country Profile: Argentina,” (Montreal: UNESCO Institute for Statistics, 2001) [online] [http://www.uis.unesco.org/countryprofiles/html/EN/countryProfile\\_en.aspx?code=320.htm](http://www.uis.unesco.org/countryprofiles/html/EN/countryProfile_en.aspx?code=320.htm) (retrieved February 10, 2005).

more than 10,000 women to Mendoza Province,<sup>8</sup> and the year before a similar number of women met in Rosario in Santa Fe Province.<sup>9</sup>

Despite advances in women's political and economic status, and despite continuous efforts, it has taken Argentina's women's movement decades to obtain even minimal advances in women's right to access modern contraception and essential health information. Though low compared to the region as a whole, Argentina's maternal mortality rate is substantially higher than that of the neighboring countries closest to Argentina in their level of material development.<sup>10</sup> Though other factors, including overall access to health care services, play an important role, the high maternal mortality rates in Argentina reflect the prevalence of illegal, unregulated abortion, which in turn is a product of barriers to contraceptives and women's lack of control of their fertility and over decisions on the number and spacing of their children. Illegal abortion has long constituted the main cause of maternal mortality in Argentina as a whole, causing a third of maternal deaths.<sup>11</sup>

### ***Nationalism and Women's Role as Childbearers***

Across the South American region, many governments and legislators have historically declared their opposition to modern birth control methods, usually with reference to Catholic church doctrine.<sup>12</sup> However, in Argentina the government went so far as to

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<sup>8</sup> Claudia Anzorena, "XIX Encuentro Nacional de Mujeres Mendoza 9, 10 y 11 de Octubre de 2004" [Nineteenth National Women's Meeting Mendoza October 9, 10, and 11 2004], *Rima* (Argentina) undated [online] [http://www.rimaweb.com.ar/encuentros/mendoza2004/apesardetodo\\_canzorena.html](http://www.rimaweb.com.ar/encuentros/mendoza2004/apesardetodo_canzorena.html) (retrieved February 4, 2005).

<sup>9</sup> Silvia Jayo, "El XVIII Encuentro de Mujeres en Rosario vota un plan de lucha" [The 18th Women's Meeting in Rosario votes on an action plan], *Prensa Obrera* (Buenos Aires), August 21, 2003 [online] <http://www.po.org.ar/po/po814/elxviii.htm> (retrieved February 4, 2005).

<sup>10</sup> The maternal mortality for Argentina in 2003 was 46.1 per 100,000 live births, whereas that number was 230 for Bolivia and 182.1 for Paraguay. However, maternal mortality rates have consistently been much lower in Chile and Uruguay—two countries with similar per capita income to Argentina—hovering around fifteen per 100,000 live births in recent years. Data from the Regional Core Health Data Initiative Table Generator System of the Pan American Health Organization [online] <http://www.paho.org/English/SHA/coresdata/tabulator/newTabulator.htm> (retrieved December 2, 2004).

<sup>11</sup> Powerpoint presentation prepared by Inés Martínez, coordinator of the National Program on Sexual Health and Responsible Procreation, National Health and Environment Ministry, "Salud Reproductiva," 2004, slide 6, on file with Human Rights Watch. In some provinces, the proportion of maternal deaths attributed to unsafe abortion is higher than the national average. In Tucumán, for example, 75 percent of maternal mortality was estimated to be attributable to consequences of unsafe abortions in 2003. "Exhortan a disminuir la mortalidad materna" [Call to Lower Maternal Mortality] *El Siglo Web* (Tucumán) [online] [http://www.elsigloweb.com/nota.asp?id\\_seccion=11&id\\_nota=29253](http://www.elsigloweb.com/nota.asp?id_seccion=11&id_nota=29253) (retrieved December 2, 2004).

<sup>12</sup> See, for example, "Polémica por píldora del día siguiente en Perú" [Polemic about the morning after pill in Peru], Associated Press, June 14, 2004. For further details on the Catholic church's influence on state policy in Argentina, see section below.

prohibit the sale of all contraceptives for several decades in the late twentieth century—an extreme display of opposition to birth control even by regional standards.

This position is only partially explained by reference to Catholic church doctrine. Historically, a central part of the identity of the political elite in Argentina has been that of a frontier nation to be colonized and populated by Caucasian immigrants from Europe.<sup>13</sup> The most famous expression of this identity is the phrase “to rule is to populate” attributed to Juan Bautista Alberdi, a central figure in Argentina’s political history known as the “father of the Argentine constitution.”<sup>14</sup> Indeed, the Argentine constitution charges the federal government with the active encouragement of European immigration.<sup>15</sup> Over the years—most recently during a 1995 congressional debate on legal access to contraception—the refrain “to rule is to populate” has been used by various political actors to justify the limitations on women’s reproductive autonomy and rights, by reference to women’s essential role as childbearers and—as such—tools for population growth.<sup>16</sup> This pro-natalist approach has historically set Argentina apart from the rest of South America, so much so that Argentina in 1996 was the only country in the region to provide no public support of any kind for access to contraception, and in 2001 the only country to provide no direct support.<sup>17</sup>

Government opposition to contraceptives and information about contraception began in 1974, before Argentina’s seven-year military dictatorship (1976-1983). The opposition gathered force during the military dictatorship, and even continued more than a decade

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<sup>13</sup> This sentiment was reflected in migration policies from the 1870s and onward directed at populating the Argentine prairies with European immigrants. See Susana Novick, *Políticas Migratorias en la Argentina* [Migration policies in Argentina], Instituto Gino Germani (Buenos Aires: Universidad de Buenos Aires, undated), [online] <http://www.iigg.fsoc.uba.ar/pobmigra/archivos/migrar.pdf> (retrieved February 4, 2005).

<sup>14</sup> See “Juan Bautista Alberdi” (Mendoza (Argentina): Government of Mendoza) [online] <http://www.mendoza.edu.ar/efemerid/jalberdi.htm> (retrieved February 4, 2005).

<sup>15</sup> 1994 Constitution of the Republic of Argentina, article 25. The original article reads “El Gobierno federal fomentará la inmigración europea; y no podrá restringir, limitar ni gravar con impuesto alguno la entrada en el territorio argentino de los extranjeros que traigan por objeto labrar la tierra, mejorar las industrias, e introducir y enseñar las ciencias y las artes.” [The federal government will encourage European immigration, and cannot restrict, limit, nor burden with any tax the entry into Argentine territory of those foreigners that come to work the earth, improve the industry, and introduce and teach science and art.]

<sup>16</sup> See Susana Novick, *Democracia y fecundidad: políticas relacionadas con la salud reproductiva y la anticoncepción. Argentina 1983-2001* [Democracy and fertility: policies related to reproductive health and contraception. Argentina 1983-2001], Instituto Gino Germani (Buenos Aires: Universidad de Buenos Aires, undated), [online] <http://www.iigg.fsoc.uba.ar/pobmigra/archivos/democracia.pdf> (retrieved February 4, 2005).

<sup>17</sup> Population Division of United Nations’ Department of Economic and Social Affairs, “Fertility, Contraception, and Population Policies,” *U.N. Doc. E/2003/182*, April 25, 2003 [online] <http://www.un.org/esa/population/publications/contraception2003/Web-final-text.PDF> (retrieved March 18, 2005), p 36. Indirect government support for access to contraceptives is defined as financial support for family planning programs through nongovernmental organizations, as opposed to direct support for family planning programs implemented through public health facilities.

after the democratic government in the mid-80s ratified human rights treaties that protect women's right to make independent decisions about their health and lives. In 1974, the Perón government issued a decree prohibiting the sale of contraceptives as well as any other activities related to voluntary birth control, limiting the possibility of providing information and services.<sup>18</sup> These measures affected mostly individuals and families with low incomes, since those with financial resources had access to services in other countries. The ban continued in effect during the military government as well as after the military junta relinquished power in 1983. It was finally repealed in 1985, after Argentina ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>19</sup> Another seventeen years had to pass before Argentina's government place reproductive and sexual health on the national political agenda.

The topic of access to contraceptives continued to generate controversy in the 1990s. In 1995, a draft bill on reproductive health and state obligations regarding the distribution of contraceptives was debated and passed by the House of Representatives, but the Senate never took it up for debate, apparently considering it too contentious. In 1999, President Carlos Ménem declared March 25 to be a national "Day of the Unborn Child" in an obvious nod to those who opposed contraceptive methods and access to safe abortion.<sup>20</sup>

Only in 2002 did the Argentine congress enact meaningful reform, overcoming vocal opposition from the Catholic church as well as several conservative legislators<sup>21</sup> to pass the National Law on Sexual Health and Responsible Procreation.<sup>22</sup> Though the law is far from perfect and has been criticized as minimalist by many women's rights activists, it contains important provisions for the advancement of women's rights and health. Indeed, two main objectives of this law—to guarantee access to sexual health

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<sup>18</sup> Sandra Cesilini and Natalia Gherardi (eds.), *Los Límites de la Ley: La Salud Reproductiva en la Argentina* [The Limits of the Law: Reproductive Health in Argentina] (Buenos Aires: World Bank, 2002), p. 29.

<sup>19</sup> Ibid., p. 30. CEDAW was ratified through Law 23.179 on May 8, 1985, and was incorporated in Argentina's constitution in 1994 by article 75(22).

<sup>20</sup> "Constituyen en Argentina Coordinadora por el Derecho al Aborto" [A Coordinating Body on the Right to Abortion is Established in Argentina], Tertulia/CIMAC/Prensa Ecuménica, July 15, 1999.

<sup>21</sup> "Polémica en Congreso argentino tras sanción ley de salud sexual" [Polemic in the Argentine Congreso after the Vote on Sexual Health Law], Reuters, April 19, 2001; and "Rechaza Iglesia Católica Argentina Nueva Ley de Salud Reproductiva" [The Catholic church Rejects a New Argentine Law on Reproductive Health], Agencia de Noticias de México (NOTIMEX), October 21, 2002. See also discussion below on religious opposition to contraceptives in general.

<sup>22</sup> Ley Nacional 25.673 [National Law 25.673], Creación del Programa Nacional de Salud Sexual y Procreación Responsable [Creation of the National Program on Sexual Health and Responsible Procreation], October 30, 2002.

information and to contraceptive methods and related health services for everyone<sup>23</sup>—would, if fully implemented, go a long way to overcome some of the violations documented in this report. However, the text of the law does not tackle the arbitrary and discriminatory denial of surgical contraception (tubal ligation), nor does it address women's severely limited access to safe and legal abortion services.<sup>24</sup> The government promulgated regulations for the law's implementation in May 2003, and the law had therefore been in force for little more than a year when Human Rights Watch conducted its research for this report.<sup>25</sup> This law placed reproductive and sexual health on the national political agenda for the first time in Argentina's history.<sup>26</sup> The law also brought Argentina up to par with other countries in the region—including Chile and Mexico—where national reproductive health programs already had been implemented.<sup>27</sup>

While women in Argentina thus have seen some advances in access to modern contraceptives, access to abortion continues to be largely a closed topic despite the catastrophic effects of illegal abortion on women's health and lives. Abortion has long constituted a crime in Argentina. When legislators have amended the penal code provisions on abortion, they have done so with little concern for women's rights but instead to address the scope of doctors' discretion in deciding when they might perform an abortion without risking a prison sentence.

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<sup>23</sup> Ley Nacional 25.673 de Creación del Programa Nacional de Salud Sexual y Procreación Responsable [National Law 25.673 on the Creation of the National Program on Sexual Health and Responsible Procreation], October 30, 2002, article 2.

<sup>24</sup> For a full description of these two issues, see sections V. and VI. below.

<sup>25</sup> Decreto Nacional 1.282/2003 [National Decree 1.282/2003], Reglamentación de la Ley Nacional 25.673 de Creación del Programa Nacional de Salud Sexual y Procreación Responsable [Regulation of National Law 25.673 on the Creation of the National Program on Sexual Health and Responsible Procreation], May 23, 2003.

<sup>26</sup> Argentina has a federal system of government, and the national constitution leaves the area of health generally to the authority of the provinces. 1994 Constitution of the Argentine Republic, article 121. Some provincial governments had passed laws or implemented policies on reproductive health before the national law came into force. See Sandra Cesilini and Natalia Gherardi (eds.), *Los Límites de la Ley: La Salud Reproductiva en la Argentina*. Provincial government laws and policies in all cases have to comply with the national constitution—including human rights provisions. 1994 Constitution of the Argentine Republic, article 5. Under international human rights law, the national government incurs obligations for the full national territory, regardless its system of government. The International Covenant on Civil and Political Rights (ICCPR) states this explicitly: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." ICCPR, 999 U.N.T.S. 171, entered into force March 23, 1976 and ratified by Argentina on August 8, 1986, article 50.

<sup>27</sup> A publication by the Inter-American Development Bank noted in 2001 that Argentina at that time was the only country in Latin America and the Caribbean that did not have a national family planning program. Ana Langer and Gustavo Nigenda, *Sexual and Reproductive Health and Health Sector Reform in Latin America and the Caribbean: Challenges and Opportunities* (Washington, D.C.: Inter-American Development Bank, 2001) [online] <http://www.iadb.org/sds/doc/SaludSexual.pdf> (retrieved December 29, 2004), p. 17, footnote 10.

When the current penal code entered into force in the late 1880s, abortion was included as a crime with no exceptions.<sup>28</sup> In 1922, while abortion was still illegal in all circumstances, the penal code provisions on abortion were amended to allow for three exceptions: punishment was lifted where the pregnant woman's life or health was in danger, where the pregnancy was the result of the rape, or where the pregnant woman was mentally disabled. During the 1976-1983 dictatorship, the penal code was changed to include further restrictions on abortion, requiring "grave" danger to a woman's life or health, and, in the case of rape, the commencement of criminal proceedings.

In 1984, after the reinstatement of a democratic government in Argentina, the provisions on abortion were amended again to return to the 1922 wording, with one small but substantive difference: a comma in the text was moved. The effect of this change was that women whose pregnancies were the result of a rape were no longer permitted a nonpunishable abortion unless they were mentally disabled. As a result, the current penal code provides for only two exceptions to punishment: where the pregnant woman's life or health is in danger, or where the pregnancy is the result of the rape of a mentally disabled woman.<sup>29</sup> These restrictions remain in force as of May 2005. In 2004, there were several bills pending in Argentina's congress, all of which seek to amend the current penal code provisions to expand or limit the situations where penalties for abortion may be waived.<sup>30</sup>

Despite this history, in 2004 and 2005 there has been unprecedented public debate on the topic of abortion and equally unprecedented government will to address one of the most heart-wrenching violations documented in this report: the provision of inhumane post-abortion care.

The recent public debate on abortion was fuelled by, among other things, the government's 2004 nomination of a female judge, Carmen Argibay, who publicly announced her support for the decriminalization of abortion.<sup>31</sup> Judge Argibay's appointment to the National Supreme Court was approved by the Senate despite

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<sup>28</sup> Marité de Rosario, "Aborto en Argentina—Síntesis de su historia legislativa" [Abortion in Argentina—Synthesis of the Legislative History] [online] <http://www.derechoalabortion.org.ar/artic/2004/100359.asp> (retrieved December 29, 2004).

<sup>29</sup> Ibid. For the full text of the 1984 Penal Code provisions on abortion currently in force, see footnote 166. In this report, we use the expression "mentally disabled" to refer to Argentina's penal code's wording: "idiot and demented."

<sup>30</sup> "Presentan en Argentina proyecto de Ley para despenalizar aborto" [In Argentina a bill is introduced to decriminalize abortion], CIMAC, September 8, 2004.

<sup>31</sup> "Jueza criticada por abortista defiende postulación a Corte Suprema argentina" [Female judge criticized for being an abortionist defends her nomination to the Argentine Supreme Court], Agence France Presse, June 23, 2004.

protests from the Catholic church and conservative groups, and was confirmed by President Nestor Kirchner.<sup>32</sup> Additionally, Argentina's health minister indicated publicly that he thought women's health and lives probably would improve if abortion were decriminalized. In response, Kirchner was quick to emphasize that the government's position continued to be a "clear rejection of the legalization of abortion."<sup>33</sup> However, Kirchner also defended his government's health minister against subsequent attacks from the Catholic church, including by asking the Vatican to retire a bishop who had suggested the health minister should be thrown into the sea with a stone around his neck for his comments.<sup>34</sup>

The National Health and Environment Ministry has also, under constant pressure from women's rights activists and health advocates, spearheaded an attempt to guarantee women access to adequate and humane post-abortion care without fear of legal prosecution, publicly recognizing the toll on women's health and lives of illegal and unsafe abortions. In October 2004, Argentina's provincial health ministries signed an agreement with the National Health and Environment Ministry on the measures that must be taken in order to lower maternal mortality in Argentina. This agreement included a commitment to ensure that "women who are aborting are not discriminated against and that they receive humane, fast, and effective assistance, with counseling and the provision of contraceptives."<sup>35</sup> In May 2005, the national government announced the publication of a new guide for doctors on how to provide such assistance.<sup>36</sup>

The agreement signed by the provincial health ministries also included a commitment to "guarantee access to nonpunishable abortion services [i.e. where abortion is not penalized by the penal code] in public hospitals in fulfillment of the penal code's

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<sup>32</sup> "Segunda mujer llega a la Corte Suprema, que completa renovación en Argentina" [Second woman reaches the Supreme Court and completes overhaul in Argentina], Agence France Presse, July 7, 2004; and "Penalista Carmen Argibay asume como miembro de la Corte Suprema" [Criminalist Carmen Argibay assumes her position on the Supreme Court], *La Nación* (Argentina), February 3, 2005.

<sup>33</sup> "Polémica por despenalización del aborto llega al más alto nivel argentino" [Polemic about Decriminalization of Abortion Reaches the Highest Levels in Argentina], Agence France Presse, November 27, 2004.

<sup>34</sup> Carlos Ares, "Kirchner pide al Vaticano el cese de un obispo por atacar a un ministro" [Kirchner asks the Vatican to retire bishop for attacking minister], *El País* (Spain), February 25, 2004. The bishop's comments are particularly problematic in Argentina, where many dissidents were killed in this manner during the 1976-83 dictatorship.

<sup>35</sup> Ministerio de Salud y Ambiente de la Nación [National Health and Environment Ministry], "Compromiso para la Reducción de la Mortalidad Materna en la Argentina" [Commitment to Reduce Maternal Mortality in Argentina], October 6, 2004, on file with Human Rights Watch.

<sup>36</sup> "Los abortos no existen, pero que los hay, los hay" [Abortion does not exist, but they do occur] Página 12 (Argentina), May 9, 2005, p. 1. For more information on post-abortion care and women's human rights see chapter VI below.

provisions [on abortion].” There are no ministerial guidelines on how public hospitals should provide such services.<sup>37</sup>

### ***Catholic Church Opposition to Reproductive Rights***

In Argentina, government policies and personal decisions on reproductive matters are developed in a context with substantial contributions from religious teachings and organizations, in particular the Catholic church. The Catholic church as well as groups claiming inspiration from Catholic church teachings have, with varying degrees of success, sought to block advances on reproductive health by lobbying the national and several provincial congresses, seeking judicial injunctions against the implementation of policies and laws that advance women’s rights to health and nondiscrimination, and publicly attacking politicians and NGO representatives who support such advances.

All NGO representatives, elected officials, and government health officials Human Rights Watch interviewed mentioned the impact of efforts by the Catholic church to block the implementation of policies and laws on access to contraceptives, information on reproductive health, and sex education. Graciela Rosso, deputy minister of health, noted: “The Pope himself has asked us to repeal the law [on reproductive health].”<sup>38</sup> A member of the national house of representatives who was a member of the Santa Fe Province congress when the provincial law on sexual health was debated told Human Rights Watch: “When we were debating the law, all the representatives received a letter from the archbishop threatening us even with excommunication [if we voted for the law].”<sup>39</sup>

In October and December 2004, ultra-conservative groups who identify with Catholic church teachings reportedly engaged in violent opposition to women’s organizing in support of reproductive rights.<sup>40</sup> Catholic church officials told Human Rights Watch in

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<sup>37</sup> E-mail message from Fernando Vallone, technical director, Dirección Nacional de Salud Materno-Infantil [National Department for Mother-Child Health], to Human Rights Watch, May 17, 2005.

<sup>38</sup> Human Rights Watch interview with Graciela Rosso, deputy minister, National Ministry on Health and Environment, Buenos Aires City, October 21, 2004. The Catholic church publicly voiced its rejection of the National Law on Sexual Health and Responsible Procreation, *inter alia*, at the time of its approval. “Rechaza Iglesia Católica Argentina nueva ley de salud reproductiva” [The Argentina Catholic Church Rejects the New Law on Reproductive Health], Agencia Mexicana de Noticias, October 31, 2002.

<sup>39</sup> Human Rights Watch interview with Alicia Tate, member of congress, Honorable National House of Representatives, Buenos Aires City, October 15, 2004.

<sup>40</sup> When a group of conservative Christians took responsibility for acts of violence and extreme vandalism during the Annual Women’s Meeting in the province of Mendoza in 2004, the internet publication “Catholic Panorama International” noted in an editorial with reference to these acts: “We urge that such courageous and masculine acts be repeated with more frequency in our fatherland.” “A dos semanas del Encuentro de Mujeres, siguen las agresiones” [Two weeks after the Women’s Meeting, the Violence Continues], [online]

October 2004 that they did not condone the violence and vandalism carried out during the Annual Women's Meeting that same month, and that they believed the criminal acts might have been carried out by the organizers of the meeting themselves—in particular lesbians and transvestites—in order to incriminate the Catholic church.<sup>41</sup>

The Argentine Catholic church has focused its advocacy in three areas: staunch opposition to nearly all forms of modern contraception, to sex education, and to abortion. At the heart of this opposition lie views about women's role in the family, and about maternity and reproduction as key parts of women's identity.<sup>42</sup> Increasingly, however, Catholic church officials have sought to justify their faith-based opposition to contraception and abortion in less doctrinal and more "pragmatic" terms, such as "scientific" proof that condoms prevent neither pregnancy nor sexually transmitted infections<sup>43</sup> or nationalist concerns with population size and growth.<sup>44</sup> Bishop Horacio Ernesto Benites Astoul from Buenos Aires told Human Rights Watch directly that he, as a nationalist, did not see the need to curb population growth in Argentina.<sup>45</sup>

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<http://www.sentidog.com/index.php?id=6911&cate=91&page=noticias/cortitas.php> (retrieved December 29, 2004), article dated October 28, 2004. See also [www.panoramacatolicointernacional.com](http://www.panoramacatolicointernacional.com). In December 2004, groups who identified as Catholic mounted loud and verbally abusive opposition to a Dutch doctor—known for her work in favor of the right to abortion—giving a speech in Buenos Aires, an incident that left two individuals injured. "Conferencia pro aborto deja dos heridos tras incidente en Argentina" [Pro Abortion Conference Leaves Two Injured After Incident in Argentina], *El Nuevo Herald (Miami)*, December 12, 2004, p. 2.

<sup>41</sup> Human Rights Watch interview with Horacio Ernesto Benites Astoul, auxiliary bishop of Buenos Aires City, Catholic church, Buenos Aires City, October 20, 2004.

<sup>42</sup> See Cardinal Joseph Ratzinger, now Pope Benedict XII, "Carta a los obispos de la Iglesia Católica sobre la colaboración del hombre y la mujer en la iglesia y en el mundo" [Letter to the bishops of the Catholic church on the collaboration between men and women in the church and in the world] (Rome: Holy See, May 31, 2004) [online]

[http://www.aica.org/aica/documentos\\_files/Santa\\_Sede/Congregaciones/Doctrina\\_de\\_la\\_Fe/doc\\_Doctrina\\_Fe\\_Colaboracion\\_Hombre\\_Mujer.htm](http://www.aica.org/aica/documentos_files/Santa_Sede/Congregaciones/Doctrina_de_la_Fe/doc_Doctrina_Fe_Colaboracion_Hombre_Mujer.htm) (retrieved February 3, 2005).

<sup>43</sup> Human Rights Watch interview with María del Carmen Cartazzo, doctor, Asociación Argentina de Médicos Católicos [Argentine Association of Catholic Doctors], October 20, 2004. See also AFP, "Catholic Cardinal suggests health warning on condom packets," October 13, 2003; "Why the fuss about condoms?", *The Tablet*, February 1, 2003; "Zambia: 'Luo's Condom Plan is Killing Our People,'" *Africa News*, May 8, 2002 (quoting the pastoral coordinator of the Catholic Archdiocese of Zambia, Fr. Evaristo Chungu, as saying, "Scientists themselves agree that condoms have been failing to prevent pregnancy, and as the head of the spermatozoa is 50 times as large as the less than one micro AIDS virus, no informed person would believe that the condom will be more than occasionally effective").

<sup>44</sup> Human Rights Watch interview with Horacio de la Torre, coordinator, Provincial Program on Responsible Procreation, Ministry of Health, Sante Fe Province, September 14, 2004.

<sup>45</sup> Human Rights Watch interview with Horacio Ernesto Benites Astoul, auxiliary bishop, Catholic church, Buenos Aires City, October 20, 2004.

## *Opposition to Modern Contraceptive Methods*

In Argentina, Catholic church officials generally do not express opposition to all modern contraceptive methods, but instead engage in a dual strategy, expressing support for “transitional, reversible, and non-abortive”<sup>46</sup> contraceptive methods, while seeking to brand modern contraceptive methods as either non-transitional (i.e. permanent), irreversible, or tantamount to abortion.<sup>47</sup> This strategy has been quite successful on two counts.

First, the Catholic church’s concerns about “transitional, reversible, and non-abortive” contraception became part of the congressional record during the 2001 congressional debate on the National Law on Sexual Health and Responsible Procreation, as a congressional member read into the record a letter from a Catholic bishop to this effect.<sup>48</sup> The terms subsequently were included in the law, which stipulates that the public health system must “prescribe and provide contraceptive methods and elements that must be of a reversible, non-abortive, and transitional character.”<sup>49</sup>

Second, the Catholic church and affiliated groups have successfully advanced the position in courts that many contraceptive methods are abortive. In 2002, the National Supreme Court, in a case brought by the group “Portal de Belén” (The Portal of Bethlehem), prohibited the manufacture and sale of “IMEDIAT,” the brand name of an emergency contraceptive pill. Five of the court’s nine members deemed the pill abortive and therefore unconstitutional.<sup>50</sup> Several other lawsuits brought by conservative groups

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<sup>46</sup> “Transitional” is meant to refer to methods that are not permanent. “Reversible” is meant to refer to semi-permanent methods that might be reversed.

<sup>47</sup> In medical terms, there is a clear distinction between contraception, defined as “the deliberate prevention of pregnancy or conception by various means,” and elective abortion, defined as “the voluntary termination of a pregnancy.” Jerrold B. Leikin MD and Martin S. Lipsky MD (eds.), *American Medical Association: Complete Medical Encyclopedia* (New York: Random House, 2003), pp. 99 and 399. See also Rebecca J. Cook, Bernard M. Dickens, and Mahmoud F. Fathalla, *Reproductive Health and Human Rights: integrating medicine, ethics, and law* (New York: Oxford University Press, 2003), p. 27: “From a medical point of view, the distinction between contraception and abortion is clear. Pregnancy is only considered established with the completion of implantation of the ovum in the lining of the uterus. A woman with a fertilized ovum floating in her Fallopian tube or uterus is not pregnant. A method that acts before complete implantation is a method of contraception. A method that acts after complete implantation is a method of abortion.”

<sup>48</sup> Congressional Debate transcript, Cámara de Diputados de la Nación [National House of Representatives], from April 18, 2001, on file with Human Rights Watch.

<sup>49</sup> Ley Nacional 25.673 [National Law 25.673], Creación del Programa Nacional de Salud Sexual y Procreación Responsable [Creation of the National Program on Sexual Health and Responsible Procreation], October 30, 2002, article 6(b).

<sup>50</sup> Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], “Portal de Belén c/Ministerio de Salud y Acción Social de la Nación s/Amparo. P. 709. XXXVI,” March 5, 2002. Other brands of emergency contraception remain legal in Argentina. For up-to-date information on access to emergency contraception in Argentina see Consorcio Latinoamericano de Anticoncepción de Emergencia [Latin American Consortium on Emergency Contraception], “Cuadro resumen de la situación actual de la Anticoncepción de Emergencia en

inspired by Catholic church teachings have focused on the definition of “abortion” and on the contested constitutionality of specific contraceptive methods, including intrauterine devices (IUDs), oral contraceptives, and hormonal injections.<sup>51</sup>

### ***Opposition to Sex Education***

The Catholic church and many conservative groups have also successfully limited provisions of the National Law on Sexual Health and Responsible Procreation that call for some advance on sex education and information on contraception, as well as draft laws and policies seeking to provide such access, in particular for adolescents. A lawyer from the Argentine Association on Family Planning, an NGO, lamented: “The opposition [from the Catholic church] is so intense that you can’t even have a serious debate. … [The schools] teach the topic of anatomy, but nothing that goes into the more sexual issues.”<sup>52</sup>

Opposition to sex education has been successful. For example, in Santa Fe Province, a law that mandates sex education in all private and public schools was adopted in 1992, but never implemented. “It got shelved,” said Horacio de la Torre, coordinator of Santa Fe provincial government’s program on responsible procreation. “It was never implemented … for reasons related to the church.”<sup>53</sup> The law was still on the books

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América Latina” [Summary table of the current situation of emergency contraception in Latin America] [online] <http://www.clae.info/paises.html> (retrieved March 3, 2005). Argentina’s constitution does not mention abortion. The argument that emergency contraception is unconstitutional is based on a selective reading of the American Convention on Human Rights (ACHR), which is incorporated into the constitution. For further discussion of ACHR provisions relevant to abortion, please see chapter VII below.

<sup>51</sup> In 2002, a federal judge granted an injunction requested by a Catholic group, ordering the National Health Ministry to stop the implementation of the National Law on Sexual Health and Responsible Procreation in all of Argentina, asserting that the law allowed for the distribution of abortive and therefore unconstitutional contraceptives. Juzgado No. 3 de Córdoba, “Cuerpo de copias en autos: ‘MUJERES POR LA VIDA – Asociación Civil sin Fines de Lucro c/Ministerio de Salud y Acción Social de la Nación s/Amparo,” December 30, 2002. The National Health Ministry appealed the case, and the Federal Court of Appeals revoked the injunction in March 2003. Cámara Federal de Córdoba, “Cuerpo de copias en autos: ‘MUJERES POR LA VIDA – Asociación Civil sin Fines de Lucro c/Ministerio de Salud y Acción Social de la Nación s/Amparo,” SALA A, March 19, 2003. In 2003, the same federal judge imposed a protective measure requested by another Catholic organization, ordering the national government to prohibit the manufacture and sale in the entire country of contraceptive methods that include “abortive” drugs and of intrauterine devices (IUDs), again because of their supposed unconstitutionality. Juzgado No. 3 de Córdoba, “Fundación 25 de Marzo - Asociación Civil sin Fines de Lucro (Filial Córdoba) c/ Estado Nacional – Poder Ejecutivo Nacional – Ministerio de Salud y Acción Social de la Nación s/Amparo,” May 23, 2003. The government appealed this decision too, and the case was pending as of February 2005.

<sup>52</sup> Human Rights Watch interview with María del Huerto Terceiro, lawyer, Asociación Argentina de Planificación Familiar [Argentine Association on Family Planning], Buenos Aires City, October 14, 2004.

<sup>53</sup> Human Rights Watch interview with Horacio de la Torre, coordinator, Provincial Program on Responsible Procreation, Ministry of Health, Santa Fe, Santa Fe Province, September 14, 2004.

unimplemented when Human Rights Watch visited Santa Fe Province in September 2004, more than ten years after the adoption of the law.

As a component of civil society, the Catholic church has a right to freedom of religion and expression, regardless of the scientific or medical accuracy of the claims it makes. The Argentine government, however, has an obligation to ensure access to complete and accurate information concerning prevailing health problems, their prevention and their control.<sup>54</sup> Where incomplete or inaccurate information is readily available in the public sphere—for example because it is provided by the Catholic church or other civil society entities exercising their right to freedom of expression—the state may have a responsibility to launch an affirmative public health information campaign specifically aimed at correcting the misperceptions. In April 2005 the national government did launch a public information campaign aimed at disseminating information on access to contraceptives through public hospitals and clinics.<sup>55</sup>

#### **IV. Pervasive Barriers in Access to Contraceptives**

Human Rights Watch identified three primary barriers to women's access to contraceptives: domestic and sexual violence, the provision of inaccurate and inadequate information by public health officials, and economic constraints, including at times unauthorized fees for contraceptives and related health services that should have been free of charge under the National Law on Sexual Health and Responsible Procreation.

##### ***Domestic and Sexual Violence***

*I was with him for fourteen years. He beat me [and] the mistreatment had become normal. ... He always told me: "I am going to fill you with children so that you can't leave my side."*

—Gladis Morello, age thirty-two, Buenos Aires Province<sup>56</sup>

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<sup>54</sup> Committee on Economic, Social and Cultural Rights, "The right to the highest attainable standard of health (General Comments), General Comment 14," August 11, 2000, *U.N. Doc. E/C.12/2000/4*, paras. 12(b), 16 and note 8.

<sup>55</sup> "El gobierno lanzó una campaña de salud reproductiva" [Government launches campaign on reproductive health], *La Nación* (Argentina), April 29, 2005.

<sup>56</sup> Human Rights Watch interview with Gladis Morello, Buenos Aires Province, October 2004. Morello moved in with her husband when she was eighteen, and had ten pregnancies during her fourteen-year physically and sexually abusive marriage, including two miscarriages due to the violence.

Domestic and sexual violence constitute a persistent barrier for women trying to access contraceptives and to control their bodies and reproductive health.<sup>57</sup> Olga Cáceres, president of a nongovernmental organization that provides shelter for battered women in Buenos Aires Province, told Human Rights Watch: “The large majority of the women in the shelter live with violence, [including] sexual violence. In those cases, there is no freedom to decide how many children you want to have, or even when you are going to have sex.” Cáceres explained that a significant number of abusive men deliberately sabotage their wife’s or partner’s access to contraceptives as part of the control and abuse: “If he gets her pregnant constantly, there is less possibility that she will leave [the abusive relationship].”<sup>58</sup>

The testimony of Romina Casillas, a forty-six-year-old mother of seven, presents one such example. She suffered physical violence at the hands of her husband, who prevented her from using contraceptives: “I didn’t want to have that many [children] but he didn’t let me [use contraceptives]. … I would start on the pills when he was away, and he would hide them when he came back. … I wanted to get an IUD [intrauterine device], but he wouldn’t let me. … I never thought that I would have many children, I thought that I would have four at the most.”<sup>59</sup>

In 1999, an estimated 25 percent of all women in Argentina suffered domestic violence on a regular basis, while 50 percent were estimated to suffer some form of gender-related violence at some point in their lives.<sup>60</sup> Of the forty-three women Human Rights Watch interviewed, more than half testified that they had suffered, or were currently suffering, domestic or sexual violence at the hands of their partners. The reasons for pervasive domestic violence are many and complex, not all of which the state is directly responsible for. However, international human rights standards set out specific minimum steps that states must take in order to comply with their obligation to eradicate domestic violence as a form of gender-based discrimination.

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<sup>57</sup> Sexual violence may also increase the risk of sexually transmitted infections, including and especially HIV. Forced or coerced sex creates a risk of trauma: when the vagina is dry and force is used, genital injury is more likely, increasing the risk of transmission. Forced oral sex may cause tears in the skin, also increasing the risk of HIV transmission.

<sup>58</sup> Human Rights Watch interview with Olga Cáceres, president, María Pueblo, Buenos Aires Province, October 18, 2004.

<sup>59</sup> Human Rights Watch interview with Romina Casillas, Santa Fe Province, September 2004.

<sup>60</sup> M. Buvinic, A Morrison, and M. Shifter, “La violencia en las Américas: marco de acción” [Violence in the Americas: a Framework for Action], in A. Morrison and M. Loreto Biehl (eds.), *El costo del silencio: violencia doméstica en las Américas* [The Cost of Silence: Domestic Violence in the Americas], (Washington, D.C.: Inter-American Development Bank, 1999), pp. 3-34.

The CEDAW Committee,<sup>61</sup> which monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women, noted in its General Recommendation No. 19 on Violence against Women that “[g]ender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”<sup>62</sup> In the same document, the committee spelled out specific obligations in terms of preventing violence against women, recommending:

States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention.<sup>63</sup>

The U.N. Commission on Human Rights, a body of fifty-three states that meets annually to issue recommendations on human rights, has emphasized “that violence against women has an impact on their … reproductive and sexual health” and has encouraged states “to ensure that women have access to … health care providers who are knowledgeable and trained to recognize signs of violence against women and to meet the needs of patients who have been subjected to violence, in order to minimize the adverse physical and psychological consequences of violence.”<sup>64</sup>

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<sup>61</sup> 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. The treaty monitoring bodies include the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, and the Committee on the Elimination of Discrimination against Women. 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 they monitor 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. These general comments or recommendations provide yet another source on the evolving authoritative interpretation of the human rights in question.

<sup>62</sup> Committee on the Elimination of Discrimination against Women (CEDAW Committee), General Recommendation No. 19: Violence Against Women, para. 1, in “Compilation of General Comments and General Recommendation Adopted by Human Rights Treaty Bodies,” May 12, 2004, *U.N. Doc. HRI/GEN/1/Rev.7*.

<sup>63</sup> *Ibid.*, para. 24(b).

<sup>64</sup> Commission on Human Rights, “Elimination of Violence against Women,” *Resolution 2004/46*, April 20, 2004 (adopted without a vote), para. 7.

Furthermore, the U.N. Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has noted that “to eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women’s right to health” of which “[a] major goal should be reducing women’s health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence.”<sup>65</sup> The Committee has further noted that “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.”<sup>66</sup>

In Argentina, a 1994 domestic violence law established protective measures for victims of domestic violence, including restraining orders and temporary paternity support.<sup>67</sup> In April 1999, the Argentine congress amended penal code provisions on “crimes against sexual integrity” to bring them more in line with international legal standards, but did not explicitly criminalize marital rape.<sup>68</sup> NGOs have criticized this clear deficiency of the law,<sup>69</sup> and the U.N. Committee on the Elimination of Discrimination against Women has expressed concern that these legal reforms have not prevented the domestic violence problem in Argentina from worsening.<sup>70</sup> Lucila Morán, a twenty-two-year-old woman who was pregnant for the second time when Human Rights Watch interviewed her, was

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<sup>65</sup> Committee on Economic, Social and Cultural Rights, “The right to the highest attainable standard of health (General Comments), General Comment 14,” August 11, 2000, *U.N. Doc. E/C.12/2000/4*, para. 21.

<sup>66</sup> *Ibid.*

<sup>67</sup> Ley 24.417/94 [Law 24.417], *Protección contra la Violencia Familiar* [Protection against Domestic Violence], article 4.

<sup>68</sup> Historically, in Latin America as in the United States the “good” that laws addressing sexual violence most often aimed to protect was the “honor” of the victim and not the victim herself. This notion finds its most explicit form in laws that exonerate the perpetrator of a rape if he marries the victim of the rape, under the reasoning that the honor would be restored. This was the case in Argentina until the reform in 1994 (and is still the case in Bolivia and Brazil, for example). Women’s rights activists in Argentina have argued that even though the new law implicitly criminalizes marital rape, the law’s silence on this topic contributes to maintain a strong judicial bias toward marriage as an exonerating factor in rape cases. Human Rights Watch interview with Silvia Chejter, sociologist, Centro de Encuentros Cultura y Mujer CECYM [Center for Culture and Women], Buenos Aires, August 13, 2003.

<sup>69</sup> Centro de Encuentros Cultura y Mujer [Women and Cultural Convergence Center], *Violación marital (Boletín)* [Marital Rape (Bulletin)], 2002 [online] <http://www.cecym.org.ar/pdfs/violacionmarital.pdf> (retrieved December 2, 2004).

<sup>70</sup> CEDAW Committee, “Report of the Committee on the Elimination of Discrimination against Women, twenty-sixth session, twenty-seventh session, exceptional session,” *U.N. Doc. A/57/38*, May 2, 2002, para. 364. Argentina’s fifth periodic report to the CEDAW Committee noted that the number of complaints filed regarding domestic violence had doubled from 1995 to 2000. Committee on the Elimination of Discrimination against Women, “Consideration of reports submitted by States parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fifth Periodic Reports, Argentina,” *U.N. Doc. CEDAW/C/ARG/5*, February 11, 2002, p. 32. Some of the increase may be the result of the new legislative framework which might encourage complaints.

beaten by her husband almost daily. Morán said that she could not leave her abusive relationship, as her husband repeatedly threatened her with keeping their two-year-old daughter:

He beats me for anything. The other day, he almost killed me. ... I filed a complaint about him one time, but they [the police] told me that they couldn't help me with anything. They gave me a restraining order [but he did not leave]. ... I don't have help from anyone. ... [My husband] says: 'If you want to leave, go, but you are leaving my daughter here.' And so he has me.<sup>71</sup>

Morán's situation was further complicated by the local public hospital's refusal to give her a tubal ligation—due to discriminatory hospital regulations<sup>72</sup>—despite a heart condition that her doctor said makes pregnancy a health hazard for her.

A community educator working with low income women affected by violence in Buenos Aires Province told Human Rights Watch that the government's response to domestic violence, in particular that of police officers, was seriously deficient:

With regard to violence, so much needs to happen. ... If they [the women] don't go to the police with the law in their hands, [the police] doesn't take the complaint. ... Because they start asking you why he hit you, and let's see if he really hit you. ... Sometimes they don't even want to take down a testimony, or they take your testimony, but they don't file the complaint. There are many police stations, but none of them file the complaint.<sup>73</sup>

One fundamental deficiency in the state's response to violence is the lack of shelters for women affected by domestic and sexual violence. A community organizer from Santa Fe Province told Human Rights Watch: "There are two state institutions [in Santa Fe

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<sup>71</sup> Human Rights Watch interview with Lucila Morán, Buenos Aires Province, October 2004.

<sup>72</sup> For a full description of limitations generally implemented in Argentina on women's access to voluntary tubal ligation and their illegality under international law, see section V below. In the case of Lucila Morán, the procedures that prevented her from accessing voluntary tubal ligation were discriminatory by denying her access based on her young age. According to the World Health Organization, youth is not, healthwise, a contraindication to surgical sterilization. Moreover, in Morán's case, the same public health workers who refuse to sterilize her also warn her against getting pregnant again under any circumstances, due to her heart condition.

<sup>73</sup> Human Rights Watch interview with Lucia Lucena, community educator, Decidir [Decide], Moreno, Buenos Aires Province, October 19, 2004.

City] that deal with this subject [domestic violence], but they don't have anywhere to send the women so that they are not killed. Because they *are* killed.”<sup>74</sup>

The National Program on Sexual Health and Responsible Procreation only addresses violence in passing,<sup>75</sup> and implementing regulations offer no specifics as to how to prevent intimate partner violence from posing an obstacle to women's independent decision-making in the area of reproductive health.<sup>76</sup> The vast majority of the public hospitals and clinics implementing the program that Human Rights Watch visited were not required or encouraged to detect domestic or sexual violence in patients and counsel patients on these issues.

### ***Misleading, Inaccurate, or Incomplete Information***

The women Human Rights Watch interviewed had limited access to contraceptives for a host of reasons, some of which had to do with a generalized level of misinformation regarding reproduction and contraception. María del Huerto Terceiro, a lawyer from a policy organization working on access to family planning, lamented: “There is no permanent information, and there is no sex education in the schools. The result is that you continue to be uninformed.”<sup>77</sup> In April 2005, Argentina's government started addressing this issue, notably through the launch of a public information campaign in television, radio, and print press, announcing access to contraceptives as a right, and referring individuals and couples to public health centers for further information.<sup>78</sup>

However, the central government's demonstrated political will does not always overcome fear and opposition from the public officials who are directly responsible for women's enjoyment of their human rights in the reproductive area. We found that

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<sup>74</sup> Human Rights Watch interview with Mabel Busaniche, community organizer, Santa Fe, Santa Fe Province, September 13, 2004.

<sup>75</sup> Ley Nacional 25.673 [National Law 25.673], Creación del Programa Nacional de Salud Sexual y Procreación Responsable [Creation of the National Program on Sexual Health and Responsible Procreation], October 30, 2002, article 2(a): “Serán objetivos de este programa: (a) Alcanzar para la población el nivel más elevado de salud sexual y procreación responsable con el fin de que pueda adoptar decisiones libres de discriminación, coacciones o violencia” [It will be the objectives of this program [National Program on Sexual Health and Responsible Procreation]: (a) To achieve the highest attainable level of sexual health and responsible procreation for the population with the purpose of enabling it to make decisions free of discrimination, coercion, or violence].

<sup>76</sup> See Decreto Nacional 1.282/2003 [National Decree 1.282/2003], Reglamentación de la Ley Nacional 25.673 de Creación del Programa Nacional de Salud Sexual y Procreación Responsable [Regulation of National Law 25.673 on the Creation of the National Program on Sexual Health and Responsible Procreation], May 23, 2003.

<sup>77</sup> Human Rights Watch interview with María del Huerto Terceiro, lawyer, Asociación Argentina de Planificación Familiar (AAPF) [Argentine Association on Family Planning], Buenos Aires City, October 14, 2004.

<sup>78</sup> “El gobierno lanzó una campaña de salud reproductiva” [Government launches campaign on reproductive health], La Nación (Argentina), April 29, 2005.

public health officials at times contributed to the existing lack of understanding by providing women with misleading, incomplete, or inaccurate information about contraception. Women we interviewed were often badly placed to demand more accurate or complete information, either because they were unaware that they were being misinformed, or because they did not feel in a position to challenge a medical authority. Considering the disadvantaged economic position of most users of public health facilities, and a related disadvantage in access to education and information, public health officials, as detailed below, did not show the kind of commitment necessary to ensure that women receive essential health information. The net result was that women many times were left with severely limited choices with regard to when and if to have children, even within the already limited range of contraceptive methods legally available to them.

Human Rights Watch found that, in many cases, public health officials offered women access to a more limited range of contraceptives than permitted by law or distributed by the government. Some women testified that doctors in the public health system actively discouraged them from using the contraceptives donated by the state, either by telling them that the contraceptives were not of good quality, or by giving misinformation about some methods. “I went to a gynecologist … [and] I opted for the pill. But then she said that after [taking the pill] I would have to have treatment to become pregnant again, and that it wasn’t worth it,” recalled María Rivara, thirty-seven, who had eight children.<sup>79</sup> Paola Méndez, thirty-five and mother of ten, wanted to get an intrauterine device (IUD), but the public health doctor told her that it would not prevent pregnancies, and that it might, in fact, damage a future child: “I wanted to get an IUD, but you know they say that many are born with the IUD in their heads. The doctor himself explained to me that the majority, almost all of them, are born with the IUD in their heads.”<sup>80</sup>

In other cases, women were not told about side effects that may render certain contraceptive methods ineffective, such as use of antibiotics while on hormonal contraception.<sup>81</sup> In the case of Laura Passaglia, thirty-two, a doctor in the public health

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<sup>79</sup> Human Rights Watch interview with María Rivara, Buenos Aires Province, October 2004.

<sup>80</sup> Human Rights Watch interview with Paola Méndez, Buenos Aires Province, October 2004. According to Human Rights Watch’s interviews with public health officials, no such cases have been reported. Moreover, the general failure rate of intrauterine devices—i.e. the percentage of women experiencing unintended pregnancies in the first year of use—is between 0.1 and 2 percent for typical use, depending on the type of device implanted. Robert A. Hatcher et al, *Contraceptive Technology* (New York: Ardent Media, 1998), p. 514.

<sup>81</sup> An on-line guide on family medicine warns in an article that reviews the interaction between hormonal contraception and antibiotics: “Most of the available data do not indicate any major reduction in the efficacy of OCPs [oral contraceptive birth control pills] with concurrent common antibiotic use. However, these studies cannot reliably exclude a small decrease in efficacy especially in the “low-dose” (<35 µg of estrogen) combination OCPs. With several well-known resources suggesting alternative contraception during antibiotic use, pragmatically *it is important to inform all female patients of the possible interaction.*” Kevin E. Burroughs,

system prescribed antibiotics to her without informing her that this treatment was likely to interfere with the effectiveness of the hormonal contraception he also prescribed to her on a monthly basis. Passaglia said: “I took the [contraceptive] pill. But I got pregnant all the same. … I was always on antibiotics for a urinary tract infection. … They never told me anything about that [that antibiotics may interfere with the contraceptive actions of the pills].”<sup>82</sup> While taking hormonal contraception, Passaglia had five unwanted pregnancies, in addition to her existing three children and one miscarriage.

Human Rights Watch did not interview any medical doctors who admitted to misinforming patients about contraceptive methods. However, the vast majority of the doctors we interviewed expressed some variant of the idea that they were better placed than the women they treat to make decisions about how the women should control their fertility. Luís Robles, head of the maternity program at Formosa Province health ministry told Human Rights Watch that the hospitals in that province routinely injected women with hormonal contraception without ensuring consent, in a blatant violation of women’s right to bodily integrity. Robles noted that this practice was particularly common when the women were hospitalized for post-abortion care, because in those cases it was assumed that the woman had deliberately refused to use contraceptives: “A woman [who is hospitalized for post-abortion care] has used abortion as contraception. [When she] is discharged, we give her contraception. … Whether she wants it or not, we inform her, and inject her.”<sup>83</sup>

Though Human Rights Watch did not interview women from Formosa Province, our interviews from elsewhere in the country suggested that many women with unwanted pregnancies—whether or not they ended in illegal and unsafe abortions—had been prevented from using any type of contraception due to abusive relationships, insufficient information, or lack of financial resources.

Robles’ comment illustrates the fact that many competing factors impede women’s possibility to make informed and independent decisions about their contraceptive use. Whereas most women Human Rights Watch interviewed were denied information about a full range of contraceptive methods in the public health system, some noted that

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MD; M. Lee Chambliss, MD, MSPH Greensboro, NC, “Antibiotics and Oral Contraceptive Failure” (emphasis added) Archives of Family Medicine [online] <http://archfami.ama-assn.org/cgi/content/full/9/1/81> (retrieved February 4, 2005).

<sup>82</sup> Human Rights Watch interview with Laura Passaglia, Buenos Aires Province, October 2004.

<sup>83</sup> Human Rights Watch interview with Luís Robles, head, Programa de Maternidad [Maternity Program], Ministerio de Salud de Formosa [Formosa Province Health Ministry], Castelar, Buenos Aires Province, September 6, 2004.

doctors prescribed contraceptives “as if they were aspirin” to women with more than three children, regardless of the individual woman’s desire to have more children.<sup>84</sup>

The U.N. Committee on Economic, Social and Cultural Rights has interpreted the “right to prevention, treatment and control of diseases” to impose a positive obligation on states parties to take steps necessary for the “prevention, treatment and control of epidemic, occupational and other diseases,” including the “establishment of prevention and education programmes for behaviour-related health concerns such as … those adversely affecting sexual and reproductive health.”<sup>85</sup> According to the committee, the right to the enjoyment of the highest attainable standard of health includes the right to information and education concerning prevailing health problems, their prevention and their control.<sup>86</sup> In the context of “specific legal obligations,” the committee notes:

States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people’s participation in health-related matters. . . . States should also ensure that third parties do not limit people’s access to health-related information and services.<sup>87</sup>

Moreover, accurate and full information on contraception and sexual health should be understood as being contained in the right to the highest attainable standard of health protected by article 12 of the International Covenant on Economic, Social and Cultural Rights.<sup>88</sup>

The U.N. Committee on the Rights of the Child has explained that this right extends to adolescent girls. The Convention on the Rights of the Child, which under Argentine law is incorporated into the constitution, recognizes the right of children to enjoy “the highest attainable standard of health and to facilities for the treatment of illness and

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<sup>84</sup> Human Rights Watch interview with [name withheld], head of maternity ward at public hospital [province withheld], September 2004; and with Julie Reina, Tucumán Province, September 2004.

<sup>85</sup> Committee on Economic, Social and Cultural Rights, The right to the highest attainable standard of health (General Comments), General Comment 14, August 11, 2000, *U.N. Doc. E/C.12/2000/4*, para. 16; and para. 36 (states must promote “health education, as well as information campaigns, in particular with respect to HIV/AIDS”).

<sup>86</sup> *Ibid.*, paras. 12(b), 16 and note 8.

<sup>87</sup> *Ibid.*, paras. 34-35.

<sup>88</sup> ICESCR, article 12.

rehabilitation of health.”<sup>89</sup> According to the U.N. Committee on the Rights of the Child which interprets the convention, adolescents “have the right to access adequate information essential for their health and development and for their ability to participate meaningfully in society.”<sup>90</sup> This implies that states parties have an obligation “to ensure that all adolescent girls and boys, both in and out of school, are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practise healthy behaviours [including] information on ... safe and respectful social and sexual behaviours.”<sup>91</sup>

Accurate information on contraception would seem particularly important in the Argentine context, where 17.5 percent of all infants were born to adolescent mothers in 2003 and 34 percent of adolescents did not use any type of contraception during their first sexual intercourse according to a 2004 poll.<sup>92</sup> Indeed, Argentina’s health minister has acknowledged the importance of sex education on several occasions, always drawing vehement opposition from conservative groups.<sup>93</sup>

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<sup>89</sup> Convention on the Rights of the Child (CRC), G.A. Res. 44/25, entered into force September 2, 1990 and ratified by Argentina on December 4, 1990, article 24.

<sup>90</sup> Committee on the Rights of the Child, “General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child” *U.N. Doc. CRC/GC/2003/4*, July 1, 2003, para. 26.

<sup>91</sup> *Ibid.*

<sup>92</sup> “Ministro argentino preocupado por abortos y embarazo adolescente” [Argentine Minister Worried about Abortion and Adolescent Pregnancies], Associated Press, *Diario La Estrella* (Madrid), November 13, 2004; and “Polémica por despenalización del aborto llega al más alto nivel argentino” [Polemic about Decriminalization of Abortion Reaches the Highest Level in Argentina], Agence France Presse, November 27, 2004.

<sup>93</sup> See “Ministro argentino preocupado por abortos y embarazo adolescente” [Argentine Minister Worried about Abortion and Adolescent Pregnancies], Associated Press, *Diario La Estrella* (Madrid), November 13, 2004; “Para Ministro de Salud, si no se educa sobre sexo en la escuela primaria ‘se pierde una oportunidad’” [For Minister, ‘We Lose an Opportunity’ by Not Educating on Sex in Primary Schools], *Agencia Diarios y Noticias*, October 1, 2004; and Guillermo Villarreal, “Silenciosa Ofensiva” [Silent Offensive], *Agencia Diarios y Noticias*, September 24, 2004.

## ***Economic Constraints***

Women Human Rights Watch interviewed identified their poverty as a decisive factor in their inability to access contraceptives and thus to exercise independent decision-making about if and when to have children. The government has recognized some dimensions of this problem. In fact, one of the main stated objectives of the National Program on Sexual Health and Responsible Procreation is to provide all legal contraceptive methods free of charge through the public health system.<sup>94</sup> This policy, however, is not being implemented effectively and many poor women still are made to pay.

A number of the women Human Rights Watch interviewed testified that public health workers charged them for services that should have been free under the National Program on Sexual Health and Responsible Procreation. “The state gives you the IUD [intrauterine device] for free, but they charge you for the checkup, 15 pesos [U.S.\$5.05]” said Norma Jiménez, thirty-five, who had been pregnant six times.<sup>95</sup> Paola Vásquez, a twenty-seven-year-old mother of three, had the same experience: “There are some places [public health clinics] where they give [contraceptives] for free, and other places [public health clinics] where they don’t give it for free.”<sup>96</sup>

When the cost of a consultation, a medical analysis, or the transport to the public hospital where the program is implemented is added to the cost of the contraceptive method itself, moreover, women we interviewed were essentially left to choose between food and shelter or paying for contraceptives.

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<sup>94</sup> Ley 25.673 [Law 25.673], National Law on Sexual Health and Responsible Procreation, article 2(f). The full article reads: “Serán objetivos de este programa [Programa Nacional de Salud Sexual y Procreación Responsable]: a) Alcanzar para la población el nivel más elevado de salud sexual y procreación responsable con el fin de que pueda adoptar decisiones libres de discriminación, coacciones o violencia; b) Disminuir la morbilidad materno-infantil; c) Prevenir embarazos no deseados; d) Promover la salud sexual de los adolescentes; e) Contribuir a la prevención y detección precoz de enfermedades de transmisión sexual, de vih/sida y patologías genital y mamarias; f) Garantizar a toda la población el acceso a la información, orientación, métodos y prestaciones de servicios referidos a la salud sexual y procreación responsable; g) Potenciar la participación femenina en la toma de decisiones relativas a su salud sexual y procreación responsable.” [It will be the objectives of this program [National Program on Sexual Health and Responsible Procreation]: a) To achieve the highest attainable level of sexual health and responsible procreation for the population with the purpose of enabling it to make decisions free of discrimination, coercion, or violence; b) To diminish mother-child morbi-mortality; c) to prevent unwanted pregnancies; d) To promote sexual health in adolescents; e) To contribute to the prevention and early detection of sexually transmitted diseases, of HIV/AIDS, and of genital and mammary pathologies; f) To guarantee to the full population access to information, orientation, methods, and the provision of services related to their sexual health and responsible procreation.”

<sup>95</sup> Human Rights Watch interview with Norma Jiménez, Santa Fe Province, September 2004.

<sup>96</sup> Human Rights Watch interview with Paola Vásquez, Santa Fe Province, September 2004.

Given this choice, many women chose to feed themselves and their families. Romina Redondo, thirty-two, exclaimed: “One does not have 30 pesos [U.S.\$10.10] every month for an injection. … Where do we get 30 pesos for an injection, when we are living off the head of household program<sup>97</sup> with 150 pesos [U.S.\$50.14] a month?”<sup>98</sup> Marisa Rossi, thirty-six, noted that sometimes the choice was between food and condoms: “[Condoms] cost 2.50 pesos for three. For that money, you can buy a kilo of bread or a couple of liters of milk.”<sup>99</sup>

In most cases, public hospitals did not allow women to set up appointments in advance or over the phone, adding to the economic burden that the access to contraceptives represented because further travel was needed or because the women had to take time off work to go to the hospital: “You have to go at four in the morning [and] they give you an appointment at eight, nine, ten, eleven. … If you don’t get an appointment, sometimes they give you one for another day,” said Romina Casillas, forty-six.<sup>100</sup> Yanina Carlotto, forty-six, asked: “If you have to feed your children, how can you spend 2.50 pesos [U.S.\$0.84] on the bus [to get to the hospital]?”<sup>101</sup> Ana Sánchez, forty-three, said: “People don’t have money, even if it is a small ticket. Sometimes you don’t have 3 pesos [U.S.\$1.01] to come and go [to the health center], and then you have to come and go again.”<sup>102</sup> Mariana Porcel, thirty-one, said of going to the public hospital for contraceptives: “You can’t work the whole morning, you have to wait twenty appointments. And if you don’t go [to work] a full day, you can’t feed your children.”<sup>103</sup> Women who use hormonal contraceptives based on a monthly cycle have to repeat the ordeal of getting to the public hospital every month: “Every month you have to go get [the pills]. … They give you a card, and when you get the pills, they mark it up,” Romina Casillas said.<sup>104</sup>

The U.N. Committee on Economic, Social and Cultural Rights has addressed the issue of economic constraints in its interpretative statement on the right to health, noting that “health facilities, goods and services must be affordable for all … [ and that] … poorer

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<sup>97</sup> The Head of Household Program [*Programa Jefes y Jefas de Hogar*] was created in 2002 to provide emergency income for the economically vulnerable population. Those inscribed in the program receive 150 pesos per month in exchange for some community service. It is administered by Decreto Nacional 565/2002 [National Decree 565/2002].

<sup>98</sup> Human Rights Watch interview with Romina Redondo, Santa Fe Province, September 2004.

<sup>99</sup> Human Rights Watch interview with Marisa Rossi, Buenos Aires Province, October 2004.

<sup>100</sup> Human Rights Watch interview with Romina Casillas, Santa Fe Province, September 2004.

<sup>101</sup> Human Rights Watch interview with Yanina Carlotto, Buenos Aires Province, October 2004.

<sup>102</sup> Human Rights Watch interview with Ana Sánchez, Buenos Aires Province, October 2004.

<sup>103</sup> Human Rights Watch interview with Mariana Porcel, Santa Fe Province, September 2004.

<sup>104</sup> Human Rights Watch interview with Romina Casillas, Santa Fe Province, September 2004.

households should not be disproportionately burdened with health expenses as compared to richer households.”<sup>105</sup>

Most women Human Rights Watch interviewed felt that they could not afford to have more children without compromising the welfare of their existing family, yet they were also unable to afford contraceptives. The fact that economic constraints played a significant role for the women we interviewed in deciding how many children to have is, of course, not unique to Argentina, nor is it unique to so-called developing countries. However, economic constraints on voluntary motherhood impose a particularly heavy burden on women who are simultaneously denied the right to decide freely on the use and method of contraception, and on access, when needed, to safe abortions.

Jazmin Castaña, a twenty-four-year-old mother of three, explained to Human Rights Watch how her decisions about if and when to have children were constrained by economic concerns. Castaña had first become pregnant at seventeen, unplanned, and had decided to continue the pregnancy “because I don’t agree with abortion.” However, despite her personal disapproval of abortion, she felt that she would not be able to justify having another child in her current economic circumstances, should her method of contraception fail:

After the last [third] child, I don’t want to have any more. … I work in the head of household program for 150 pesos a months [U.S.\$50.14].<sup>106</sup> … [My husband] drives a cab, and that is bread for today and not for tomorrow. … As I am doing, there is not enough [money] to have another one. I think that if I had to do it [have an abortion], it hurts my soul and may God forgive me, but I don’t know that I wouldn’t do it. And I am telling you that I don’t agree with abortion.<sup>107</sup>

The implementation of the National Program on Sexual Health and Responsible Procreation is an essential step in making contraceptive methods affordable to more women. However, the government needs to ensure closer oversight to ensure that public hospitals do not charge women for contraceptives and services that they are required to provide for free of charge. In addition, Human Rights Watch believes that the government should help women overcome other economic obstacles to access by

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<sup>105</sup> Committee on Economic, Social and Cultural Rights, “The right to the highest attainable standard of health (General Comments), General Comment 14,” August 11, 2000, *U.N. Doc. E/C.12/2000/4*, para. 12(b).

<sup>106</sup> The exchange rate used in this report is 2.97 Argentine pesos to one U.S. dollar, the exchange rate on December 3, 2004, unless otherwise indicated.

<sup>107</sup> Human Rights Watch interview with Jazmín Castaña, Tucumán Province, September 2004.

facilitating the implementation of the program through primary health care centers and not—as is the case now—mostly through hospitals. Primary health care centers are generally smaller, more numerous, and geographically more spread out and therefore accessible to many more women.

While the national government has plans to extend the program to primary health care centers, the program is still concentrated in hospitals. There is some evidence that key officials do not see this issue as a priority. Inés Martínez, the implementation coordinator of the National Program on Sexual Health and Responsible Procreation, told Human Rights Watch: “I am not worried about [the program] existing only in hospitals, because the population itself disdains the primary health level: they prefer to go to the hospital and stand in line.”<sup>108</sup> The women Human Rights Watch interviewed stated quite clearly that this was not true in their cases. Mariana Porcel, thirty-two, said: “They should have the conditions [to give contraceptives and services] in the health centers, now they send us to the hospitals. … You can’t work a whole morning. … [And] if you don’t go [to work] a full day, you can’t feed your children.”<sup>109</sup> Yanina Carlotto, forty-six, noted: “Information is the basis for everything, but also access. They [the public health system] have to get closer [to their clients].”<sup>110</sup>

## **V. Voluntary Tubal Ligation: A Case Study in Denial of Access to Contraceptives**

A prime example of the inaccessibility of contraceptives is the fact that many women in Argentina are arbitrarily denied access to one of the most effective forms of contraception: voluntary tubal ligation (female surgical sterilization).<sup>111</sup> Argentine law restricts access to tubal ligation to situations where the intervention is warranted by a “therapeutic reason.”<sup>112</sup> While courts and experts have interpreted this clause in different ways, medical doctors and public health officials often cite the restrictive law as justification for denying women access to voluntary tubal ligation. Many public hospitals have formulated and implemented burdensome procedures that women must comply with to obtain a tubal ligation, in violation of authoritative interpretations of women’s rights to health, to privacy, to nondiscrimination, and to decide on the number and spacing of their children. Twenty of the forty-three women Human Rights Watch interviewed were denied a voluntary tubal ligation the first time they asked, and of these,

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<sup>108</sup> Human Rights Watch interview with Inés Martínez, head, National Program on Sexual Health and Responsible Procreation, Ministerio de Salud de la Nación [National Health Ministry], October 21, 2004.

<sup>109</sup> Human Rights Watch interview with Mariana Porcel, Santa Fe Province, September 2004.

<sup>110</sup> Human Rights Watch interview with Yanina Carlotto, Buenos Aires Province, October 2004.

fourteen had been unable to obtain a voluntary tubal ligation altogether, often despite repeated attempts. One of the women who were initially denied the operation was later granted permission for medical reasons, and the remaining five were able to obtain a voluntary tubal ligation only after great efforts to find a “friendly” doctor in the public health care system who performed the operation as a “favor.”<sup>113</sup>

Most of the women we spoke to who had sought to obtain a tubal ligation were required to go through arbitrary and discriminatory procedures—including the requirement of spousal consent—as a condition for access to voluntary tubal ligation in the public health system, and the majority were denied the operation even when they fulfilled the criteria. This situation subjects women’s decision-making in the most intimate area of their lives to male authority or arbitrary medical intervention. As such, it constitutes a violation of women’s rights to nondiscrimination, privacy, and health.<sup>113</sup>

### ***Tubal Ligation and the Law***

The routine denial of voluntary tubal ligation in the public health system has its roots in the Legal Regime for the Exercise of Medicine, Odontology, and Collaborative Activities (henceforth “law on the medical profession”) dating from 1967, an era of political hostility to all contraceptive methods.<sup>114</sup> The law requires a “perfectly determined therapeutic indication”<sup>115</sup> and the exhaustion of “all possibilities to preserve the reproductive organs” in order for it to be legal to carry out an operation that results in

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<sup>111</sup> Tubal ligation is a method of female sterilization which involves mechanically blocking the fallopian tubes to prevent the sperm and ovum from uniting. The fallopian tubes may be blocked by ligation, mechanical occlusion with clips or rings, or electrocoagulation. Robert A. Hatcher et al, *Contraceptive Technology*, pp. 546 and 554. In Argentina, female sterilization is generally referred to as tubal ligation even when the fallopian tubes are not blocked by ligation but by other surgical methods.

<sup>112</sup> Ley 17.132 [Law 17.132]: Régimen Legal del Ejercicio de la Medicina, Odontología, y Actividades Auxiliares de las Mismas [Legal Regime for the Exercise of Medicine, Odontology, and Collaborative Activities,] January 24, 1967, published in the Legal Journal on January 31, 1967.

<sup>113</sup> Whether women are forced to undergo a tubal ligation or arbitrarily prevented from having one, their human rights to nondiscrimination, privacy, and health are at stake. Women have been denied the right to decide independently over access to tubal ligation in other countries in the region, including most famously during the government of Alberto Fujimori in Peru where thousands of women reportedly were sterilized without their consent or knowledge. See Laura Puertas, “Fujimori ordenó la esterilización forzosa de 200.000 mujeres indígenas en Perú” [Fujimori ordered the forced sterilization of 200,000 indigenous women in Peru], *El País* (Madrid), July 25, 2002, p. 3.

<sup>114</sup> Ley 17.132: Régimen Legal del Ejercicio de la Medicina, Odontología, y Actividades Auxiliares de las Mismas.

<sup>115</sup> This term is not defined in the law. Where women have sought judicial authorization for tubal ligation, the interpretation of what constitutes a “perfectly determined therapeutic indication” has varied greatly. For a more detailed discussion of selected jurisprudence on this matter, please see section on judicial authorization for tubal ligation below.

sterilization.<sup>116</sup> In addition, some legal scholars cite penal code provisions that criminalize violence which causes permanent damage to a limb as applying to sterilization procedures.<sup>117</sup> These restrictive laws are in and of themselves inconsistent with Argentina's obligations and commitments under international human rights treaties.

The U.N. Committee on Economic, Social and Cultural Rights has advised that the right to the highest attainable standard of health—protected by the International Covenant on Economic, Social and Cultural Rights—creates a specific legal obligation of the state to “refrain from limiting access to contraceptives.”<sup>118</sup> Voluntary tubal ligation or female sterilization is widely accepted by medical science and international health and human rights entities as a method of contraception or birth control.<sup>119</sup> In fact, the WHO has declared tubal ligation one of the most effective contraceptive methods and highly appropriate where women give meaningful informed consent and the medical conditions allow the operation.<sup>120</sup> In 1999, the U.N. Committee on the Elimination of Discrimination against Women (CEDAW Committee) clarified its position on sterilization in its concluding remarks on the periodic report of Chile: “The Committee is … concerned that [under Chilean law] a husband’s consent is required for sterilization and a woman who wishes to be sterilized must already have four children. The Committee considers these provisions to violate the human rights of all women.”<sup>121</sup>

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<sup>116</sup> Ley 17.132: Régimen Legal del Ejercicio de la Medicina, Odontología, y Actividades Auxiliares de las Mismas, article 20(18). Original article reads: “Queda prohibido a los profesionales que ejerzan la medicina … [p]racticar intervenciones que provoquen la esterilización sin que exista indicación terapéutica perfectamente determinada y sin haber agotado todos los recursos conservadores de los órganos reproductores …” [It is prohibited for those who exercise the medical profession … to carry out interventions that provoke sterilization without a perfectly determined therapeutic indication and without having exhausted all possibilities to preserve the reproductive organs.]

<sup>117</sup> Penal Code, articles 90, 91, and 92. See also Luisa Cabal, Julieta Lemaitre, and Mónica Roa (eds.), *Cuerpo y Derechos, Legislación y Jurisprudencia en América Latina* (Bogotá: Editorial Temis, S.A., 2001), p. 93.

<sup>118</sup> Committee on Economic, Social and Cultural Rights, “The right to the highest attainable standard of health (General Comments), General Comment 14,” August 11, 2000, *U.N. Doc. E/C.12/2000/4*, para. 34.

<sup>119</sup> See, e.g. Leikin and Lipsky (eds.), *American Medical Association: Complete Medical Encyclopedia*, p. 1241 [defining tubal ligation as a method of birth control]; and World Health Organization, *Selected Practice Recommendation for Contraceptive Use* (Geneva: World Health Organization, 2004) [intended to provide guidelines for service delivery of contraceptives, and covering *inter alia* sterilization]; and World Health Organization, *Medical Eligibility Criteria for Contraceptive Use* (Geneva: World Health Organization, 2004) [intended as reference guideline in assessing the medical eligibility for use of contraceptives, and covering *inter alia* sterilization.] See below for a discussion of international human rights committees’ comments on sterilization or tubal ligation.

<sup>120</sup> World Health Organization, *Medical Eligibility Criteria for Contraceptive Use*, Chapter on Surgical Sterilization Procedures, p. 1. This guide notes that “there is no medical condition that would absolutely restrict a person’s eligibility for sterilization.”

<sup>121</sup> CEDAW Committee, “Report of the Committee on the Elimination of All Forms of Discrimination against Women,” *U.N. Doc. A/54/38/Rev.1*, July 9, 1999, para. 228.

Government officials in Argentina confirmed that public health workers deny women access to tubal ligation not because of physical and economic constraints in the public health system, but rather because the law does not recognize tubal ligation as a valid method to control fertility. “The law does not contemplate tubal ligation or vasectomy because they are not approved methods by the ANMAT [National Administration of Medicines, Food, and Medical Technology],” explained Inés Martínez, who is responsible for the coordination of the National Program on Sexual Health and Responsible Procreation. “The law does not permit it, does not see it as a method of contraception.”<sup>122</sup>

To be fully consistent with international human rights standards, the law on the medical profession should be amended to allow access to safe voluntary sterilization with informed consent. The National Program on Sexual Health and Responsible Procreation should include voluntary tubal ligation and vasectomy in the spectrum of contraceptive methods offered, subject to meaningful informed consent by the person involved. The U.N. Human Rights Committee reached this conclusion in 2000, when it noted with regard to Argentina, “women should be given access to family planning methods and sterilization procedures.”<sup>123</sup>

Human Rights Watch interviewed women in three provinces—Tucumán, Santa Fe, and Buenos Aires—who had been denied access to voluntary tubal ligation, usually because health officials said it was illegal or not allowed under local hospital procedures. At the same time, it is important to note that not all public hospitals deny this form of contraceptive, and that some provinces have recently passed legislation to attempt to overcome the shortcomings in the national law. However, even where provincial law or municipal decrees make voluntary sterilization more readily available, some providers still professed fear of legal consequences. For example, two weeks after a provincial law in Santa Fe had been approved to allow for voluntary sterilization in that province, Elda Cerrano, the municipal official responsible for the implementation of the reproductive health program in Rosario in the province of Santa Fe told Human Rights Watch: “The issue with tubal ligation is a big problem, even after the law has been passed. . . . [The professional code] has to be amended . . . . How can I require my people to do this if

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<sup>122</sup> Human Rights Watch interview with Inés Martínez, head, National Program on Sexual Health and Responsible Procreation, Ministerio de Salud y Ambiente de la Nación [National Health Ministry], October 21, 2004.

<sup>123</sup> Human Rights Committee, “Concluding observation of the Human Rights Committee: Argentina,” *U.N. Doc. CCPR/CO/70/ARG*, November 3, 2000, para. 14.

they risk having their license taken away? ... Until now, it has been totally prohibited. It is not written down in any code how to proceed.”<sup>124</sup>

### **Women’s Decisions Subject to Male Authority**

The criteria for women to access tubal ligation vary from one hospital to the next, but a common denominator mentioned by most women we interviewed was the spousal consent requirement. “You have to have permission from your husband” said Valentina Rodríguez, twenty-two.<sup>125</sup> Micaela Márquez, twenty-eight, as well as ten other women Human Rights Watch interviewed in three provinces, gave a similar testimony: “I asked about it, and they told me that you have to have a certain age, [and] you have to have spousal authorization.”<sup>126</sup>

The requirement of spousal authorization for access to tubal ligation contravenes Argentina’s obligations under CEDAW<sup>127</sup> and the International Covenant on Civil and Political Rights,<sup>128</sup> both of which were incorporated into the Argentine constitution in 1994.<sup>129</sup> The CEDAW Committee has spelled out that “[d]ecisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government.”<sup>130</sup> The Human Rights Committee has indicated that the right to privacy, protected by article 17 of the ICCPR, may be violated “where there is a requirement for the husband’s authorization to make a decision in regard to sterilization [and] where general requirements are imposed for the sterilization of women, such as having a certain number of children or being of a certain age.”<sup>131</sup>

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<sup>124</sup> Human Rights Watch interview with Elda Cerrano, head, Reproductive Health Unit, Secretaría de Salud Pública de la Municipalidad de Rosario [Public Health Ministry of Rosario Municipality], September 17, 2004.

<sup>125</sup> Human Rights Watch interview with Valentina Rodríguez, Tucumán Province, September 2004.

<sup>126</sup> Human Rights Watch interview with Micaela Márquez, Buenos Aires Province, October 2004.

<sup>127</sup> CEDAW, in particular articles 1 and 2.

<sup>128</sup> ICCPR, articles 2(1) and 3.

<sup>129</sup> It is hard to see how spousal consent is justifiable even under Argentina’s restrictive 1967 law on the medical profession. Whether or not a woman’s husband agrees to her undergoing a tubal ligation has no bearing on the potential medical justification for the surgery.

<sup>130</sup> Committee for the Elimination of Discrimination against Women, “General recommendation No. 21: Equality in marriage and family relations,” February 4, 1994, para. 22, in “Compilation of General Comments and General Recommendation Adopted by Human Rights Treaty Bodies,” May 12, 2004, *U.N. Doc. HRI/GEN/1/Rev.7*.

<sup>131</sup> Human Rights Committee, “General Comment No. 28: Equality of rights between men and women (article 3),” *U.N. Doc. CCPR/C/21/Rev.1/Add.10*, March 29, 2000, para. 20.

When a hospital requires spousal authorization for access to certain family planning services, an unmarried woman who is denied access to these services because she cannot obtain spousal consent also experiences discrimination on the basis of her marital status. This was the case for Romina Parma, who had tried to get a tubal ligation several times, both before and after the separation from her physically and sexually abusive husband. She said: “[To have a tubal ligation] I have to be married, I have to have authorization from my husband. But if you are not duly married, they deny it again and again.” Parma had had eleven children and thirteen pregnancies. The doctor at a public hospital in Buenos Aires City denied her the procedure because of the lack of spousal authorization despite the weekly and sometimes daily rapes Parma was enduring at the hands of her live-in partner and despite the adverse health consequences of other contraceptive methods for her: “The IUD gave me enormous hemorrhaging and very bad anemia.” Parma finally decided to live alone because she saw this as the only way to avoid having any more children. “It has been six years since I separated,” Parma noted, “and I don’t have a husband because I don’t want any more children.” She saw what happened to her as a great injustice: “It is illegal that they tie your tubes. . . . But I ask you: having ten children and being thirty years old, you might have at least fifteen children more. Is that right? . . . Maybe it is illegal, but if I could just sign a consent form, because it is my life. Not the life of any future child, but my life, physically and mentally.”<sup>132</sup>

### ***Women’s Decisions Subject to Arbitrary Veto by Medical Authorities***

The lack of national regulations interpreting the law on the medical profession results in arbitrary and inconsistent implementation that often gives more weight to the views on morality of local doctors and health officials than to women’s own choices in the reproductive realm. Some hospitals set up elaborate and onerous local procedures and requirements, and individual doctors sometimes deny tubal ligations even where women fulfill all specified criteria.

Many public hospitals require women to obtain prior approval from social services or family planning offices, the hospital’s ethical committee, the hospital’s legal advisor, or any combination thereof.

The women Human Rights Watch interviewed who had asked for a tubal ligation had generally done so in connection with a cesarean section, and were under the impression that the operation could not be done unless during an already scheduled cesarean section. One woman had asked her doctor at a public hospital in Buenos Aires City if

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<sup>132</sup> Human Rights Watch interview with Romina Parma, Buenos Aires Province, October 2004.

she could have a tubal ligation without her being pregnant, and was told no.<sup>133</sup> Indeed, in many countries, the most common time for tubal ligation is the immediate postpartum period because of the greater convenience, lower costs, ease of surgery, and more efficient use of health resources when the surgery is carried out at this time as opposed to any other time. Where the surgery is carried out during the same surgery session as a cesarean section, these advantages are doubly relevant.<sup>134</sup>

Romina Redondo, thirty-two, was pregnant with her tenth child when Human Rights Watch spoke to her. She explained that when pregnant with her eighth child, she had completed all the steps required by her local public hospital, “Dr. José María Cullen” hospital in Santa Fe City, to have a tubal ligation. Her doctor still denied her the operation at the last moment:

When I was pregnant with the eighth child, I did all the paperwork to have a tubal ligation. ... A lawyer seeks the consent of the husband. ... When I got to the hospital, I had the paperwork with me, but the doctor said that [in the time it took to] prepare me for the cesarean section<sup>135</sup> they could do three natural births. It was like they were wasting their time. ... I insisted and insisted and they told me that I had to go back to family planning and get an IUD [intrauterine device]. ... But I didn't want an IUD.<sup>136</sup>

After an unplanned pregnancy while taking hormonal contraception, a birth, and another unplanned pregnancy, Redondo was attempting to gather the paperwork to have a tubal ligation at another public hospital, “J.B. Iturraspe,” when we spoke to her in September 2004. She described an onerous process where the ultimate outcome—notwithstanding endless paperwork and consultations—depended on her own ability to convince the individual doctor who was to carry out the operation:

Now I have done all the paperwork at another hospital. I have to go there again for them to give me the papers. ... The social worker told me that I have to insist and insist, because there are doctors who don't want to do it. ... At first we went to talk to the director [of the hospital]

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<sup>133</sup> Human Rights Watch interview with Gisela Oporto, Buenos Aires Province, October 2004.

<sup>134</sup> Robert A. Hatcher et al, *Contraceptive Technology* , pp. 550-551.

<sup>135</sup> It is common practice in Argentina's public hospitals to carry out tubal ligations immediately after a cesarean section, during the same operation. The World Health Organization notes that this is acceptable practice. World Health Organization, *Medical Eligibility Criteria for Contraceptive Use*, p. 11—Surgical Female Sterilization.

<sup>136</sup> Human Rights Watch interview with Romina Redondo, Santa Fe Province, September 2004.

... then my husband had to sign, and I had to take this [his signature] to the lawyer. ... Then to family planning. To get an appointment you have to go early in the morning. ... I talked to the head [of family planning], and he gave me a piece of paper to go to the social worker. ... She met with a group of us [women who wanted a tubal ligation], and she told us that we have to negotiate with the doctors, and she gave us an appointment for the gynecologist. He asked me questions, and they give you a piece of paper that the husband has to sign along with two witnesses. Now I need to go ask for the form that says that they can do it, and then I have to go get an appointment so that they can put in my papers that they are allowed to do the tubal ligation.<sup>137</sup>

Marianela Casillas, thirty-seven and mother of six, explained to Human Rights Watch that she also was denied a tubal ligation at the local public hospital “Dr. José María Cullen” in Santa Fe City during her sixth pregnancy, against the recommendation of her gynecologist: “I shouldn’t become pregnant anymore because I have hypertension. ... Also I get very high blood pressure from the contraceptive pills. ... My organism rejects the IUD [intrauterine device], and then there is no other method. ... I want to get my tubes tied. ... The gynecologist prescribed it herself, that they should do it at the same time [when I gave birth]. ... But they didn’t.”<sup>138</sup>

Several women told Human Rights Watch that doctors second-guessed their wishes, denying them access to tubal ligation on the reasoning that the women might change their minds later. “What they say is that if you do it while you are very young, you might change your mind and they would have to reverse it. It is like they are in favor of you having more children,” noted Yanina Carlotto, forty-six.<sup>139</sup> According to the World Health Organization (WHO), approximately 20 percent of women sterilized at a young age later regret this decision.<sup>140</sup> The WHO, however, does not advise the delay of tubal ligation for young women who are otherwise medically eligible, but rather cautions that all women should be properly counseled about the permanency of sterilization and the availability of alternative contraceptive methods.<sup>141</sup>

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<sup>137</sup> Ibid.

<sup>138</sup> Human Rights Watch interview with Marianela Casillas, Santa Fe Province, September 2004.

<sup>139</sup> Human Rights Watch interview with Yanina Carlotto, Buenos Aires Province, October 2004.

<sup>140</sup> World Health Organization, *Medical Eligibility Criteria for Contraceptive Use*, p. 2—Surgical sterilization procedures.

<sup>141</sup> World Health Organization, *Medical Eligibility Criteria for Contraceptive Use*, p. 2—Surgical sterilization procedures.

Moreover, Human Rights Watch's interviews show that women face questioning about their potential future husbands or partners even at a quite advanced reproductive age. "The doctor asked me ... if I was going to separate and get together with someone else," recalled Marina Padilla, forty-one, who was thirty-nine when she asked for a tubal ligation during her seventh pregnancy at public hospital "J.B. Iturraspe" in Sante Fe City.<sup>142</sup> Marcela Espinosa, thirty-two, captured the sentiments of many of the women Human Rights Watch interviewed when she said: "If I don't want any more [children], and if I ask for it [a tubal ligation], no one can say to me: 'what happens if you have another husband.'"<sup>143</sup>

In some cases, women we interviewed managed to convince a doctor in the public health care system to provide access to a tubal ligation as a personal "favor." Andrea González, forty-six, had asked for a tubal ligation after the birth of her third child, but the doctor had denied her the operation at the public hospital "Maternidad Nuestra Señora de las Mercedes" in San Miguel de Tucumán. After the birth of her seventh child, another doctor told González that she would "help her." "She put on the gloves, she didn't tell me anything. I suppose she did something. ... I haven't gotten pregnant again," González recalled.<sup>144</sup> Although González was ultimately fortunate enough to succeed in her pleadings with her doctor, the fact remains that she was not allowed to make an independent decisions about her reproductive health.

### ***Economics Trumps Medical Need: Ready Access in Private Health Clinics***

Though the law on the medical profession applies to both public and private medical practices, it appears to have more force in the public health care system. A legislative aide in Santa Fe Province explained: "Here you have two options. If you have money, you go to a private institute, and the same doctor who does it there [i.e. performs the tubal ligation] is the one who refuses to do it in the public sphere. ... In reality, this allows for a discriminatory situation."<sup>145</sup>

Marisa Rossi, thirty-six, who worked as a nurse in the private health system for several years, confirmed that women had access to tubal ligation upon demand if they could pay for it:

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<sup>142</sup> Human Rights Watch interview with Marina Padilla, Santa Fe Province, September 2004.

<sup>143</sup> Human Rights Watch interview with Marcela Espinosa, Santa Fe Province, September 2004.

<sup>144</sup> Human Rights Watch interview with Andrea González, Tucumán Province, September, 2004.

<sup>145</sup> Human Rights Watch interview with Soledad Mendoza, aide, Office of Province Senator Patricia Sánchez, Santa Fe, September 14, 2004.

If you want to do it, they will do it. You decide. Because in the private system you decide anything you want to do. ... They put some kind of pathology that does not exist [in your papers, to cover for the tubal ligation]. And even more if you have many children, then they offer it to you, they say: 'Stop torturing yourself' ... If you have money, they do anything you want.<sup>146</sup>

The fact that there is economic discrimination at play was not lost on the women who sought and were refused tubal ligations. Laura Passaglia, a thirty-two-year-old woman who had had nine pregnancies, was denied a tubal ligation by a court in Buenos Aires Province in 2004.<sup>147</sup> She said: "If you have the money, yes [you can get a tubal ligation], but what about those of us who don't have money? I have neighbors who cannot even afford shoes."<sup>148</sup> Nora Casas, thirty-four, echoed this sentiment: "If you have the money, the doctor does it for you. ... If you have the money you can do it at any age."<sup>149</sup>

Indeed, many women Human Rights Watch interviewed cited financial constraints as their main reason for wanting the operation in the first place. "I would like to do it, because I am forty years old, I have seven children, and the economic situation is not good," said Marina Padilla. "I told the doctor: 'The economic situation is worse all the time, and they just fired my husband. It is all the time more and more difficult. And there are so many of them now [my children].'"<sup>150</sup>

### ***Requiring Judicial Authorization***

Argentina's law does not specifically require judicial authorization for tubal ligation. However, many doctors, government officials, NGO representatives, and individual women believed this to be a requirement, either legally or de facto, or saw the legal provisions as ambiguous enough that they felt compelled to seek authorization to avoid legal action. "[N]o one has ever done a tubal ligation without judicial authorization," noted Inés Martínez, responsible for the coordination of the National Program on Sexual Health and Responsible Procreation.<sup>151</sup> "Those [doctors] who might otherwise do it [perform a tubal ligation] are afraid to go to jail," explained Paola Bergallo, a university

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<sup>146</sup> Human Rights Watch interview with Marisa Rossi, Buenos Aires Province, October 2004.

<sup>147</sup> For further information on this case, see section below on judicial authorization for tubal ligations.

<sup>148</sup> Human Rights Watch interview with Laura Passaglia, Buenos Aires Province, October 2004.

<sup>149</sup> Human Rights Watch interview with Nora Casas, Santa Fe Province, September 2004.

<sup>150</sup> Human Rights Watch interview with Marina Padilla, Santa Fe Province, September 2004.

<sup>151</sup> Human Rights Watch interview with Inés Martínez, head, National Program on Sexual Health and Responsible Procreation, Ministerio de Salud de la Nación [National Health Ministry], October 21, 2004.

professor with expertise in reproductive health law.<sup>152</sup> That said, to Human Rights Watch's knowledge, no doctor had had his or her license revoked or been sent to prison for performing a tubal ligation.

While Human Rights Watch interviewed women who did have a voluntary tubal ligation without judicial authorization, we also encountered women who had to go to court to ask for a judicial authorization for their operation, sometimes only to be denied authorization, or to give birth before their motion was considered or appealed.

Gisela Oporto, thirty-seven, told Human Rights Watch that she sought judicial authorization for a tubal ligation during her last pregnancy due to severe pregnancy-related health problems, but she gave birth before the case was finally resolved. As a result, she never had the operation.

Oporto started suffering from hypertension during her first unplanned pregnancy, and her doctors at public hospital "Gobernador Domingo Mercante" in Buenos Aires Province advised against using contraceptive pills: "They [the doctors] didn't want to give me the pills. They told me to use condoms, but ... my husband says that [then] he doesn't feel anything." Oporto had two other unplanned pregnancies, then tried to use contraceptive pills again to avoid another health-threatening pregnancy:

When I was pregnant with the third child, I got very depressed. ... I was really ill, I almost died with the last pregnancy. ... I started to throw up and the scar [from previous cesarean sections] started to bleed, and I couldn't breathe. ... After I had her, the doctor gave me pills, but they changed my nerves. ... I was menstruating three or four times a month.<sup>153</sup>

Oporto decided to stop taking the contraceptive pills. After six years, Oporto got pregnant again, unplanned.

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<sup>152</sup> Human Rights Watch telephone interview with Paola Bergallo, professor, Universidad de Buenos Aires [Buenos Aires University], Buenos Aires, August 10, 2004.

<sup>153</sup> Human Rights Watch interview with Gisela Oporto, Buenos Aires Province, October 2004.

[The birth] had to be by cesarean section,<sup>154</sup> so I decided to have a tubal ligation. ... We were trying to find out how. You have to have money. In the private clinic, the price depends, something between 600 and 800 pesos [U.S.\$202-269.36], plus the days you are there. [It comes to up to] 2,500 pesos [U.S.\$841.75]. ... I also checked it out at the public hospital. ... The doctor said that without authorization from the judge, she wouldn't do it.

With the help of a local NGO, Oporto decided to seek judicial authorization. She recounted her experience with the court:

This doctor, she gave me a note that said my life would run risk [with another pregnancy] and also supposedly the life of the baby. ... Another doctor said the same thing. ... [The court] asked for the birth certificates of my children, and for a psychological analysis ... [and] a summary of my clinical history. ... I asked the social worker for help with all of this. ... The judge denied the motion, and the baby was almost ready to be born. ... The [scheduled] birth [by cesarean section] was set earlier [than expected] , and we had to appeal to the Supreme Court [of the Province]. ... [Finally] they couldn't do it [the tubal ligation], because she was already born.

The court held that there were no “serious” reasons for Oporto to require a tubal ligation, and moreover that she had not proven that it would be impossible for her to use other types of contraception that did not require sterilization.<sup>155</sup> However, neither the court nor the doctors at the local public hospital specified what those methods might be: “No one at the hospital has given me any information about contraception. ... If I go to the gynecologist and I ask for pills or an injection, she says that she cannot [give them to me] because of my high blood pressure. As for the IUD [intrauterine device], because I am fat, they are afraid that the IUD will fall out.” Oporto concluded: “They should make it easier for women who decide to have a tubal ligation, especially when their lives are in danger.”<sup>156</sup>

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<sup>154</sup> It is common practice in some countries for doctors to strongly advise a cesarean section where a pregnant woman has already had one or several previous cesarean sections, based on the belief that a rupture in the uterine scar may occur if vaginal birth is attempted. This is the case in Argentina.

<sup>155</sup> [Case name withheld], Buenos Aires Province, May 2004. Case materials on file with Human Rights Watch.

<sup>156</sup> Human Rights Watch interview with Gisela Oporto, Buenos Aires Province, October 2004.

Laura Passaglia, thirty-two, had a similar experience, also in Buenos Aires Province. When Human Rights Watch interviewed Passaglia, she had had nine pregnancies, including two miscarriages and a premature child that died soon after birth. She tried to get a tubal ligation for the first time when she plunged into deep depression after that child died: “The fourth child was the baby that died. … I was in a state, I didn’t want anything, neither the children that I already had, nor the ones that might come. … I was asking around for a tubal ligation. They said no, that there was no law. That with money, yes, but I would have to take food away from my children to get the 1,000-2,000 pesos [U.S.\$336.70-673.40] needed [for the operation].” Several pregnancies later, Passaglia consulted her doctor at public hospital “Larcade” in Buenos Aires Province about the possibility of having a tubal ligation once more.

I asked the doctor, and she said no, that there was no law [that allows tubal ligations]. … I thought I was going to die, but I wanted to do it, because I thought it was my decision to make. … In the hospital, they set up every possible obstacle. … The head of the hospital told me that it was the same as having an abortion. At that point I was four months pregnant.<sup>157</sup>

Passaglia filed a case for judicial authorization. She told Human Rights Watch that the public hospital kept presenting obstacles that prevented her from complying with the court’s demands:

I needed to get the summary of my medical history. … They gave me two or three pages [of it]. They made me pay, but they didn’t give [all of] it to me. … They charged me 10 pesos [U.S.\$3.37] and I had to wait for a month for them to give it to me. You can’t get your medical history just like that. … The expert witness said that having many children is not an added health risk or anything. [But] I was having contractions during the whole pregnancy, and I didn’t have help at home, I had to keep going.<sup>158</sup>

The court that reviewed Passaglia’s case admitted that the evidence presented proved that she had high blood pressure and repeated urinary tract infections; that the medicine she received did not help her; and that she was under medical order only to carry out light tasks and not to walk around, but that she was unable to do so because of her other

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<sup>157</sup> Human Rights Watch interview with Laura Passaglia, Buenos Aires Province, October 2004.

<sup>158</sup> Ibid.

children. The court nevertheless denied Passaglia the tubal ligation based on the testimony of the expert witness chosen by the court, who noted that there was “no medical reason” for the operation even though he considered Passaglia’s pregnancy-related health problems serious enough to add that Passaglia should seek medical attention.<sup>159</sup>

Not all women who have asked for judicial authorization for tubal ligation have been denied the operation. Some courts have ordered hospitals to honor such petitions.<sup>160</sup> However, the fact remains that women’s right to access voluntary tubal ligation—a safe, highly effective contraceptive method—depends on spouses, judges, doctors, social workers, and personal finances.

## **VI. Obstacles to the Right to Decide in Matters Concerning Abortion**

An estimated half a million women undergo illegal and therefore generally unsafe abortion every year in Argentina, representing 40 percent of all pregnancies.<sup>161</sup> Some public officials told Human Rights Watch that, in the public health system in their provinces, for every woman giving birth, approximately one other woman is hospitalized with health complications as a consequence of an illegal abortion.<sup>162</sup> Unsafe abortions have constituted the leading cause of maternal mortality in the country for decades.<sup>163</sup>

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<sup>159</sup> [Case name withheld], Buenos Aires Province, February 2004. Case materials on file with Human Rights Watch.

<sup>160</sup> See Juzgado de Primera Instancia en lo Correccional No. 1, Paraná, E., N. B. c/Hospital San Roque y/o Secretaría de Salud y/o Estado Provincial, Acción de Amparo, November 29, 1996, on file with Human Rights Watch; Superior Tribunal de Justicia, Sala No. 1 en lo Penal, Entre Ríos, E., N. B. c/ Hospital San Roque y/o Secretaría de Salud y/o Estado Provincial, Acción de Amparo, December 9, 1996, on file with Human Rights Watch.

<sup>161</sup> In 2003, 727000 live births occurred in Argentina. United Nations Children and Education Fund (UNICEF), “At a Glance: Argentina” [online] <http://www.unicef.org/infobycountry/argentina.html> (retrieved March 4, 2005). Argentina’s health minister declared in 2004 that 500,000 abortions occur in Argentina on an annual basis. “Argentina: Graves incidentes en conferencia de doctora pro aborto” [Argentina: Serious incidents at conference with pro-abortion doctor], Associated Press, December 10, 2004.

<sup>162</sup> Human Rights Watch interviews with María Ana Palmieri, coordinator, Programa Materno-Infantil [mother-child program], Ministerio de Salud de La Rioja [La Rioja Health Ministry], Castelar, Buenos Aires Province, September 6, 2004; and with Stella Carrido, coordinator, Área Materno Infantil [Mother-Child Area] of Jujuy Welfare Ministry, Buenos Aires City, September 8, 2004.

<sup>163</sup> In a publication citing numbers from 1993, the Pan-American Health Organization (PAHO) noted that 30 percent of maternal mortality in Argentina was due to illegal abortions. PAHO, *La Salud en las Américas. Edición de 1998* [Health in the Americas, 1998 Edition] (Washington, D.C.: PAHO, 1998), p. 212, cited [online] <http://www.eclac.cl/publicaciones/UnidadMujer/5/lc1295/cuadro6.gif> (retrieved February 3, 2004). In 2002, almost twenty years later, 31 percent of maternal mortality was caused by illegal abortions. Powerpoint presentation prepared by Inés Martínez, coordinator of the National Program on Sexual Health and Responsible Procreation, National Health and Environment Ministry, “Salud Reproductiva,” 2004, slide 6, on file with Human Rights Watch.

The extraordinarily high proportion of pregnancies ending in abortions bears testimony to women's lack of access to effective family planning information and services. This chapter documents the tragic personal consequences of Argentina's restrictions on women's human rights in this area.

Argentina's penal code stipulates that abortion is a crime in all circumstances, though the penalty may be waived if the life or health of the pregnant woman is in danger or if the pregnancy results from the rape of a mentally disabled woman. In practice, such "nonpunishable" abortions are rare because there are no clear policies regulating access.

The criminalization of abortion leads women to take desperate measures, such as attempting to abort with knitting needles, rubber tubes, parsley sprigs, or the use of abortive medicines without adequate medical assistance. It also enables clandestine abortion "clinics" to operate with little regard for women's health and lives. When women hemorrhaging or suffering from life-threatening infections or injuries caused by botched abortions show up at public hospitals, health care personnel sometimes scorn them and deny them treatment. Doctors performing post-abortion curettage—the highly painful scraping of a woman's uterus with a sharp instrument—sometimes do so without anesthesia. Women who fear criminal proceedings are discouraged from seeking necessary post-abortion care, often to the serious detriment of their health. Some women who have had abortions are sentenced to prison, in a further assault on their human rights.

### ***Failure to Implement the Existing Abortion Law***

*People have demonized abortion, that's what has happened. [They say] that it is the position of the feminists, the communists, the radicals. This has closed the possibility for serious discussion to the extent that where the penal code allows [for abortion] it is not known. It is as if it were completely criminalized.*

—Head of Maternal-Infant Health at Jujuy Welfare Ministry<sup>164</sup>

Argentina's penal code declares abortion illegal in all circumstances, though the penalties are suspended in two circumstances: 1) where a doctor decides that the pregnant woman's life or health<sup>165</sup> is in danger and cannot be saved in any other way than by

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<sup>164</sup> Human Rights Watch interview with Stella Carrido, coordinator, Area Materno Infantil [Mother-Child Area] of Jujuy Welfare Ministry, Buenos Aires City, September 8, 2004.

<sup>165</sup> In international legal terms, "health" is defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." Preamble to the Constitution of the World Health

inducing an abortion; and 2) where a mentally disabled and pregnant woman is pregnant as a result of a rape and her guardian or legal representative allows the abortion.<sup>166</sup>

However, there are no national regulations to ensure women's access to such non-punishable abortions. In fact, some provincial government officials Human Rights Watch interviewed were not aware that any exceptions existed in the law.<sup>167</sup>

Confusion and fear about the legal consequences of abortion prevent women from accessing what is their right: a nonpunishable abortion when their health or life is in danger, or when the pregnancy is the result of the rape of a mentally disabled woman. "There is a lot of fear," said Juliana Weisburd, coordinator of the National Program on Sexual Health and Responsible Procreation at the Santa Fe Province ministry of health. Weisburd noted that while the penal code does not require judicial authorization for an

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Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

<sup>166</sup> Penal Code, articles 85-88. The original articles read: "Art. 85. El que causare un aborto será reprimido: 1º. con reclusión o prisión de tres a diez años, si obrare sin consentimiento de la mujer. Esta pena podrá elevarse hasta quince años, si el hecho fuere seguido de la muerte de la mujer; 2º. con reclusión o prisión de uno a cuatro años, si obrare con consentimiento de la mujer. El máximo de la pena se elevará a seis años, si el hecho fuere seguido de la muerte de la mujer. Art. 86. Incurrirán en las penas establecidas en el artículo anterior y sufrirán, además, inhabilitación especial por doble tiempo que el de la condena, los médicos, cirujanos, parteras o farmacéuticos que abusaren de su ciencia o arte para causar el aborto o cooperaren a causarlo. El aborto practicado por un médico diplomado con el consentimiento de la mujer encinta, no es punible: 1º. si se ha hecho con el fin de evitar un peligro para la vida o la salud de la madre y si este peligro no puede ser evitado por otros medios; 2º. si el embarazo proviene de una violación o de un atentado al pudor cometido sobre una mujer idiota o demente. En este caso, el consentimiento de su representante legal deberá ser requerido para el aborto. Art. 87.- Será reprimido con prisión de seis meses a dos años, el que con violencia causare un aborto sin haber tenido el propósito de causarlo, si el estado de embarazo de la paciente fuere notorio o le constare. Art. 88.- Será reprimida con prisión de uno a cuatro años, la mujer que causare su propio aborto o consintiere en que otro se lo causare. La tentativa de la mujer no es punible." [Article 85. He who causes an abortion will be punished: 1. with detention or prison from three to ten years, if the operation was carried out without the consent of the woman. This punishment may be raised to fifteen years, if the woman died as a result; 2. with detention or prison of one to four years, if the operation was carried out with the consent of the woman. The maximum punishment is six years, if the woman died as a result. Article 86. The doctors, surgeons, midwives or pharmacists who abuse their science or profession to cause an abortion or cooperate to cause it will be punished as established in the previous article and will, additionally, be prohibited from exercising their profession for twice the time than that which they will serve. An abortion carried out by a medical doctor with the consent of the pregnant woman is not punishable: 1. if it was done with the objective to avoid a danger to the life or health of the mother and if this danger could not have been avoided by any other means; 2. if the pregnancy is the result of the rape or assault to the modesty committed against an idiot or demented woman. In this case, the consent of the legal representative is required for the abortion. Article 87. He who causes an abortion with violence involuntarily will be punished with prison of six months to two years if the pregnant state of the patient was obvious or known to him. Article 88. The woman who causes her own abortion or who consents to someone else causing it will be punished with one to four years of prison. The woman's attempt [to abort] is not punishable.]

<sup>167</sup> Human Rights Watch interview with Pedro Eduardo Picasso, director, Area Materno-Infantil [Mother-Child Area] of El Chaco Health Ministry, Castelar, Buenos Aires Province, September 7, 2004 (Picasso told Human Rights Watch that abortion is not allowed in any circumstances in Argentina).

abortion, judicial authorization had become a de facto requirement because most doctors would not carry out the procedure without it.<sup>168</sup>

Walter Barbato, a reproductive health expert with years of public health experience, told Human Rights Watch that it is very difficult for women to access nonpunishable abortion: “It is practically impossible, because the [Penal] Code does not leave you any possibilities, because of the resistance from the doctors, and because they [doctors] are afraid of sanctions.”<sup>169</sup>

Another reproductive health expert, the head of a maternity ward at a public hospital, told Human Rights Watch that he did not believe that judicial authorization was required to carry out abortions, and therefore never sought it. Yet he regularly consulted a judge privately to get an informal go-ahead for abortions, more for his own peace of mind than out of legal necessity.<sup>170</sup> Either way, an additional and arbitrary level of approval is added to a woman’s access even to abortions that are not punishable under Argentine law.

In 2000, the U.N. Human Rights Committee expressed concern about Argentina’s restrictive abortion laws: “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 disabled women.” The Committee recommended that Argentina remove all obstacles to obtaining abortion procedures where not punishable by law.<sup>171</sup>

### ***Illegal and Unsafe Abortions***

*I became pregnant again. ... I tried to get it out by any possible means. I even took rat poison. I hid this [from my husband] because he wanted more children. ... I took the [poison] pills for three months in a row, always at the same time, and always at the time of my period I had a bleeding. I did everything possible to lift*

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<sup>168</sup> Human Rights Watch interview with Juliana Weisburd, coordinator of the National Program on Sexual Health and Responsible Procreation, Santa Fe Province Health Ministry, Santa Fe, Santa Fe Province, September 14, 2004.

<sup>169</sup> Human Rights Watch telephone interview with Walter Barbato, medical doctor, Rosario, Santa Fe Province, October 10, 2004.

<sup>170</sup> Human Rights Watch interview with [name withheld], [name of province withheld], September 2004.

<sup>171</sup> Human Rights Committee, “Concluding observations of the Human Rights Committee : Argentina, (Concluding Observations/Comments),” *UN Doc. CCPR/CO/70/ARG*, November 3, 2004, para. 14.

*heavy things. ... I tried with the parsley sprig, and I made my child walk on top of my stomach [but I did not miscarry]. ... That is the worst pregnancy I have had, because on top of this I was very alone, I couldn't tell my husband any of this. All the guilt fell on me. I thought this was God's punishment.*

—Julia Reina, thirty-four years old<sup>172</sup>

As a direct consequence of the criminalization of abortion, women have severely limited access to safe abortions, with harmful and sometimes fatal consequences.<sup>173</sup> The consequences of unsafe abortions have long been the leading cause of maternal mortality in Argentina, causing 30 percent of maternal deaths.<sup>174</sup> “In twenty years, there has been no progress. Ever since we have had statistical data for this country [on maternal mortality], the biggest cause of maternal mortality has been abortion,” said Elida Marconi, director of the state office on health information and statistics, during a meeting of reproductive health officials in September 2004.<sup>175</sup>

Human Rights Watch interviewed women who underwent abortions in precarious and illegal circumstances to the detriment of their health. “You get overwhelmed by desperation,” said Paola Méndez, a thirty-six-year-old woman who became pregnant with the first of her ten children at age seventeen. “You seek all the ways out, pills, anything. But if there is no way out, then you take a knife or a knitting needle.”<sup>176</sup>

As with access to contraceptives, the quality and therefore the health consequences of illegal abortions seemed to depend on the economic standing of the women. This situation is not limited to Argentina. The World Health Organization has warned that poor women and those living in isolated areas worldwide are at particular risk for unsafe abortions performed by unskilled providers when abortion services are legally

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<sup>172</sup> Human Rights Watch interview with Julia Reina, Tucumán Province, September 2004.

<sup>173</sup> Where abortion is legal, the most common methods are medical abortion, suction curettage, dilation and evacuation, or labor-induced abortion, all of which are relatively safe procedures when carried out by or under the supervision of a trained professional and in the appropriate environment. See Leikin and Lipsky (eds.), *American Medical Association: Complete Medical Encyclopedia*, pp. 99-100.

<sup>174</sup> In a publication citing numbers from 1993, the Pan-American Health Organization (PAHO) noted that 30 percent of maternal mortality in Argentina was due to illegal abortions. PAHO, *La Salud en las Américas. Edición de 1998* [Health in the Americas, 1998 Edition] (Washington, D.C.: PAHO, 1998), p. 212, cited [online] <http://www.eclac.cl/publicaciones/UnidadMujer/5/lc1295/cuadro6.gif> (retrieved February 3, 2004). In 2002, almost twenty years later, 31 percent of maternal mortality was caused by illegal abortions. Powerpoint presentation prepared by Inés Martínez, coordinator of the National Program on Sexual Health and Responsible Procreation, National Health and Environment Ministry, “Salud Reproductiva,” 2004, slide 6, on file with Human Rights Watch.

<sup>175</sup> Remarks made by Elida Marconi at meeting on maternal mortality sponsored by the Health Ministry, Castelar, Buenos Aires Province, September 6, 2004.

<sup>176</sup> Human Rights Watch interview with Paola Méndez, Buenos Aires Province, October 2004.

restricted.<sup>177</sup> The U.N. Human Rights Committee has expressed concern about this situation in Argentina specifically, noting its “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.”<sup>178</sup> Notwithstanding the relatively safer services in the more expensive clandestine abortion clinics, the illegal nature of these clinics means that their operations escape government regulation and oversight. Such regulation and oversight are crucial to protect women’s health and lives.

### ***Methods Commonly Used to Induce Abortion in Argentina***

Some women Human Rights Watch interviewed believed they could abort by drinking specific teas or juices, in particular potato or parsley tea. Julia Reina recalled: “I got pregnant and I did everything humanly possible in order not to have it during the first three months. I took liquids, potato juice, parsley juice, tea. I didn’t work up the courage to go to a place [an illegal abortion clinic] and I also didn’t have the money.”<sup>179</sup>

Other women told Human Rights Watch that they introduced foreign objects into their cervixes, such as rubber tubes, parsley sprigs, knitting needles, or pieces of wood. “You cannot even imagine what people end up putting into their uterus,” said a community worker from Tucumán Province.<sup>180</sup> This was confirmed by Human Rights Watch’s interviews with medical doctors from public hospitals.<sup>181</sup>

Introduction of a foreign object into the cervix carries a high risk of infection when the object is not sterile. In physiological terms, the introduction of an object into the cervix generates contractions and sometimes punctures the amniotic sac, which may result in an abortion.<sup>182</sup> However, self-induced abortions are often incomplete, which further heightens the need for life-saving post-abortion care. A guide to abortion methods for medical doctors notes:

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<sup>177</sup> World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* (Geneva: WHO, 2003), p. 14.

<sup>178</sup> Human Rights Committee, “Concluding observations of the Human Rights Committee : Argentina,” *U.N. Doc. CCPR/CO/70/ARG*, November 3, 2000, para. 14.

<sup>179</sup> Human Rights Watch interview with Julia Reina, Tucumán Province, September 2004. Julia Reina had had three abortions when we spoke to her.

<sup>180</sup> Human Rights Watch interview with Adriana Díaz, treasurer, Madres Cuidadoras [Caring Mothers], San Miguel, Tucumán Province, September 9, 2004.

<sup>181</sup> Human Rights Watch interviews with [name withheld], doctor at maternity ward at public hospital, Santa Fe Province, September 2004; with [name withheld], doctor at maternity ward at public hospital, Tucumán Province, September 2004; and with [name withheld], doctor at maternity ward at public hospital, Buenos Aires Province, September 2004.

<sup>182</sup> Human Rights Watch interview with Sofía Aminábar, head of delivery, Maternidad Nuestra Señora de las Mercedes [Maternity Hospital Our Lady of Mercy], San Miguel, Tucumán Province, September 11, 2004.

This Knitting Needle Method is a well known back street method. It seldom leads to an early abortion so that the treatment has to be repeated several times, increasing largely the complication-rate. Main complications: infection, blood loss (if the placenta is penetrated), perforation of the uterine wall eventually with bowel damage resulting in peritonitis. Clostridium infection is particularly dangerous and mostly fatal.<sup>183</sup>

Another popular method in Argentina is for a woman to self-induce abortion by ingesting one or several pills containing misoprostol,<sup>184</sup> with or without medical supervision. This method in theory carries a lower risk of infection than the “knitting needle method,” though the relative safety requires access to medical services before and after taking the pills.<sup>185</sup> Some doctors Human Rights Watch interviewed said they recommended misoprostol to low-income women seeking abortions, considering that the alternative would be a rubber tube or knitting needle.<sup>186</sup> One doctor told Human Rights Watch that he routinely told women with unwanted pregnancies to use misoprostol in order for them not to use rubber tubes. Regardless of his personal opinion about abortion, he felt that, as a doctor, he was obligated to tell women how to avoid a deadly infection. “I can’t stop her from aborting,” he said, “but I can at least tell her what not to do.”<sup>187</sup>

## ***Health Consequences***

Whether induced by foreign objects or pills, the health consequences of illegal and unsafe abortions can be dire. Teresa Mariani, twenty-four, experienced this first hand.

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<sup>183</sup> Joeri Van den Bergh and Charles Schlebaum, *Abortion, A Practical Guide for Doctors* [online], Chapter 1 “Summary of Methods” <http://www.isad.org/prguide/p%206.methods.htm#4.%20mech%20methoden> (retrieved November 23, 2004). A clostridium infection is an acute inflammation of the colon, usually causing diarrhea and colitis (inflammation of the lining of the colon), in some cases life-threatening. Leikin and Lipsky (eds.), *American Medical Association: Complete Medical Encyclopedia*, pp. 372-4

<sup>184</sup> Although misoprostol is prescribed and produced as an anti-inflammatory pill, one side-effect is that it causes uterine contractions. The label on misoprostol marketed as Cytotec reads: “Cytotec (Misoprostol) administration to women who are pregnant can cause abortion, premature birth, or birth defects. Uterine rupture has been reported when Cytotec was administered in pregnant women to induce labor or to induce abortion beyond the eighth week of pregnancy.” Center for Drug Evaluation, “Cytotec” [online] <http://www.fda.gov/cder/foi/label/2002/19268slr037.pdf> (retrieved November 23, 2004).

<sup>185</sup> “[Misoprostol] is a safe and reliable method in the early pregnancy, but there is generally much more blood loss and discomfort than in the case of aspiration.” Joeri Van den Bergh and Charles Schlebaum, *Abortion, A Practical Guide for Doctors* [online].

<sup>186</sup> Human Rights Watch interview with [name withheld], doctor at a maternity ward in a public hospital, Santa Fe Province, September 2004; and with [name withheld], doctor at a maternity ward in a public hospital, Buenos Aires Province, September 2004.

<sup>187</sup> Human Rights Watch interview with [name withheld], doctor at a maternity ward in a public hospital, [name of province withheld], September 2004.

Mariani was raped repeatedly by her husband, resulting in five abortions and one full-term pregnancy and birth over four years. She was only able to pay for an assisted abortion once, otherwise resorting to misoprostol. She told Human Rights Watch:

The first time, I did it with pills. I don't know how I didn't die. ... The second time I was afraid, and I went to a private clinic. ... The other three times, with pills. ... [The first time] there was a guy who sold the prescriptions, and I went to buy the pills. ... Then I had my daughter in 2000. ... Then I had an abortion again in 2001, and in 2003 twice in a row, and then again not long ago in 2004. ... My husband is sexually violent and he doesn't let me protect myself. ... [The first time] I had my period twenty days in a row, at first normal, then with big clots, and then it stopped. ... Then after a month the hemorrhaging begins, and then a bag of blood. ... It was a two month pregnancy. ... [The next time] I gathered 200 pesos [U.S.\$200]<sup>188</sup> ... The other times I did it with pills. ... I ended up hospitalized with a very low blood count. ... Also this year with pills, and badly. ... I think he did it [wanted to get me pregnant] to tie me down with another child, and I did not want to.<sup>189</sup>

The health consequences of an illegal abortion may be both physical and mental. In addition to the physical health consequences of her abortions, Marisa Rossi, thirty-six, told Human Rights Watch that the illegal and clandestine nature of the procedure made it even harder for her to heal: “[O]n top of the fact that I felt really bad [physically], I had to try to forgive my partner for leaving me alone in this, and forgive myself. ... And on top of this, with no psychological help. You do it, and you have to forget it.”<sup>190</sup> Ana Sánchez, forty-three, had contemplated having an abortion after her sixth unwanted pregnancy, but was too scared of the health consequences. She noted the strain women who undergo illegal abortions suffer because of the illegality: “The woman [who aborts] is alone, because maybe her boyfriend knows, but with the rubber tube inside her, she still has to cook, she still has to wash the clothes.”<sup>191</sup>

The ultimate health consequence of illegal abortion is, of course, death. It happens all too often in Argentina. Yanina Carlotto accompanied a friend to have an abortion at an illegal clinic where the friend died under anesthesia. She recalled: “Abortion, personally I have not experienced it, but I accompanied a woman who died. ... She went into [the

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<sup>188</sup> The official conversion rate in 2001, at the time of the incident, was one dollar to one peso.

<sup>189</sup> Human Rights Watch interview with Teresa Mariani, Buenos Aires Province, October 2004.

<sup>190</sup> Human Rights Watch interview with Marisa Rossi, Buenos Aires Province, October 2004.

<sup>191</sup> Human Rights Watch interview with Ana Sánchez, Buenos Aires Province, October 2004.

illegal clinic] and she never came out. They said that it was a problem with the anesthesia. She died in that very place. ... They said that she died of a heart attack. ... I only went to accompany her, and I stayed outside. ... Legally, it was like nothing had happened.”<sup>192</sup>

Studies from several countries have shown that restrictive abortion laws do not reduce the number of abortions, but only diminish their safety and increase maternal mortality. In Romania, the number of abortion-related deaths increased drastically after 1966 when the government tightened a previously liberal abortion law. This number fell again after Romania relaxed its abortion laws in December 1989.<sup>193</sup> In Guyana, where abortion was legalized in 1995, admissions for septic and incomplete abortions in the capital’s largest maternity hospital declined by 41 percent within six months after the law went into effect.<sup>194</sup>

In fact, restrictive abortion laws may actually increase the number of abortions by denying women access to counseling and services that may reduce repeat abortions. A community educator in Buenos Aires Province noted that it is only the clandestine clinics that stand to gain from criminalizing abortion: “There is one [I know], they have been doing it [abortions] for thirty years. They charge 500 pesos [U.S.\$168.35] up until three months. ... Then up until eight months, they charge 1,000 pesos [U.S.\$336.70].”<sup>195</sup>

### ***Lack of Medical Accountability***

As a direct consequence of the penal code provisions prohibiting abortion in Argentina, there is no regulation or medical ethic guiding the treatment women receive when they pay for an abortion at an illegal abortion clinic. As a result, while doctors and midwives who practice illegal abortions can be and occasionally are convicted under penal code articles 85-87 for causing a woman to abort,<sup>196</sup> they have no legal responsibility toward

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<sup>192</sup> Human Rights Watch interview with Yanina Carlotto, Buenos Aires Province, October 2004.

<sup>193</sup> World Health Organization, *Unsafe Abortion: Global and Regional Estimates of Incidence and Mortality Due to Unsafe Abortion with a Listing of Available Country Data* (Geneva: WHO, 1997), p. 1.

<sup>194</sup> Alan Guttmacher Institute, *Sharing Responsibility: Women, Society and Abortion Worldwide* (New York: AGI, 1999), p. 39.

<sup>195</sup> Human Rights Watch interview with [name withheld], Buenos Aires Province, October 2004.

<sup>196</sup> In 2000, eleven women and five men were sentenced for the crime of abortion. In 2001, ten women and two men were sentenced for the same crime. In 2002 and 2003, only women who had caused or consented to their own abortion were sentenced (one woman and eight women, respectively). Until 2002, the Ministry of Justice did not segregate the data regarding women sentenced for the crime of abortion into those causing or consenting to their own abortion, and those women performing an abortion on others. Data available at Ministry of Justice, “Estadísticas Criminales” [Penal Statistics], [online]

<http://www.jus.gov.ar/minjus/ssjyal/Reincidencia/Estad.html> (retrieved March 22, 2005).

the woman if the procedure is badly done. Such regulation and accountability, which are a necessary part of guaranteeing women's rights to life and the highest attainable standard of health, are only possible where abortion is not illegal.

The women Human Rights Watch interviewed said that this lack of regulation and accountability had both physical and mental health implications. Romina Parma, forty-two, was living with her sexually and physically abusive partner when she got pregnant for the sixth time. Parma sought out an abortion provider who asked her to choose between an abortion with or without antibiotics—an option that would be unthinkable if abortion were legal:

I wanted to do it. ... She said to me that she had to examine me. She pushed on my stomach, and she felt the fetus in there, it was very small. I sat down, and she told me: "It will cost you 250 pesos without antibiotics and 300 pesos with antibiotic [U.S.\$250 and U.S.\$300, respectively]."<sup>197</sup>

Parma told Human Rights Watch that the illegality and clandestine nature of the procedure made her decide not to have the abortion for fear of the health consequences.

An acute lack of regulation and "medical" accountability was common to the experience of most women Human Rights Watch interviewed, even those who had managed to pay for an abortion at a more expensive clinic. Women Human Rights Watch interviewed said that when things went wrong with their abortions, there was nowhere to turn, another reflection of how the clandestine nature of the procedure undermines women's health. Marisa Rossi, thirty-six, told Human Rights Watch about her own and her sister's experience, which she witnessed firsthand:

I had two abortions of two-month pregnancies. He [my partner] decided [on the abortions], but he didn't take any responsibility, and I felt very alone.... They don't do any kind of analysis, on whether or not you are going to be all right or not. [For example, the "clinic" did not check the blood-pressure or carry out other generally accepted medical safeguard before the operation]... They anesthetize you, and they do the

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<sup>197</sup> Human Rights Watch interview with Romina Parma, Buenos Aires Province, October 2004. The conversion rate at the time of the incident was one dollar to one Argentine peso.

curettage<sup>198</sup> directly. ... Afterwards I had problems with my [subsequent pregnancies], I think because of this. Many problems, above all to retain [the pregnancies]. It was really hard, I was nine months in bed. ... My sister went to have one and they did it without anesthesia. I was there, I heard her scream. ... Afterwards I checked out what they had done. ... They do a well-done curettage, but she suffered a lot. ... And you can't go there to ask before [what the procedure is].<sup>199</sup>

A community educator in Santa Fe Province who accompanied women to abortions for many years said that the illegality of the procedure also prevents the development of any kind of relationship between the doctor and the patient, which can have its own adverse health consequences. The worker told Human Rights Watch about an illegal clinic members of the grassroots group accompanied women to: "They put us in a van and drove us away from [name of place withheld]. It was like a horror movie. ... The doctor did not have any relationship with the patients. He was a butcher, and that was that."<sup>200</sup>

### ***Inadequate or Inhumane Post-Abortion Care***

*A woman [we work with] went to the hospital in a very bad state with an abortion and she was infected and hemorrhaging. A doctor started to examine her, and when he started to see her and realized, he threw down his instruments on the floor. He said: "This is an abortion, you go ahead and die!"*

—Social worker, Santa Fe Province<sup>201</sup>

Human Rights Watch interviewed women who avoided necessary post-abortion care to the detriment of their health for fear of being reported to the police.<sup>202</sup> Others received inadequate or even inhumane treatment. Agustina Silveira, forty-six, explained: "When they [the doctors] see that the women have done something [to abort], they don't care

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<sup>198</sup> Curettage is a "procedure in which a thin layer of the lining (endometrium) of the uterus is removed by scraping the inside with a metal loop, called a curet. ..." Leikin and Lipsky (eds.), *American Medical Association: Complete Medical Encyclopedia*, p. 428. "[Dilation and curettage] is ... commonly performed after a woman has a miscarriage or for an abortion." Ibid., p. 435.

<sup>199</sup> Human Rights Watch interview with Marisa Rossi, Buenos Aires Province, October 2004.

<sup>200</sup> Human Rights Watch interview with [name withheld], Santa Fe Province, September 2004.

<sup>201</sup> Human Rights Watch interview with Mili Glikstein, social worker, Organización Desde el Pie [From the Bottom Up Organization], Rosario, Santa Fe Province, September 16, 2004.

<sup>202</sup> Human Rights Watch interviews with Daniela García, Tucumán Province, September 2004; and with Teresa Mariani, Buenos Aires Province, October 2004.

very much. They leave them with fever.”<sup>203</sup> As this report was being finalized, the government has started implementing reform that, if effective, could overcome many of the abuses laid out in this subsection.

A community educator working on access to contraception in a low-income neighborhood in Buenos Aires Province told Human Rights Watch that the deterrent effect of the criminalization of abortion can be deadly: “Here, the most common thing [abortion method] is the rubber tube. … It is the most risky because they get infected and they don’t go to the hospital because they are afraid of going to prison. … Some die at home, because they don’t want to go to the doctor. … There should be a poster at every hospital … that says that a woman who has had an abortion can come to the doctor [without fear of prosecution].”<sup>204</sup>

In May 2005, the National Health and Environment Ministry announced the publication of a guide aimed at improving post-abortion care in the public health system.<sup>205</sup>

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<sup>203</sup> Human Rights Watch interview with Agustina Silveira, Santa Fe Province, September 2004.

<sup>204</sup> Human Rights Watch interview with Lucia Lucena, community educator, Decidir, Moreno, Buenos Aires Province, October 19, 2004. Women’s fear of prosecution is not unfounded as explained in the section below on sentencing.

<sup>205</sup> “Los abortos no existen, pero que los hay, los hay” [Abortion does not exist, but they do occur] Página 12 (Argentina), May 9, 2005, p. 1. The guide was still not printed or in general circulation when this report was being finalized. Human Rights Watch obtained a final version from the National Health and Environment Ministry. See also section on government response to the provision of inadequate post-abortion care below.

### *Post-Abortion Care without Anesthesia*

Some women who overcame their fear of prosecution and sought out post-abortion care in Argentina were subject to inhumane or inadequate treatment, including being subjected to curettage without anesthesia. “The doctors themselves say that they do it [perform post-abortion curettage] without anesthesia. … We already know this from the health centers,” the director of a public hospital who worked as a consultant to the National Health and Environment Ministry told Human Rights Watch.<sup>206</sup> An NGO-directed study on reproductive health care in Santa Fe Province published in 2003 confirmed that some doctors perform post-abortion curettage—a painful procedure—without anesthesia.<sup>207</sup>

A psychologist who worked as a social worker at a public hospital in Tucumán Province told Human Rights Watch that, at her hospital, doctors carried out curettage without anesthesia as a form of vigilantism until very recently, and that she believed they still would do so if she did not act as a watchdog:

A small victory for me was to have achieved that they don’t do the curettage without anesthesia anymore. … I went to the director and I told them that I knew [that doctors don’t administer anesthesia before performing curettage]. They pretended they were stupid and said: “Really? You don’t say so?” And nothing changed. … I had to threaten them with the ombudsman. … Now they administer anesthesia. Maybe one or two at night slip by me.<sup>208</sup>

In some cases, government officials and doctors told Human Rights Watch that women were denied anesthesia due to limited resources. “We don’t give them anesthesia because we have neither personnel nor material for it,” said Luís Robles, head of the maternity program at the health ministry of Formosa Province.<sup>209</sup> Stella Carrido, the

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<sup>206</sup> Human Rights Watch interview with Diana Galimberti, director, Alvarez Hospital, Buenos Aires City, October 21, 2004.

<sup>207</sup> See Instituto de Género, Derecho y Desarrollo (INSGENAR) [Institute for Gender, Rights and Development], “Reporte de Derechos Humanos: Tratos Crueles, Inhumanos y Degradiantes a Mujeres en Servicios de Salud Reproductiva” [Human Rights Report: Cruel, Inhuman, and Degrading Treatment of Women in Reproductive Health Services], (Rosario, Argentina: INSGENAR, December 2003) [online] <http://www.insgenar.org.ar/actividades/tratoscrueles.htm#2> (retrieved February 15, 2005); and “Persiste el maltrato a las mujeres en hospitales” [The mistreatment of women in hospitals continues], CIMAC, January 11, 2005.

<sup>208</sup> Human Rights Watch interview with [name withheld], Tucumán Province, September 2004.

<sup>209</sup> Human Rights Watch interview with Luís Robles, head, Programa de Maternidad [Maternity Program], Ministerio de Salud de Formosa [Formosa Health Ministry], Castelar, Buenos Aires Province, September 6, 2004.

coordinator of the mother-child health program in Jujuy Province told Human Rights Watch that anesthesia was sometimes replaced by cheaper painkillers because of resource concerns: “Where there is no anesthesia, they put [painkillers] in the IV [intravenous line].”<sup>210</sup> Carrido noted that the painkillers used were not as effective as anesthesia.

### ***Denial of Post-Abortion Care***

Angelica Grima, thirty-one, told Human Rights Watch that she had personally witnessed doctors at her local public hospital denying medical services to a woman who told her she was hospitalized for post-abortion care: “She was left until the end. … The woman had blood all over, but they just put her in a bed. … They did not treat her.”<sup>211</sup> Julia Reina had a similar experience when she was hospitalized due to an incomplete self-induced abortion. Reina witnessed a nurse saying to another woman: “You liked killing your child, here you will see how you will suffer.” Reina continued: “I was lucky. I said that I had come from Buenos Aires by train, and they thought [my condition was due to] a natural interruption of the pregnancy.”<sup>212</sup>

Several U.N. treaty bodies have expressed concern with the health consequences of illegal abortion, in particular where women are subject to criminal penalties and therefore are discouraged from seeking care.<sup>213</sup> In addition, the International Conference on Population and Development (ICPD), held in Cairo in 1994, resulted in a consensus document signed by 179 nations which insisted on the provision of post-abortion care. The ICPD Programme of Action called upon all governments and intergovernmental and nongovernmental organizations to “deal with the health impact of unsafe abortion

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<sup>210</sup> Human Rights Watch interview with Stella Carrido, coordinator, Area Materno Infantil [Mother-Child Area] of Jujuy Welfare Ministry, Buenos Aires, September 8, 2004. For a discussion of the adverse effects on the public health budget of illegal abortion, see below footnote 269 and accompanying text.

<sup>211</sup> Human Rights Watch interview with Angelica Grima, Tucumán Province, September 2004.

<sup>212</sup> Human Rights Watch interview with Julia Reina, Tucumán Province, September 2004.

<sup>213</sup> See e.g. CEDAW Committee, “Report of the Committee on the Elimination of All Forms of Discrimination Against Women,” U.N. Doc. A/54/38/Rev.1, July 9, 1999, para. 393 (noting for example with reference to Colombia that “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 [CEDAW]”); and Human Rights Committee, “Concluding Observations of the Human Rights Committee: Colombia,” U.N. Doc. CCPR/C/79/Add.76, April 1, 1997, para. 24 (noting the Committee’s concern with the link between maternal mortality and the clandestine nature of abortion in that country); and Human Rights Committee, “Concluding Observations of the Human Rights Committee: Bolivia,” U.N. Doc. CCPR/C/79/Add.74, May 1, 1997, para. 22 (noting the Committee’s concern that the illegality of abortion contributes to the high maternal mortality in Bolivia); and Committee on the Rights of the Child, “Concluding Observations of the Committee on the Rights of the Child: Guatemala,” U.N. Doc. CRC/C/15/Add.154, June 8, 2001, para. 40 (noting that the illegality of abortion contributes to the high maternal mortality in Guatemala).

as a major public health concern,”<sup>214</sup> and stated that “[i]n all cases, women should have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family-planning services should be offered promptly, which will also help to avoid repeat abortions.”<sup>215</sup> Indeed, the U.N. Special Rapporteur on the Highest Attainable Standard of Health emphasized in his report to the U.N. Commission on Human Rights in 2004 that “[i]n all cases, women should have access to quality services for the management of complications arising from abortion.”<sup>216</sup>

### ***Excessive Scrutiny of Miscarriages***

Human Rights Watch’s research indicated that the criminalization of abortion has contributed to an atmosphere at public hospitals where any “deviant” behavior with regard to childbirth—for example giving birth at home—was treated with suspicion and contempt. Paula Gómez, thirty-six, said that she was questioned by police after a miscarriage, and later after she had given birth at home instead of the hospital:

I had a miscarriage, it happened by itself. I was six months pregnant. ... The police came, they did an investigation. ... The midwife came, the doctor came, the police came. They called my husband and he said no, that any child who came along would be welcome. ... Because I hadn’t done anything. ... [Later, my] daughter ... was born at home. ... They came again to investigate, to see if I had done something. They thought it was an abortion, because she was born at home.<sup>217</sup>

All of the women Human Rights Watch interviewed who had sought care whether after a miscarriage or after an induced abortion faced hostile questioning. Norma Jiménez, thirty-five, who miscarried, recounted: “They [the doctors at the public hospital] said: ‘Did you put anything [in your uterus]? Did you do anything to yourself? Did you make any efforts? Tell us the truth!’”<sup>218</sup> Gladis Morello, thirty-two, who miscarried twice because her husband beat her, said she had not been asked about domestic violence or offered any counseling or assistance to help her with that. Instead, she said, “the first thing they ask you is if you did something [to yourself], if you took something.”<sup>219</sup>

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<sup>214</sup> ICPD Programme of Action, para. 8.25.

<sup>215</sup> Ibid.

<sup>216</sup> Report of the Special Rapporteur, Paul Hunt, U.N. E/CN.4/2004/49, February 16, 2004, para. 30.

<sup>217</sup> Human Rights Watch interview with Paula Gómez, Tucumán Province, September 2004.

<sup>218</sup> Human Rights Watch interview with Norma Jiménez, Santa Fe Province, September 2004.

<sup>219</sup> Human Rights Watch interview with Gladis Morello, Buenos Aires Province, October 2004.

## ***Government Response***

The national health ministry has started taking important steps toward addressing many of the abuses women face in the public health system when they seek post-abortion care. In October 2004, the provincial health ministries signed an agreement with the national health minister, Dr. Ginés González García, laying out some essential steps to lower the maternal mortality in the country including ensuring women access to humane, fast, and effective post-abortion care without discrimination.<sup>220</sup> In May 2005, the national health ministry promised to strengthen this agreement with a publication with technical recommendations for how public health providers can improve post-abortion care.<sup>221</sup>

The publication provides guidance on a number of issues related to the abuse exposed in this report. It repeatedly emphasizes the need for the use of general anesthesia where incomplete abortions are treated with curettage,<sup>222</sup> and recommends the less invasive use of manual vacuum aspiration (instead of curettage), medical conditions permitting.<sup>223</sup> The guide also insists on the protection of doctor-patient confidentiality, and describes in detail what constitutes respectful treatment of women, including talking to them in a quiet and private environment about their choices.<sup>224</sup>

The publication of this guide and its distribution in public hospitals and health centers is a necessary and very positive step. At the same time, Human Rights Watch interviews with medical doctors and heads of maternity wards in public hospitals in several provinces suggest a persistent fear of retribution related to this topic. “All the heads of maternity wards will receive the guide,” said one head of a maternity ward. “But it is not

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<sup>220</sup> Ministerio de Salud y Ambiente de la Nación [National Health and Environment Ministry], “Compromiso para la Reducción de la Mortalidad Materna en la Argentina” [Commitment to Lower Maternal Mortality in Argentina], October 6, 2004.

<sup>221</sup> Dirección Nacional de Salud Materno-Infantil [National Department for Mother-Child Health], “Guía para el mejoramiento de la atención post-aborto” [Guide for the Improvement of Post-Abortion Care], (Ministerio de Salud y Ambiente de la Nación, 2005), on file with Human Rights Watch. This guide was still unpublished when this report was finalized.

<sup>222</sup> Ibid, pp. 8, 12, 14, and 21.

<sup>223</sup> Ibid, p. 12. The international Postabortion Care Consortium (including IntraH (an affiliate of the University of North Carolina Chapel Hill), Ipas, the JHPIEGO Corporation (an international health organization affiliated with the Johns Hopkins University), Pacific Institute for Women’s Health, Pathfinder International, and USAID/Washington) recommends that “high quality treatment uses manual vacuum aspiration (MVA) wherever possible and depending on local conditions.” Postabortion Care Consortium Community Task Force, “Essential Elements of Postabortion Care: An Expanded and Updated Model,” Postabortion Care Consortium, July 2002, [online] <http://www.pac-consortium.org/pages/pacmodel.html> (retrieved May 17, 2005).

<sup>224</sup> Dirección Nacional de Salud Materno-Infantil, “Guía para el mejoramiento de la atención post-aborto”, (Ministerio de Salud y Ambiente de la Nación, 2005), on file with Human Rights Watch, p. 13.

an order, it is sent like a guide. ... Until we have a real mandate to implement it, I would be putting my own neck out there to do it.”<sup>225</sup>

If fully and effectively implemented, the post-abortion care model recommended in the guide could overcome many of the abuses women face when they seek medical treatment after incomplete abortions. Our research suggests that its effectiveness could be enhanced tremendously if backed by a legal mandate, such as a ministerial resolution, requiring the application of the model, or if accompanied by a sustained training program for public health providers.

### ***Obligation to Report Women to the Authorities***

Women’s fear of prosecution or of being reported to the authorities if they seek post-abortion care after an illegal abortion is well-founded. Many doctors believe they have an obligation to report women who come to hospitals for post-abortion care because Argentina’s penal code penalizes anyone who “helps someone to avoid the authorities’ investigations ... or who avoids denouncing a fact, where they are obligated to do so.”<sup>226</sup>

There is contradictory jurisprudence in Argentina as to whether or not the confidentiality of the doctor-patient relationship is overridden by an obligation, on behalf of the doctor, to inform the authorities of an alleged or suspected crime,<sup>227</sup> but the prevailing belief among doctors and government officials is that doctors are obligated to report women who have had induced abortions to the authorities. Indeed, an NGO-directed study concludes that a large proportion of doctors seem to believe not only that they are obligated to do so, but that it is the right thing to do. In a study published in 2001 on the opinions of Argentine doctors regarding contraception and abortion, almost 60 percent of the interviewed doctors thought that they should report a woman with

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<sup>225</sup> Human Rights Watch phone interview with [name withheld], head of maternity ward, public hospital, [province withheld], May 16, 2005.

<sup>226</sup> Penal Code, article 277(1). The original text reads: “Será reprimido con prisión de seis meses a tres años, el que sin promesa anterior al delito, cometiere después de su ejecución, algunos de los hechos siguientes: (1) ayudare a alguien a eludir las investigaciones de la autoridad o a sustraerse a la acción de ésta, u omitiere denunciar el hecho estando obligado a hacerlo. ...” [He who without having promised to do so prior to a crime commits, after its execution, one of the following acts: (1) helping someone to evade the authorities’ investigation or to avoid the authorities’ actions, or avoiding to denounce a fact where he is under obligation to do so, will be punished with six months’ to three years’ prison].

<sup>227</sup> Cámara Nacional de Apelaciones en lo Criminal y Correccional de Capital Federal [National Chamber of Appeals in Criminal and Correccional Law of the Federal Capital], in Full (CNCrimCorr)(Pleno). *Natividad Fries* F., N. Publisher in LA LEY, 123-842 - JA, 966-V-69, August 26, 1966; and Sala Primera del Tribunal de Casación Penal de la Provincia de Buenos Aires [First Chamber of the Penal Tribunal of the Province of Buenos Aires], M., P.s/Recurso de Casación, TC0001 LP, P 6193 RSD-717-2 S 26-11-2002, November 26, 2002.

symptoms of a self-induced abortion to the authorities when she presented herself at a hospital for post-abortion care.<sup>228</sup>

Even so, according to some doctors and public health experts Human Rights Watch interviewed, doctors do not report women who come for post-abortion care unless the women are in imminent danger of dying, mostly to protect themselves from legal action. Rodolfo Gómez Ponce de Léon, a medical doctor from Tucumán Province with years of experience in the public health sector told Human Rights Watch:

In the law, it is still like that [we have an obligation to report women]. The health system will obviously seek to ensure that there is no mal-practice or negligence going on, but generally only the serious cases are reported to the police. Of all the deaths in public hospitals [in Tucumán Province] in 2002 where women had abortions, 90 percent were reported to the police. I suppose some doctors seek to distance themselves from the problem cases by reporting them to the police.<sup>229</sup>

A public official from El Chaco Province Health Ministry agreed with this assessment: “We don’t report those that are not complicated.”<sup>230</sup> In some public hospitals, there is a permanent police guard who records the name and address of any woman who may have had an illegal abortion, though apparently nothing further is done.<sup>231</sup>

The national health ministry, through its May 2005 guide on the improvement of post-abortion care, has made quite clear that it considers the protection of doctor-patient confidentiality paramount for purposes of public health.<sup>232</sup> However, the guide does not carry the force of law or ministerial resolution, and therefore does not necessarily overcome the ambiguity of the penal code provisions.

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<sup>228</sup> Silvina Ramos, Mónica Gogna, Mónica Petracchi, Mariana Romero, and Dalia Szulik, *Los Médicos Frente a la Anticoncepción y el Aborto: ¿Una Transición Ideológica?* [Doctors, Contraception and Abortion: An Ideological Transition?] (Buenos Aires: Centro de Estudios de Estado y Sociedad, CEDES, 2001), p. 128.

<sup>229</sup> Human Rights Watch telephone interview with Rodolfo Gómez Ponce de Léon, medical doctor, Chapel Hill, North Carolina, August 30, 2004.

<sup>230</sup> Human Rights Watch interview with Pedro Eduardo Picasso, director, Área Materno-Infantil [Maternal-Infant Area], Ministerio de Salud del Chaco [El Chaco Health Ministry], Castelar, Buenos Aires Province, September 7, 2004.

<sup>231</sup> Human Rights Watch interviews with several service providers in all provinces covered by our research, names withheld, in September and October 2004.

<sup>232</sup> Dirección Nacional de Salud Materno-Infantil [National Department for Mother-Child Health], “Guía para el mejoramiento de la atención post-aborto” [Guide for the Improvement of Post-Abortion Care], (Minsterio de Salud y Ambiente de la Nación, 2005), on file with Human Rights Watch.

## ***Sentenced to Prison for Punishable Abortion***

Argentina's penal code provides that a woman's decision to undergo an abortion is a crime, subject to imprisonment for one to four years, except where the penalty is suspended as provided by law.<sup>233</sup> Although none of the women Human Rights Watch interviewed had been prosecuted for undergoing an abortion, the government confirmed that a small number of women have indeed been sentenced for this "crime."<sup>234</sup> In 2002 and 2003, nine women were convicted and sentenced for having had or consented to have an abortion, and four of them were under twenty-one years old.<sup>235</sup>

Though the number of women sent to prison in Argentina for having caused or consented to an abortion has been minimal compared to the estimated number of abortions that are performed,<sup>236</sup> the threat of a prison-sentence for undergoing an abortion is real and was perceived as such by women we interviewed. Laura Passaglia, thirty-two, told us that she had been a character witness in criminal proceedings against a friend accused of having had an abortion: "A classmate of mine, I had to go declare [in her criminal case], she almost went to jail."<sup>237</sup>

The implementation and enforcement of criminal sanctions—whether jail time or fines—against women who undergo illegal and unsafe abortions constitutes yet another assault on women's human rights, as explained in the chapter on international law below. Moreover, considering that women are unlikely to be prosecuted for abortion unless they seek medical care, the criminalization of abortion may add considerably to the detrimental health consequences of unsafe abortions by discouraging care. Angel Bertuzzi, a seventy-two-year-old medical doctor from Rosario who by his own testimony

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<sup>233</sup> Penal Code, article 88. For full penal code provisions on abortion see footnote 166.

<sup>234</sup> E-mail message from Hernán Olaeta, public official, Dirección Nacional de Políticas Criminales [National Coordinator for Penal Policies], Ministerio de Justicia y Derechos Humanos [Ministry of Justice and Human Rights], to Human Rights Watch, February 16, 2005. Olaeta noted that the ministry does not keep segregated information on how many individuals—women or men—actually serve prison sentences for violations of articles 85-88 of the Penal Code. Human Rights Watch sought clarification on this point from other officials from the Ministry of Justice, but our calls were not returned.

<sup>235</sup> Data available at Ministry of Justice, "Estadísticas Criminales" [Penal Statistics], [online] <http://www.jus.gov.ar/minjus/ssjyal/Reincidencia/Estad.html> (retrieved March 22, 2005). A government official from the Ministry of Justice notes that not all of those individuals convicted and sentenced for this crime has actually served time in jail. E-mail message from Hernán Olaeta, public official, Dirección Nacional de Políticas Criminales [National Coordinator for Penal Policies], Ministerio de Justicia y Derechos Humanos [Ministry of Justice and Human Rights], to Human Rights Watch, February 16, 2005.

<sup>236</sup> An estimated 500,000 abortions are performed annually in Argentina. In 2002, one woman, and in 2003, eight, were sentenced for having consented to having an abortion. Data available at Ministry of Justice, "Estadísticas Criminales" [Penal Statistics], [online] <http://www.jus.gov.ar/minjus/ssjyal/Reincidencia/Estad.html> (retrieved March 22, 2005).

<sup>237</sup> Human Rights Watch interview with Laura Passaglia, Buenos Aires Province, October 2004.

had been performing abortions for forty years, told an Argentine newspaper in March 2005: “No one understands that decriminalization is for the woman, not for the doctor doing the abortion. It is so that the woman can get to a doctor, to a hospital, and not get prosecuted for a crime.”<sup>238</sup>

## **VII. International Human Rights Law and Abortion**

*Women with unwanted pregnancies should be offered reliable information and compassionate counseling, including information on where and when a pregnancy may be terminated legally. Where abortions are legal, they must be safe: public health systems should train and equip health service providers and take other measures to ensure that such abortions are not only safe but accessible. ... Punitive provisions against women who undergo abortions must be removed.*

—U.N. Special Rapporteur on the Right to the Highest Attainable Standard of Health<sup>239</sup>

Authoritative interpretations of international law recognize that obtaining a safe and legal abortion is vitally important to women’s effective enjoyment and exercise of their human rights. Since the mid-1990s the U.N. treaty bodies that monitor the implementation of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the Convention of the Rights of the Child have produced a significant body of jurisprudence regarding abortion in over 122 concluding observations concerning at least ninety-three countries.<sup>240</sup> The treaty bodies’ comments on abortion address a range of issues, including specific concern about the limited access to safe abortion in Argentina. In fact, measured against the standards promoted by these expert human rights bodies Argentina falls significantly short of its international legal obligations.

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<sup>238</sup> Soledad Vallejos, “El silencio no es zonzo” [Silence isn’t stupid], Las 12, weekly supplement to Página 12 (Buenos Aires), March 11, 2005.

<sup>239</sup> Report of the Special Rapporteur, Paul Hunt, U.N. E/CN.4/2004/49, February 16, 2004, para. 30.

<sup>240</sup> By Human Rights Watch’s count. See also Center for Reproductive Rights and Policy (CRLP, now Center for Reproductive Rights, CRR) and University of Toronto International Programme on Reproductive and Sexual Health Law, *Bringing Rights to Bear: An Analysis of the Work of UN Treaty Monitoring Bodies on Reproductive and Sexual Rights* (New York: CRLP, 2002), in particular pp. 145-158, [online] [http://www.reproductiverights.org/pdf/pub\\_bo\\_tmb\\_full.pdf](http://www.reproductiverights.org/pdf/pub_bo_tmb_full.pdf) (retrieved March 3, 2005).

An important shift in the conception of reproductive rights in general occurred in connection with two world conferences in the 1990s: the International Conference on Population and Development (ICPD), held in Cairo in 1994 and the Fourth World Conference on Women, held in Beijing in 1995. Signed by 179 and 189 nations, respectively, the consensus documents from these conferences demonstrate a move from demographically driven population policies to reproductive rights policies with human rights at their core.

The ICPD Programme of Action and the Platform for Action from the Beijing Conference each affirm the integral nature of reproductive health and rights to human rights. The ICPD Programme of Action emphasizes that “reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents.”<sup>241</sup> Moreover, the Beijing Platform for Action states: “The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”<sup>242</sup>

The ICPD Programme of Action and the Beijing Platform for Action are relatively restrained on the topic of abortion, reflecting the difficulty governments had in reaching consensus on this complex issue. The ICPD Program of Action states that “[i]n no case should abortion be promoted as a method of family planning” and “[i]n circumstances where abortion is not against the law, such abortion should be safe.”<sup>243</sup> It also calls upon all governments and intergovernmental and NGOs to “deal with the health impact of unsafe abortion as a major public health concern.”<sup>244</sup> Likewise, the Beijing Platform for Action calls on governments to “consider reviewing laws containing punitive measures against women who have undergone illegal abortions”<sup>245</sup> and to reduce the mortality and morbidity that stem from unsafe abortion, which it considers a “grave public health problem.”<sup>246</sup>

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<sup>241</sup> United Nations General Assembly, Programme of Action of the International Conference on Population and Development, U.N. Doc. A/171/13, New York, October 18, 1994 (ICPD Programme of Action), para. 7.3.

<sup>242</sup> United Nations General Assembly, Beijing Declaration and Platform for Action: Fourth World Conference on Women, U.N. Doc. A/Conf.177/20, New York, October 17, 1995 (Beijing Platform for Action), para. 95.

<sup>243</sup> ICPD Program of Action, para. 8.25. These concerns are consistently echoed in concluding observations issued by the CEDAW Committee on a number of countries. See e.g. CEDAW Committee, “Report of the Committee on the Elimination of Discrimination against Women,” U.N. Doc. A/56/38, July 2001, paras. 62, 105, 185; and CEDAW Committee, “Report of the Committee on the Elimination of Discrimination against Women,” U.N. Doc. A/59/38, July 2004, paras. 355-56.

<sup>244</sup> ICPD Program of Action, para. 8.25.

<sup>245</sup> Beijing Platform for Action, para. 106(k).

<sup>246</sup> Ibid., para. 97.

As explained in more detail below, U.N. bodies and conferences have repeatedly emphasized that access to safe and legal abortion can save women's lives and that governments have a positive duty to ensure that women have access to adequate abortion information and services. The treaty bodies have also consistently linked a pregnant woman's right to decide about abortion without interference with her right to nondiscrimination and to equal enjoyment of other human rights. In doing so, the bodies recognize that firmly established human rights are jeopardized by restrictive or punitive abortion laws and practices.

Decisions about abortion belong to a pregnant woman alone, without interference by the state or others. Any restrictions on abortion that unreasonably interfere with a woman's exercise of her full range of human rights should be rejected. The Argentine government should take all necessary steps, both immediate and incremental, to ensure that women have informed and uncoerced 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.

### ***Rights to Nondiscrimination and Equality***

The rights to nondiscrimination and equality are set forth in a number of international human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the American Convention on Human Rights.<sup>247</sup> 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."<sup>248</sup>

Access to legal and safe 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. The CEDAW Committee has implied in its General Recommendation on women and health that the denial of medical procedures only

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<sup>247</sup> UDHR, articles 1 and 2; ICCPR, articles 2(1) and 3; ICESCR, articles 2(2) and 3; CEDAW, in particular articles 1 and 12; and ACHR, article 1(1).

<sup>248</sup> 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.

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 action taken by women in pursuit of their health goals."<sup>249</sup> 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."<sup>250</sup> The committee recommended that "[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion."<sup>251</sup>

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].<sup>252</sup>

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."<sup>253</sup>

Women are in practice more likely than men to experience personal hardship as well as 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.

The U.N. Human Rights Committee has established the clear link between women's equality and the availability of reproductive health services and information, including

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<sup>249</sup> CEDAW committee, General Recommendation 24, Women and Health (Article 12), *U.N. Doc. No. A/54/38/Rev.1* (1999), para. 14.

<sup>250</sup> *Ibid.*, para. 14.

<sup>251</sup> *Ibid.*, para. 31(c).

<sup>252</sup> CEDAW Committee, "Report of the Committee on the Elimination of All Forms of Discrimination Against Women," *U.N. Doc. A/54/38/Rev.1*, July 9, 1999, para. 393.

<sup>253</sup> CEDAW Committee, "Report of the Committee on the Elimination of All Forms of Discrimination Against Women," *U.N. Doc. A/53/38/Rev.1*, part I, February 6, 1998, para. 426

abortion, in several concluding observations on country reports from the Latin American region, including Argentina, Ecuador, Colombia, and Guatemala.<sup>254</sup> 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 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.<sup>255</sup>

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.<sup>256</sup>

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.<sup>257</sup>

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<sup>254</sup> See Human Rights Committee, "Concluding observation of the Human Rights Committee: Argentina," U.N. Doc. CCPR/CO.70/ARG (2000), para. 14; Human Rights Committee, "Concluding observation of the Human Rights Committee: Ecuador," U.N. Doc. CPR/C/79/Add.92 (1998), para. 11; Human Rights Committee, "Concluding observation of the Human Rights Committee: Colombia," U.N. Doc. CCPR/C/79/Ad.76 (1997), para. 24; and Human Rights Committee, "Concluding observation of the Human Rights Committee: Guatemala," U.N. Doc. CCPR/CP/72/GTM (2001), para. 19.

<sup>255</sup> Human Rights Committee, "Concluding observation of the Human Rights Committee: Argentina," U.N. Doc. CCPR/CO.70/ARG (2000), para. 14.

<sup>256</sup> Human Rights Committee, "Concluding observation of the Human Rights Committee: Colombia," U.N. Doc. CCPR/C/79/Ad.76 (1997), para. 24.

<sup>257</sup> Human Rights Committee, "General Comment No. 28: Equality of rights between men and women (article 3)," U.N. Doc. CCPR/C/21/Rev.1/Add.10, March 29, 2000, para. 11.

## **Rights to Health and Health Care**

The rights to the highest attainable standard of health and to equal enjoyment of this right are recognized in a number of international instruments that are deemed to be on par with the constitution in Argentina's legal system. These rights are most clearly stated in: the Universal Declaration of Human Rights (UDHR),<sup>258</sup> the ICESCR,<sup>259</sup> CEDAW,<sup>260</sup> and the American Declaration on the Rights and Duties of Man.<sup>261</sup>

As this report has shown, where there is a lack of legal and safe abortion services and pervasive barriers to other reproductive health services, including contraceptives, there will be unwanted pregnancies and unsafe abortions. Both cause largely preventable physical and mental health problems for women. Unsafe abortions, in particular, constitute a grave threat to women's health: worldwide 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.<sup>262</sup> These may result in death, permanent injury, or infertility. In light of this, even the most conservative reading of international human rights law would require governments to decriminalize abortion.<sup>263</sup>

The 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."<sup>264</sup> The CESCR further noted:

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<sup>258</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), article 25.

<sup>259</sup> ICESCR, article 12.

<sup>260</sup> CEDAW, article 12.

<sup>261</sup> American Declaration on the Rights and Duties of Man, approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948, article XI.

<sup>262</sup> World Health Organization, *Abortion: A Tabulation of Available Information*, 3rd edition (Geneva: World Health Organization, 1997).

<sup>263</sup> "Decriminalizing" abortion means that abortion would not be considered a crime, and that the state therefore no longer has the duty or power to arrest, investigate, prosecute, convict, or punish those who have induced abortions. "Decriminalization" is not the same as "legalization" of abortion, which would imply that abortion is a health procedure that is under state control and interest. Access to abortion can by law be decriminalized or legalized in full or in part.

<sup>264</sup> Committee on Economic, Social and Cultural Rights, "The right to the highest attainable standard of health (General Comments), General Comment 14," August 11, 2000, U.N. Doc. E/C.12/2000/4, para. 8.

To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health 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.<sup>265</sup>

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. The CEDAW Committee has often recommended that states parties review legislation prohibiting abortion to meet their obligation to eliminate discrimination against women in the health field,<sup>266</sup> as set out in detail in its General Recommendation No. 24 on women and health (including the recommendation that governments remove punitive measures imposed on women who undergo abortion).<sup>267</sup>

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<sup>265</sup> Ibid., para. 21.

<sup>266</sup> See e.g. CEDAW Committee, "Report of the Committee on the Elimination of Discrimination against Women," U.N. Doc. A/54/38/Rev.1, Part II, July 9, 1999, para. 229 (noting with regard to Chile: "The Committee recommends that the Government consider review of the laws relating to abortion with a view to their amendment, in particular to provide safe abortion and to permit termination of pregnancy for therapeutic reasons or because of the health, including the mental health, of the woman"); and CEDAW Committee "Report of the Committee on the Elimination of Discrimination against Women," U.N. Doc. A/53/38/Rev.1, February, 1998, para. 349 (noting with regard to the Dominican Republic: "The Committee ... invites the Government to review legislation in the area of women's reproductive and sexual health, in particular with regard to abortion, in order to give full compliance to articles 10 [education] and 12 [health] of the Convention.") See also CEDAW Committee, "Report of the Committee on the Elimination of Discrimination against Women," U.N. Doc. A/54/38/Rev.1, Part I, July 9, 1999, para. 393, quoted above at footnote 252 and accompanying text.

<sup>267</sup> CEDAW Committee, "General Recommendation 24, Women and Health (Article 12)," U.N. Doc. No. A/54/38/Rev.1 (1999), para. 31: "31. States parties should also in particular: ... (c) Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion."

Denying access to abortion services is not justifiable from a resource perspective. Treating complications from unsafe abortion is much more expensive than providing medically safe abortions.<sup>268</sup> While abortion is generally a low-cost procedure, particularly early in the pregnancy when vacuum aspiration or pharmaceutical techniques can be used, the costs of treating women for complications from unsafe abortions can be substantial.<sup>269</sup>

Restrictive abortion laws affect women's health in other ways, not only by limiting their access to safe abortion services. For example, the right to health is violated when women are arbitrarily denied treatment for incomplete abortions or when such treatment is given but available pain medication is withheld.

Government interference with women's right to decide on abortion also interferes with the right to privacy. The right to privacy is protected by article 17 of the International Covenant on Civil and Political Rights and is intimately related to the right to health insofar as the full realization of both rights requires the protection of patient confidentiality and noninterference with individual decision-making regarding health.<sup>270</sup> Indeed, the Committee on Economic, Social and Cultural Rights has explained that the fulfillment of the right to privacy addresses an integral component of the right to health, and that the fulfillment of the latter depends on the protection of the former.<sup>271</sup>

Women's right to health is also seriously compromised when a woman is forced against her will to continue a pregnancy of a fetus with genetic deficiencies that are incompatible with an existence outside the uterus. In fact, some courts in Argentina have begun to

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<sup>268</sup> Sonia Corrêa, *Population and Reproductive Rights; Feminist Perspectives from the South* (London: Zed Books, 1994), p. 71.

<sup>269</sup> In some developing countries where abortion is illegal, as many as two out of three maternity beds in urban public hospitals are taken up by women hospitalized from abortion complications and up to half of obstetrics and gynecology budgets are spent on this problem. World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* (Geneva: WHO, 2003), p. 89.

<sup>270</sup> Committee on Economic, Social and Cultural Rights, *The right to the highest attainable standard of health (General Comments)*, General Comment 14, August 11, 2000, U.N. Doc. E/C.12/2000/4, para. 12(b), (establishing a right to confidentiality); Human Rights Committee, "General Comment No. 28: Equality of rights between men and women (article 3)," U.N. Doc. CCPR/C/21/Rev.1/Add.10, March 29, 2000, para. 20, (establishing women's right to privacy with regard to her reproductive functions.)

<sup>271</sup> Committee on Economic, Social and Cultural Rights, *The right to the highest attainable standard of health (General Comments)*, General Comment 14, August 11, 2000, U.N. Doc. E/C.12/2000/4, para. 3: "The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health."

permit abortion in cases of anencephalic pregnancies.<sup>272</sup> However, the arguments most commonly employed do not refer to the penal code exception on women's health, but rather seek to classify the abortion of an anencephalic fetus as a situation *sui generis*. Several judges have held that abortions in these cases are not abortions at all, but the advancement of a birth after which the infant dies.<sup>273</sup> At the same time, most courts acknowledge the health consequences of the anencephalic pregnancy on the woman,<sup>274</sup> in effect rendering the *sui generis* argument for the abortions unnecessary: Argentina's penal code already allows for abortions in cases where the pregnant woman's health is in danger.

### **Right to Life**

The right to life is guaranteed by all major international and regional human rights treaties. Restrictive abortion laws have a devastating impact on women's right to life. Approximately 30 percent of maternal deaths in Argentina<sup>275</sup>—and 13 percent worldwide<sup>276</sup>—are attributable to unsafe abortion. Evidence in this report and elsewhere suggests not only that restrictive abortion laws drive women to unsafe abortion, but that women die from the consequences of such abortions.<sup>277</sup>

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<sup>272</sup> Anencephaly is a "severe neural tube defect in which an infant's brain and spinal cord fail to develop in utero (within the uterus). Anencephaly occurs when the top portion of an embryo's neural tube fails to close in the early stage of pregnancy. As a result, the infant is born without a forebrain (the part of the brain responsible for thinking and coordination). Remaining brain tissue is often left exposed, uncovered by skin or bone. Although reflex actions such as breathing may occur, an affected infant is usually blind, deaf, unconscious, and unable to experience sensations, such as pain. The lack of a functioning cerebrum means that the infant cannot gain consciousness. When the infant is not still born, death usually occurs within hours or days after birth." Leikin and Lipsky (eds.), *American Medical Association: Complete Medical Encyclopedia*, p. 160.

<sup>273</sup> See for example Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], T. 421 XXXVI "Tanus, Silvia c/Gobierno de la Ciudad de Buenos Aires s/Amparo," January 11, 2001. Since the Tanus case at least fifteen courts across Argentina have granted women with anencephalic pregnancies the possibility of an early induced birth.

<sup>274</sup> Anencephalic pregnancies can have many health consequences for the pregnant woman, including polyhydramnios, oligohydramnios, and hypertension, as well as mental health consequences. See Jorge Andalaft Neto, "Anencefalia: Posição da FEBRASGO" [Anencephalia: FEBRASGO's (Brazilian Federation of Association of Gynecology and Obstetrics) Position] [online] <http://www.febrasgo.org.br/anencefalia1.htm> (retrieved February 4, 2005). Polyhydramnios is the excess amount of amniotic fluid during pregnancy, and symptoms may include abdominal discomfort, breathlessness, nausea, and swelling of legs. Oligohydramnios is an abnormally small amount of amniotic fluid during pregnancy. Leikin and Lipsky (eds.), *American Medical Association: Complete Medical Encyclopedia*, p. 917 and 1005.

<sup>275</sup> Powerpoint presentation prepared by Inés Martínez, head, National Program on Sexual Health and Responsible Procreation, National Health and Environment Ministry, "Salud Reproductiva," 2004, slide 6, on file with Human Rights Watch.

<sup>276</sup> World Health Organization, *Abortion: A Tabulation of Available Information*, 3rd edition (Geneva: World Health Organization, 1997).

<sup>277</sup> See World Health Organization, Division of Reproductive Health, "Address Unsafe Abortion" [online] [http://www.who.int/archives/whday/en/pages1998/whd98\\_10.html](http://www.who.int/archives/whday/en/pages1998/whd98_10.html) (retrieved December 22, 2004).

The U.N. Human Rights Committee has requested that states parties to the ICCPR report on measures taken to prevent women from having to undergo life-threatening clandestine abortions.<sup>278</sup> It has noted with concern the relationship between restrictive abortion laws, clandestine abortions, and threats to women's lives, and has recommended the review or amendment of punitive and restrictive abortion laws.<sup>279</sup> In the case of Chile, where abortion has been illegal in all circumstances since 1986, the Committee 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.<sup>280</sup>

In the case of Peru, the Committee 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, life, and freedom from torture and other cruel, inhuman, or degrading treatment or punishment, as 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 [right to freedom from torture and other cruel,

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<sup>278</sup> Human Rights Committee, "General Comment No. 28: Equality of rights between men and women (article 3)," U.N. Doc. CCPR/C/21/Rev.1/Add.10, March 29, 2000, para. 10.

<sup>279</sup> See Human Rights Committee, "Concluding Observations of the Human Rights Committee: Colombia," *U.N. Doc. CCPR/CO/80/COL*, May 26, 2004, para. 13; Human Rights Committee, "Concluding Comment of the Human Rights Committee: Peru," *U.N. Doc. CCPR/CO/70/PER*, November 15, 2000, para. 20; Human Rights Committee, "Concluding comment of the Human Rights Committee: Venezuela," *U.N. Doc. CCPR/CO/71/VEN*, 2001, para. 19; Human Rights Committee, "Concluding comment of the Human Rights Committee: Chile," *U.N. Doc. CCPR/C/79/Add.104*, 1999, para. 15; Human Rights Committee, "Concluding comment of the Human Rights Committee: Costa Rica," *U.N. Doc. CCPR/C/79/Add.107*, 1999, para. 11; and Human Rights Committee, "Concluding comment of the Human Rights Committee: Guatemala," *U.N. Doc. CCPR/CO/72/GTM*, 1999, para. 19.

<sup>280</sup> Human Rights Committee, "Concluding observations of the Human Rights Committee: Chile," *U.N. Doc. CCPR/C/79/Add.104*, March 3, 1999, para. 15.

inhuman, or degrading treatment or punishment] of the Covenant and recommends that the legislation be amended to establish exceptions to the prohibition and punishment of abortion.<sup>281</sup>

In 2004, it noted with regard to Colombia:

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.<sup>282</sup>

Finally, in its 2001 concluding observations on Guatemala—a country with stricter restrictions on abortion than those in Argentina—the Human Rights Committee noted that “the 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.”<sup>2283</sup>

The CEDAW Committee has expressed concern in many concluding observations about high rates of maternal mortality, including due to the unavailability of safe abortion services.<sup>284</sup> In its comments on some countries in Latin America, the committee has

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<sup>281</sup> Human Rights Committee, “Concluding observations of the Human Rights Committee: Peru,” *U.N. Doc. CCPR/CO/70/PER*, November 15, 2000, para. 20.

<sup>282</sup> Human Rights Committee, “Concluding Observations of the Human Rights Committee: Colombia,” *U.N. Doc. CCPR/CO/80/COL*, May 26, 2004, para. 13.

<sup>283</sup> Human Rights Committee, “Concluding comment of the Human Rights Committee: Guatemala,” *U.N. Doc. CCPR/CO/72/GTM*, 2001, para. 19.

<sup>284</sup> See for example, CEDAW Committee, “Report of the Committee on the Elimination of Discrimination Against Women,” *U.N. Doc. A/53/38/Rev.1*, July 1998, part I paras. 73 (Azerbaijan); 337 (Dominican Republic); part II paras. 339 (Peru); CEDAW Committee, “Report of the Committee on the Elimination of Discrimination Against Women,” *U.N. Doc. A/54/38/Rev.1*, July, 1999, part 2, para. 393 (Colombia); para II para. 56 (Belize); Committee, “Report of the Committee on the Elimination of Discrimination Against Women,” *U.N. Doc. A/55/38/Rev.1*, July, 2000, part I, para. 129 (Myanmar); and CEDAW Committee, “Report of the Committee on the Elimination of Discrimination Against Women,” *U.N. Doc. A/56/38/Rev.1*, July, 2001, part I paras. 31 (Burundi) and 273 (Mongolia); and part II paras. 48 (Andorra); 300 (Nicaragua).

explicitly stated that maternal deaths due to unsafe abortions indicate that governments are not respecting women's right to life.<sup>285</sup> The CEDAW Committee has also noted that "states parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control."<sup>286</sup>

The Committee on the Rights of the Child has, in its concluding observations, asked governments to review legislation prohibiting abortions where unsafe abortion contributes to high rates of maternal mortality, and in some cases to undertake studies to understand the negative impact of illegal abortion.<sup>287</sup> The Argentine government made a declarative statement upon signing the Convention on the Rights of the Child, noting: "Concerning article 1 of the Convention, the Argentine Republic declares that the article must be interpreted to the effect that a child means every human being from the moment of conception up to the age of eighteen."<sup>288</sup> Notably, this declarative statement was not reiterated upon ratification of the convention, and no other human rights treaty signed or ratified by Argentina has been subject to similar declarations.

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<sup>285</sup> CEDAW Committee, "Report of the Committee on the Elimination of Discrimination Against Women," U.N. Doc. A/54/38/Rev.1, July, 1999, part 1, para 393 (noting on Colombia: "The Committee notes with great concern that abortion, which is the second cause of maternal deaths in Colombia, is punishable as an illegal act. No exceptions are made to that prohibition, including where the mother's life is in danger or to safeguard her physical or mental health or in cases where the mother has been raped. ... 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."); CEDAW Committee, "Report of the Committee on the Elimination of Discrimination Against Women," U.N. Doc. A/54/38/Rev.1, July, 1999, part 2, para. 56 (noting on Belize; "... The Committee is ... concerned at the restrictive abortion laws in place in the State party. ... In this connection, the Committee notes that the level of maternal mortality due to clandestine abortions may indicate that the Government does not fully implement its obligations to respect the right to life of its women citizens."); and CEDAW Committee, "Report of the Committee on the Elimination of Discrimination Against Women," U.N. Doc. A/53/38/Rev.1, July 1998, part I, para. 337 (noting on the Dominican Republic: "The Committee expresses deep concern with respect to the high rate of maternal mortality which is caused, as is noted in the report, by toxæmia, haemorrhages during childbirth and clandestine abortions; the Committee also notes that toxæmia may be caused by induced abortions. The high rate of maternal mortality, in conjunction with the fact that abortions in the Dominican Republic are absolutely and under all circumstances illegal, cause very great concern to the Committee and draws attention to the implications of the situation for women's enjoyment of the right to life.")

<sup>286</sup> CEDAW Committee, General Recommendation No. 19: Violence Against Women, para. 24(m).

<sup>287</sup> Committee on the Rights of the Child concluding observations on Chad, U.N. Doc. CRC/C/15/Add.107 (1999), para. 30: "The Committee ... is ... concerned at the impact that punitive legislation regarding abortion can have on maternal mortality rates for adolescent girls. The Committee suggests that a comprehensive and multi-disciplinary study be undertaken to understand the scope of adolescent health problems, including the negative impact of early pregnancy and illegal abortion. ...."

<sup>288</sup> Office of the High Commission on Human Rights, "Convention on the Rights of the Child, New York, 20 November 1989, Declarations and Reservations," (Geneva: OHCHR) [online] <http://www.ohchr.org/english/countries/ratification/11.htm#reservations> (retrieved December 6, 2004).

Despite the authoritative interpretations of the treaty monitoring bodies, opponents of safe and legal abortions in Argentina and elsewhere sometimes argue that the “right to life” of a fetus should take precedence over a woman’s human rights, in particular the rights to nondiscrimination and health. Indeed, some opponents cite the supposed fetal “right to life” as an argument against even the use of contraceptives that work after fertilization but before implantation.

Most international human rights instruments are silent concerning the starting point for the right to life, whereas the negotiating history of the treaties, jurisprudence, and most legal analysis suggest that the right to life, as contemplated in those documents, does not apply before the birth of a human being.<sup>289</sup>

The American Convention on Human Rights (ACHR) is the only international human rights instrument that contemplates the application of the right to life from the moment of conception, though, as discussed below, not in an unqualified manner.<sup>290</sup> The American Declaration on the Rights and Duties of Man, the predecessor instrument to the ACHR, does not include this mention of the conceived, guaranteeing instead that “every human being has the right to life, liberty, and the security of his person.”<sup>291</sup>

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

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<sup>289</sup> For an analysis of the international consensus regarding the right to life in the ICCPR, see Cook and Dickens, “Human Rights Dynamics of Abortion Law Reform,” *Human Rights Quarterly*, Vol. 25 (2003), p. 24; and Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Kehl am Rhein: N.P. Engel, 1993), p. 123 (describing how several states proposed protecting a right to life of the fetus during treaty negotiations, and that these proposals were voted down by the majority of the delegates). For an analysis of the regional consensus regarding the right to life in the European Convention for the Protection of Human Rights and Fundamental Freedoms, see *Paton v. United Kingdom* (1980), 3 E.H.R.R. 408 (European Commission on Human Rights) (noting that the right to life in the European Convention does not cover the fetus).

<sup>290</sup> ACHR, article 4. Article 4 reads: “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.”

<sup>291</sup> American Declaration, article I.

an abortion in 1973—the Baby Boy case. 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.<sup>292</sup> 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.<sup>293</sup>

In the case of the declaration, the commission explained:

[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.<sup>294</sup>

With regard to the convention, the commission found that the wording of the right to life in article 4 was very deliberate and that the convention's founders 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’,”<sup>295</sup> allowing for legal abortion under this article. The commission went on to correct the petitioners in their selective reading of the American Convention on Human Rights:

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<sup>292</sup> 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.

<sup>293</sup> 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.

<sup>294</sup> Inter-American Commission on Human Rights, *White and Potter (“Baby Boy Case”)*, Resolution No. 23/81, Case No. 2141, U.S., March 6, 1981, OAS/Ser.L/V/II.54, Doc. 9 Rev. 1, October 16, 1981, para. 14 (a).

<sup>295</sup> *Ibid.*, para. 14(c).

[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.<sup>296</sup>

Opponents of abortion rights in Argentina often engage in the same sort of selective reading of article 4 of the ACHR when they argue that the constitution protects the right to life of a fetus, because the ACHR is incorporated into the constitution. This argument ignores the convention's drafters' intention to allow domestic legislation permitting abortions.<sup>297</sup> It also ignores the host of other internationally recognized human rights incorporated in the constitution that have been interpreted by authoritative bodies to protect women's right to decide in matters regarding abortion.

### ***Right to Liberty***

In Argentina, women can face imprisonment for obtaining abortion, a situation which jeopardizes women's right to liberty. The right to liberty is protected by article 9(1) of the ICCPR which provides that "[n]o one shall be subjected to arbitrary arrest or detention" and that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."<sup>298</sup>

The prohibition of abortion constitutes an obstacle to women's full exercise of their human rights to nondiscrimination, health, and life. The enforcement of the law's criminal sanctions constitutes an additional assault on women's rights, 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 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

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<sup>296</sup> Ibid., para. 30.

<sup>297</sup> Conferencia Especializada Interamericana sobre Derechos Humanos, OEA/Ser.K/XVI/1.2, at 159, cited in Baby Boy Case, Inter-Am. C.H.R., 25 OEA/ser.L/V./II.54, doc.9 rev.1 (1981), para. 14(c).

<sup>298</sup> ICCPR, article 9(1).

undergoing illegal abortions, and have urged governments to review their laws to suspend penalties and imprisonment for abortion.<sup>299</sup>

### ***Rights to Privacy and to Decide on the Number and Spacing of Children***

International human rights law protects the right to noninterference with one's privacy and family,<sup>300</sup> as well as the right of women to decide on the number and spacing of their children without discrimination.<sup>301</sup> These rights can only be fully implemented where women have the right to make decisions about when or if to carry a pregnancy to term without interference from the state. It is also essential for the fulfillment of these rights that women have access to all safe, effective means of controlling their family size, including abortion as part of a full range of reproductive health care services, and that governments make abortion services legal, safe, and accessible to all women. In some circumstances, abortion will be the only way for a woman to exercise this right, particularly if she became pregnant through rape or contraceptive failure or if family planning services are unavailable where she lives.

The CEDAW Committee's General Recommendation No. 21 on equality noted that the right to decide on the number and spacing of one's children is integrally related to women's exercise of other human rights:

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,

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<sup>299</sup> See CEDAW Committee, "Report of the Committee on the Elimination of Discrimination against Women," A/50/38, July 1995, para. 446 (Peru); CEDAW Committee, "Report of the Committee on the Elimination of Discrimination against Women," A/54/38, July 1999, para. 147 (Nepal); CEDAW Committee, "Report of the Committee on the Elimination of Discrimination against Women CEDAW/C/1999/I/L.1/Add.8, 1999, para 57 (Colombia); CEDAW Committee, "Report of the Committee on the Elimination of Discrimination against Women," A/52/38/Rev.1, July 1996, para 127 (Namibia); and CEDAW Committee, "Report of the Committee on the Elimination of Discrimination against Women," A/51/38, 1996, para. 131 (Paraguay).

<sup>300</sup> ICCPR, article 17.

<sup>301</sup> CEDAW, article 16(1)(e). This article reads: "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."

women are entitled to decide on the number and spacing of their children.<sup>302</sup>

The U.N. Human Rights Committee has declared that women's right to equal enjoyment of their privacy, as well as other basic human rights, may be compromised where states impose a legal duty on doctors and other health personnel to report cases of women who may have undergone abortions:

...States may fail to respect women's privacy ... where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion. In these instances, other rights in the Covenant, such as those of articles 6 and 7 [rights to life and to freedom from torture], might also be at stake.<sup>303</sup>

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 that convention.<sup>304</sup>

### ***Right to Freedom of Conscience and Religion***

The right to freedom of thought, conscience, and religion is protected in the ICCPR and the ACHR.<sup>305</sup> 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 conscience regarding doctrines of faith one does not hold. In this sense, women cannot be compelled to comply with laws based solely or principally on religious doctrines, which many abortion restrictions are.

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<sup>302</sup> CEDAW Committee, General Recommendation 21, Equality in Marriage and Family Relations (1992), para. 21.

<sup>303</sup> Human Rights Committee, "General Comment No. 28: Equality of rights between men and women (article 3)," *U.N. Doc. CCPR/C/21/Rev.1/Add.10*, March 29, 2000, para. 20.

<sup>304</sup> Committee against Torture, "Conclusion and recommendations of the Committee against Torture: Chile," *U.N. Doc. CAT/C/CR/32/5*, June 14, 2004, para. 6(j): "The Committee expresses concern about the following: ... (j) Reports that life-saving medical care for women suffering complications after illegal abortions is administered only on condition that they provide information on those performing such abortions. Such confessions are reportedly used subsequently in legal proceedings against the women and against third parties, in contravention of the provisions of the Convention."

<sup>305</sup> ICCPR, article 18; and ACHR, article 12.

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. The committee has also expressly recommended that public hospitals provide abortion services.<sup>306</sup>

## **VIII. Conclusion**

Women in Argentina are prevented from making independent decisions about their health and lives in the area of reproduction. Women face multiple barriers in their access to contraception, including lack of information, inaccurate and incomplete information, domestic and sexual violence, and economic restraints that the government is not adequately addressing. One of the safest and most effective forms of contraception—tubal ligation—is subject to discriminatory restrictions, resulting in its arbitrary denial. As a result of these restrictions, many women are forced to choose between an unwanted pregnancy and birth that might further impoverish their families or put their health at risk, or an unsafe abortion.

In Argentina, unsafe abortion has constituted the leading cause of maternal mortality for decades. Abortion is illegal in all circumstances, although the law waives the punishment in cases where the pregnant woman's life or health is in danger, or where the pregnancy results from the rape of a mentally disabled woman. In reality, access to a legally permitted and therefore safer abortion is almost nonexistent, and many women with unwanted pregnancies or health problems seek abortions through unsafe clinics or induce their own abortions by methods that gravely jeopardize their health and lives.

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<sup>306</sup> See CEDAW Committee, "Report of the Committee on the Elimination of Discrimination against Women," U.N. Doc. A/53/38 (1998), part I, para. 109 (noting with regard to Croatia: "In the area of health, the Committee is ... concerned about information regarding the refusal, by some hospitals, to provide abortions on the basis of conscientious objection of doctors. The Committee considers this to be an infringement of women's reproductive rights."); and CEDAW Committee, "Report of the Committee on the Elimination of Discrimination against Women," U.N. Doc. A/52/38/Rev.1 (1997), part I, paras. 353 and 360 (noting with regard to Italy: "The Committee expressed particular concern with regard to the limited availability of abortion services for women in southern Italy, as a result of the high incidence of conscientious objection among doctors and hospital personnel" and "The Committee strongly recommended that the Government take steps to secure the enjoyment by women, in particular, southern Italian women, of their reproductive rights by, inter alia, guaranteeing them access to safe abortion services in public hospitals.")

Doctors feel obligated to report women with induced abortions to the authorities, creating an intimidating situation that deters women from seeking the care they need. Despite international obligations to provide humane post-abortion care in public hospitals, women receive inhumane and sometimes grossly inadequate treatment when they arrive at public hospitals with an incomplete abortion or other complications due to an unsafe abortion. While a guide on post-abortion care announced by the national health ministry in May 2005, if fully implemented, could address most of these issues, it does not carry the force of law and may not overcome persistent fear and resistance among service providers in this area.

If Argentina is to fulfill its international obligations on women's human rights, reform is urgently needed to ensure women's access to safe and legal abortion and to guarantee access to contraceptives and related information. For all women, it is a question of equality. For some, it is a question of life or death.

## **IX. Acknowledgments**

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