



Amicus Brief: Decriminalization on Abortion in South Korea

Honorable Justices of the Constitutional Court of Korea

I. Introduction

Human Rights Watch has the honor of submitting this amicus brief in connection with case 2017Hun-Ba127, which is before the Constitutional Court of Korea (Constitutional Court). This case involves a review of the constitutionality of the Republic of Korea (South Korea)'s **criminal law on abortion**.

Under articles 269 and 270 of the Criminal Act, abortion is a crime, and any woman who undergoes an abortion risks up to one year of imprisonment or fines up to 2 million won (US\$1850). Healthcare workers who provide abortions can face up to two years in prison, or more under certain circumstances.¹

Article 14 of the Mother and Child Health Act provides for limited exceptions to the criminalization of abortion. Those exceptions allow women to procure abortion without fear of punishment in very limited cases, such as when the pregnancy results from rape or incest, if continuation of the pregnancy is likely to jeopardize **the pregnant woman's** health, including her life, or when the pregnant woman or her spouse has a hereditary disorder or communicable disease designated by a government decree.² Married women require **their spouse's permission to obtain an abortion**.³

The Constitutional Court is now reviewing the laws relating to abortion. As the Court reviews case 2017Hun-Ba127, Human Rights Watch urges it to take international human rights law, and authoritative interpretations of how it applies to abortion, into account.

¹ Art. 269 and 270, Criminal Act, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG (accessed April 27, 2018).

² Art. 14, Mother and Child Health Act, https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=33648&type=part&key=38 (accessed April 27, 2018).

³ Art. 15, Presidential Decree No. 22075.

South Korea's laws and jurisprudence should comply with its international human rights obligations, including by decriminalizing abortion and ensuring safe, legal access.

II. International human rights jurisprudence related to abortion

Access to safe abortion is a human rights imperative. Authoritative interpretations of international human rights law establish that denying women and girls access to abortion is a form of discrimination and jeopardizes a range of human rights. UN human rights treaty bodies regularly call for governments to decriminalize abortion in all cases, to legalize abortion in certain circumstances at a minimum, and to ensure access to safe, legal abortion.

Drawing on recent jurisprudence of UN human rights treaty bodies, this amicus brief provides an overview of key international human rights that are at risk when abortion is illegal or inaccessible. It focuses on the rights to life, health, freedom from cruel, inhuman and degrading treatment, nondiscrimination and equality, privacy, information, and the right to decide the number and spacing of children.

South Korea is obligated to respect, protect, and fulfil the rights guaranteed under the international human rights treaties to which it is a party, including but not limited to the International Covenant on Civil and Political Rights (ICCPR),⁴ the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁶ the Convention on the Elimination of Discrimination Against Women (CEDAW)⁷ and the Convention on the Rights of the Child (CRC)⁸. **Fulfilment of South Korea's obligations** under these and other relevant treaties includes ensuring that abortion is safe, legal, and accessible. UN bodies have specifically criticized South Korea's **abortion** law and have called for reform.

⁴ Republic of Korea became a party on April 10, 1990.

⁵ Republic of Korea became a party on April 10, 1990.

⁶ Republic of Korea became a party on January 9, 1995.

⁷ Republic of Korea became a party on December 27, 1984.

⁸ Republic of Korea became a party on November 20, 1991.

Right to life

Denial of access to safe, legal abortion puts the lives of women and girls at risk. A 2017 global report on abortion found that 25 million unsafe abortions were performed every year between 2010 – 2014, and that many women and girls die of complications. It found that between 8 to 11 percent of maternal deaths around the world relate to abortion, resulting in 22,800 – 31,000 preventable deaths each year.⁹ The World Health Organization has noted that the removal of restrictions on abortion results in reduction of maternal mortality.¹⁰

The right to life is guaranteed by international human rights treaties and customary international law. For example, article 6(1) of the ICCPR provides that: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹¹ Similarly, article 6 of the CRC states that “every child has the inherent right to life.”¹²

International human rights bodies and experts have repeatedly stated that restrictive abortion laws contribute to maternal deaths from unsafe abortions and jeopardize the right to life. For instance, the UN Human Rights Committee (HRC), which monitors states’ compliance with the ICCPR, has explained that the right to life should not be understood in a restrictive manner.¹³ It has instructed states that when they report to the Committee, they should provide information on measures to ensure that women do not have to undergo life-threatening, clandestine abortions.¹⁴ The HRC is updating its general comment on the right to life. The current draft emphasizes that any regulation of abortion must not violate the right to life, or any human right under the ICCPR, of a pregnant woman or girl. It calls on states to eliminate barriers to safe and legal abortion, and to ensure that any restrictions do not subject pregnant women and girls to physical or mental pain or

⁹ Guttmacher Institute, “Abortion Worldwide 2017: Uneven Progress and Unequal Access,” 2018, pp.10 and 33.

¹⁰ World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems*, (Geneva: WHO, 2012), noting, “The accumulated evidence shows that the removal of restrictions on abortion results in reduction of maternal mortality due to unsafe abortion and, thus, a reduction in the overall level of maternal mortality.”

¹¹ International Covenant on Civil and Political Rights (ICCPR), art. 6(1).

¹² Convention on the Rights of the Child (CRC), art. 6.

¹³ UN Human Rights Committee (HRC), General Comment No. 6 on the right to life, UN Doc HRI/GEN/1/Rev.9 (2008), para. 5.

¹⁴ HRC General Comment No. 28 on equality of rights between men and women, UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 10.

suffering. It affirmatively calls on governments to provide safe, legal, and effective access to abortion.¹⁵

In country-specific concluding observations related to states' compliance with the ICCPR, the HRC has noted the relationship between restrictive abortion laws and threats to **women's and girls' lives**. It has frequently expressed concern about criminalization of abortion, and has called for expanded exceptions.¹⁶ **The Committee's standard language in many recent concluding observations is as follows: "The State party should amend its legislation with a view to ensuring effective access to safe, legal abortion when the life or health of a pregnant woman or girl is endangered and when carrying a pregnancy to term would cause the woman or girl substantial pain or suffering, most notably when the pregnancy is the result of rape or incest or when it is not viable."**¹⁷

The HRC has also called on states to guarantee unimpeded and timely access to legal abortion services, **saying that states should "ensure the availability of medical facilities and guaranteed access to those facilities for legal abortion."**¹⁸ It has called for measures such as establishing referral systems for women seeking abortion services, publishing public health guidelines on abortion, facilitating access to information on legal abortions, lifting requirements for prior court authorization for abortions, removing requirements for multiple medical authorizations, combatting the stigma related to abortion, and considering incorporation of abortion into national health insurance schemes.¹⁹

The UN CEDAW Committee, which monitors state compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), has also repeatedly

¹⁵ Draft HRC General Comment on the right to life, para. 9. In July 2017, during its 120th session, the Human Rights Committee finalized its first reading of the draft General Comment, the version of which can be found at http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf. The draft has been updated during several sessions in the intervening period and Human Rights Watch has the version from March 2018 on file.

¹⁶ See, for example, HRC concluding observations on El Salvador, UN Doc. CCPR/C/SLV/CO/7 (2018); Guatemala, UN Doc. CCPR/C/GTM/CO/4 (2018); Lebanon, UN Doc. CCPR/C/LBN/CO/3 (2018); Cameroon, UN Doc. CCPR/C/CMR/CO/5 (2017); Democratic Republic of the Congo, UN Doc. CCPR/C/COD/CO/4 (2017); Dominican Republic, UN Doc. CCPR/C/DOM/CO/6 (2017); Jordan, UN Doc. CCPR/C/JOR/CO/5 (2017); Mauritius, UN Doc. CCPR/C/MUS/CO/5 (2017); Honduras, UN Doc. CCPR/C/HND/CO/2 (2017); Madagascar, UN Doc. CCPR/C/MDG/CO/4 (2017); Pakistan, UN Doc. CCPR/C/PAK/CO/1 (2017); Bangladesh, UN Doc. CCPR/C/BGD/CO/1 (2017); Morocco, UN Doc. CCPR/C/MAR/CO/6 (2016); and Ecuador, UN Doc. CCPR/C/ECU/CO/6 (2016).

¹⁷ Many of the concluding observations listed in footnote 8 include this language.

¹⁸ See, for example, HRC concluding observations on Jordan, UN Doc. CCPR/C/JOR/CO/5 (2017).

¹⁹ See, for example, HRC concluding observations on Lebanon, UN Doc. CCPR/C/LBN/CO/3 (2018); Cameroon, UN Doc. CCPR/C/CMR/CO/5 (2017); Democratic Republic of the Congo, UN Doc. CCPR/C/COD/CO/4 (2017); Italy, UN Doc. CCPR/C/ITA/CO/6 (2017); Poland, UN Doc. CCPR/C/POL/CO/7 (2016); Colombia, UN Doc. CCPR/C/COL/CO/7 (2016); Burkina Faso, UN Doc. CCPR/C/BFA/CO/1 (2016); and Ghana, UN Doc. CCPR/C/GHA/CO/1 (2016).

expressed concern about the links between maternal mortality and unsafe abortion, and has called for decriminalization of abortion in all cases and legalization of abortion, at a minimum in specific circumstances. In a 2014 statement, the CEDAW Committee said:

Unsafe abortion is a leading cause of maternal mortality and morbidity. As such, States parties should legalize abortion at least in cases of rape, incest, threats to the life and/or health of the mother, or severe fetal impairment, as well as provide women with access to quality post-abortion care, especially in cases of complications resulting from unsafe abortions. States parties should also remove punitive measures for women who undergo abortion.²⁰

Echoing this statement, many of the CEDAW Committee's concluding observations call for states to “legalize abortion not only in cases in which the life of the pregnant woman is threatened, but also in cases of threats to her health, pregnancies resulting from rape or incest, and cases of severe fetal impairment, and to decriminalize abortion in all cases.”²¹

This was the case in the CEDAW Committee's 2018 review of South Korea. The Committee commented on the risk of maternal mortality and morbidity in the country due to unsafe abortions. It recommended that the country legalize abortion under some circumstances and decriminalize it in all cases. It said:

The Committee expresses its concern that, even though abortion is legal under certain circumstances, including in cases of rape and incest, under the Mother and Child Health Act, it remains a punishable offense under the Criminal Code. In addition, the Committee is concerned that in September 2016, the Ministry of

²⁰ CEDAW Committee, “Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review,” 57th Session (2014),

<http://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pdf>.

²¹ See, for example, CEDAW Committee concluding observations on Chile, UN Doc. CEDAW/C/CHL/CO/7 (2018); Fiji, UN Doc. CEDAW/C/FJI/CO/5 (2018); Marshall Islands, UN Doc. CEDAW/C/MHL/CO/1-3 (2018); Republic of Korea, UN Doc. CEDAW/C/KOR/CO/8 (2018); Saudi Arabia, UN Doc. CEDAW/C/SAU/CO/3-4 (2018); Suriname, UN Doc. CEDAW/C/SUR/CO/4-6 (2018); Burkina Faso, UN Doc. CEDAW/C/BFA/CO/7 (2017); Guatemala, UN Doc. CEDAW/C/GTM/CO/8-9 (2017); Kenya, UN Doc. CEDAW/C/KEN/CO/8 (2017); Kuwait, UN Doc. CEDAW/C/KWT/CO/5 (2017); Monaco, UN Doc. CEDAW/C/MCO/CO/1-3 (2017); Nauru, UN Doc. CEDAW/C/NRU/CO/1-2 (2017); Oman, UN Doc. CEDAW/C/OMN/CO/2-3 (2017); Paraguay, UN Doc. CEDAW/C/PRY/CO/7 (2017); Costa Rica, UN Doc. CEDAW/C/CRI/CO/7 (2017); Niger, UN Doc. CEDAW/C/NER/CO/3-4 (2017); Nigeria, UN Doc. CEDAW/C/NGA/CO/7-8 (2017); El Salvador, UN Doc. CEDAW/C/SLV/CO/8-9 (2017); Ireland, UN Doc. CEDAW/C/IRL/CO/6-7 (2017); Jordan UN Doc. CEDAW/C/JOR/CO/6 (2017); Micronesia, UN Doc. CEDAW/C/FSM/CO/1-3 (2017); Rwanda, UN Doc. CEDAW/C/RWA/CO/7-9 (2017); Sri Lanka, UN Doc. CEDAW/C/LKA/CO/8 (2017); Argentina, UN Doc. CEDAW/C/ARG/CO/7 (2016); Bangladesh, UN Doc. CEDAW/C/BGD/CO/8 (2016); Bhutan, UN Doc. CEDAW/C/BTN/CO/8-9 (2016); Burundi, UN Doc. CEDAW/C/BDI/CO/5-6 (2016); Haiti, UN Doc. CEDAW/C/HTI/CO/8-9 (2016); Tanzania, UN Doc. CEDAW/C/TZA/CO/7-8 (2016); and Honduras, UN Doc. CEDAW/C/HND/CO/7-8 (2016).

Health and Welfare reportedly defined abortion in violation of the Mother and Child Act as an unethical medical practice, subjecting health care professionals to criminal punishment and medical license suspension. It, however, welcomes that this policy measure was later withdrawn. In that regard, the Committee takes note of the information provided by the State party that the constitutionality of the **criminalization of abortion is currently before the State party's Constitutional Court.**

The Committee reiterates its previous recommendation (CEDAW/C/KOR/CO/7, para. 35) and, in view of the fact that unsafe abortion is a leading cause of maternal mortality and morbidity, calls on the State party to legalize abortion in cases of rape, incest, threats to the life and/or health of the pregnant woman, or severe foetal impairment, and to decriminalize it in all other cases, remove punitive measures for women who undergo abortion, and provide women with access to quality post-abortion care, especially in cases of complications resulting from unsafe abortions.²²

The CEDAW Committee also regularly calls for measures to ensure access to safe abortion. For example, it calls for training of medical personnel; ensuring that conscientious objection by health-care personnel does not pose an obstacle for terminating a pregnancy; eliminating procedural obstacles that hinder access to legal abortion, including requirements for committee approval or judicial recognition of criminal acts in rape cases; adopting protocols on provision of legal abortion; raising awareness among women and providers about access to legal abortion; protecting medical confidentiality; and conducting campaigns to prevent abortion stigma.²³

Similarly, the UN Committee on the Rights of the Child, which monitors the implementation of the CRC, has noted **that “the risk of death and disease during the adolescent years is real, including from preventable causes such as ... unsafe abortions”** and urged states to **“decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislation with a view to guaranteeing the**

²² CEDAW Committee concluding observation on the Republic of Korea, UN Doc. CEDAW/C/KOR/CO/8 (2018), paras. 42 and 43.

²³ See, for example, CEDAW Committee concluding observations on Chile, UN Doc. CEDAW/C/CHL/CO/7 (2018); Burkina Faso, UN Doc. CEDAW/C/BFA/CO/7 (2017); Israel, UN Doc. CEDAW/C/ISR/CO/6 (2017); Kenya, UN Doc. CEDAW/C/KEN/CO/8 (2017); Monaco, UN Doc. CEDAW/C/MCO/CO/1-3 (2017); Nauru, UN Doc. CEDAW/C/NRU/CO/1-2 (2017); Paraguay, UN Doc. CEDAW/C/PRY/CO/7 (2017); Costa Rica, UN Doc. CEDAW/C/CRI/CO/7 (2017); Italy, UN Doc. CEDAW/C/ITA/CO/7 (2017); El Salvador, UN Doc. CEDAW/C/SLV/CO/8-9 (2017); Ireland, UN Doc. CEDAW/C/IRL/CO/6-7 (2017); Sri Lanka, UN Doc. CEDAW/C/LKA/CO/8 (2017); and Argentina, UN Doc. CEDAW/C/ARG/CO/7 (2016).

best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions.”²⁴ The Committee has expressed concern about the elevated risks of maternal mortality among adolescent mothers,²⁵ and has explicitly called for decriminalization of abortion “in all circumstances” in many concluding observations.²⁶

Moreover, the UN Committee on Economic, Social and Cultural Rights, which monitors compliance with the ICESCR, has called on states to amend restrictive abortion laws and to increase access to legal abortion in order to decrease maternal deaths.²⁷ The Committee has observed that denial of abortion often leads to maternal mortality or morbidity, which in turn constitutes a violation of the right to life or security.²⁸ It has urged states to remove penalties for women who seek abortion, and to make it legal in certain circumstances.²⁹ It has expressed deep concern about prohibitions on abortion with no exceptions.³⁰

The Committee has also said that states should ensure that abortion services can be accessed in practice, for example by adopting protocols on legal abortion, guaranteeing that conscientious objection laws are not an obstacle to abortion, and ensuring that health insurance covers abortion.³¹

²⁴ Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence, UN Doc. CRC/C/GC/20 (2016), paras. 13 and 60.

²⁵ See, for example, concluding observations of the Committee on the Rights of the Child on Guatemala, UN Doc. CRC/C/GTM/CO/5-6 (2018); Marshall Islands, UN Doc. CRC/C/MHL/CO/3-4 (2018); and Palau, UN Doc. CRC/C/PLW/CO/2 (2018).

²⁶ See, for example, concluding observations of the Committee on the Rights of the Child on Guatemala, UN Doc. CRC/C/GTM/CO/5-6 (2018); Marshall Islands, UN Doc. CRC/C/MHL/CO/3-4 (2018); Palau, UN Doc. CRC/C/PLW/CO/2 (2018); Panama, UN Doc. CRC/C/PAN/CO/5-6 (2018); Solomon Islands, UN Doc. CRC/C/SLB/CO/2-3 (2018); Sri Lanka, UN Doc. CRC/C/LKA/CO/5-6 (2018); Malawi, UN Doc. CRC/C/MWI/CO/3-5 (2017); Saudi Arabia, UN Doc. CRC/C/SAU/CO/3-4 (2016); Sierra Leone, UN Doc. CRC/C/SLE/CO/3-5 (2016); Haiti, UN Doc. CRC/C/HTI/CO/2-3 (2016); Peru, UN Doc. CRC/C/PER/CO/4-5 (2016); Kenya, UN Doc. CRC/C/KEN/CO/3-5 (2016); and Ireland, UN Doc. CRC/C/IRL/CO/3-4 (2016).

²⁷ See, for example, concluding observations of the Committee on Economic, Social and Cultural Rights (CESCR) on the Republic of Korea, UN Doc. E/C.12/KOR/CO/4 (2017); The Philippines, UN Doc. E/C.12/PHL/CO/5-6 (2016); Kenya, UN Doc. E/C.12/KEN/CO/2-5 (2016); and Pakistan, UN Doc. E/C.12/PAK/CO/1 (2017).

²⁸ CESCR, General Comment No. 22 on the right to sexual and reproductive health (2016), para. 10.

²⁹ See, for example, CESCR concluding observations on Honduras, UN Doc. E/C.12/HND/CO/2 (2016); Poland, UN Doc. E/C.12/POL/CO/6 (2016); the Philippines, UN Doc. E/C.12/PHL/CO/5-6 (2016); Costa Rica, UN Doc. E/C.12/CRI/CO/5 (2016); Macedonia UN Doc. E/C.12/MKD/CO/2-4 (2016); Kenya, UN Doc. E/C.12/KEN/CO/2-5 (2016); and the United Kingdom of Great Britain and Northern Ireland, UN Doc. E/C.12/GBR/CO/5 (2009).

³⁰ See, for example, CESCR concluding observations on the Philippines, UN Doc. E/C.12/PHL/CO/5-6 (2016); Honduras, UN Doc. E/C.12/HND/CO/2 (2016); and El Salvador, UN Doc. E/C.12/SLV/CO/3-5 (2014).

³¹ See, for example, CESCR concluding observations on Spain, UN Doc. E/C.12/ESP/CO/6 (2018); Mexico, UN Doc. E/C.12/MEX/CO/5-6 (2017); Moldova, UN Doc. E/C.12/MDA/CO/3 (2017); Uruguay, UN Doc. E/C.12/URY/CO/5 (2017); Poland, UN Doc. E/C.12/POL/CO/6 (2016); and Costa Rica, UN Doc. E/C.12/CRI/CO/5 (2016).

Right to health

The right to health is protected in numerous human rights treaties. For example, the ICESCR guarantees everyone the right to the highest attainable standard of physical and mental health, and the CRC guarantees this right for children.³² CEDAW provides, “[S]tates Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, **access to health care services, including those related to family planning.**”³³

Unsafe abortions are a grave threat to the health of women and girls. According to the 2017 report by the World Health Organization and the Guttmacher Institute, 25 million unsafe abortions occurred every year between 2010 and 2014.³⁴ Complications from unsafe abortions can include incomplete abortion, hemorrhage, vaginal, cervical and uterine injury, and infections. Unavailability of safe abortion also poses risks to mental health, including severe anguish and risk of suicide.³⁵

International bodies have repeatedly stated that criminalization of or unreasonable restrictions on access to abortion violate the right to health. The Committee on Economic, Social and Cultural Rights has **stated that “States must reform laws that impede the exercise of the right to sexual and reproductive health. Examples include laws criminalizing abortion....”**³⁶ In country-specific concluding observations, the Committee has recommended that states **advance women’s health by providing for exceptions to criminalization of abortion and removing barriers to access.**³⁷ In its 2017 review of South Korea, the Committee said that it was **“concerned about the criminalization of abortion”** and urged the country to:

³² ICESCR, art. 12(1) and CRC art. 24.

³³ CEDAW, art. 12.

³⁴ World Health Organization and Guttmacher Institute, “Global, regional, and subregional classification of abortions by safety, 2010–14: estimates from a Bayesian hierarchical model,” *The Lancet*, vol. 390, pp. 2372–2381, November 2017.

³⁵ Report of the UN Special Rapporteur on the Right to Health, UN Doc. A/66/254, August 3, 2011, para. 36.

³⁶ CESCR, General Comment No. 22 on the right to sexual and reproductive health (2016), para. 40.

³⁷ See, for example, concluding observations of the CESCR on the Republic of Korea, UN Doc. E/C.12/KOR/CO/4 (2017); Pakistan, UN Doc. E/C.12/PAK/CO/1 (2017); Honduras, UN Doc. E/C.12/HND/CO/2 (2016); Poland, UN Doc. E/C.12/POL/CO/6 (2016); the Philippines, UN Doc. E/C.12/PHL/CO/5-6 (2016); Costa Rica, UN Doc. E/C.12/CRI/CO/5 (2016); Kenya, UN Doc. E/C.12/KEN/CO/2-5 (2016); and Macedonia, UN Doc. E/C.12/MKD/CO/2-4 (2016).

[D]ecriminalize women undergoing abortion so as to guarantee women’s right to sexual and reproductive health and the protection of their dignity, and ensure that sexual and reproductive health services are made available and accessible to all.³⁸

The CEDAW Committee has affirmed states’ obligation to “take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care.”³⁹ It explained that “barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”⁴⁰ As noted above, the CEDAW Committee consistently recommends that states amend their laws to decriminalize abortion in all cases, and legalize abortion at least in cases of rape, incest, risk to the life or health of the women, and severe fetal impairment.⁴¹

The Committee on the Rights of the Child has warned of the danger of unsafe abortion to **adolescent girls’ health**. It has often urged states to decriminalize abortion in all circumstances, and to ensure that adolescent girls have access to safe abortions.⁴²

This was the case in the Committee’s review of South Korea in 2012. It expressed concern that “the legislative prohibition of abortions, except in narrowly defined situations of exception, does not adequately take into account the best interests of pregnant adolescents and can give rise to situations which exacerbate the difficulties faced by them, including exposing them to the risks of unsafe illegal abortions and/or forced

³⁸ CESCR, concluding observations on the Republic of Korea, UN Doc. E/C.12/KOR/CO/4 (2017), paras 59 and 60.

³⁹ CEDAW Committee, General Recommendation No. 24 on women and health, UN Doc. A/54/38/Rev.1 (1999), para. 14.

⁴⁰ Ibid.

⁴¹ See, for example, CEDAW Committee concluding observations on Chile, UN Doc. CEDAW/C/CHL/CO/7 (2018); Fiji, UN Doc. CEDAW/C/FJI/CO/5 (2018); Marshall Islands, UN Doc. CEDAW/C/MHL/CO/1-3 (2018); Republic of Korea, UN Doc. CEDAW/C/KOR/CO/8 (2018); Saudi Arabia, UN Doc. CEDAW/C/SAU/CO/3-4 (2018); Suriname, UN Doc. CEDAW/C/SUR/CO/4-6 (2018); Burkina Faso, UN Doc. CEDAW/C/BFA/CO/7 (2017); Guatemala, UN Doc. CEDAW/C/GTM/CO/8-9 (2017); Kenya, UN Doc. CEDAW/C/KEN/CO/8 (2017); Kuwait, UN Doc. CEDAW/C/KWT/CO/5 (2017); Monaco, UN Doc. CEDAW/C/MCO/CO/1-3 (2017); Nauru, UN Doc. CEDAW/C/NRU/CO/1-2 (2017); Oman, UN Doc. CEDAW/C/OMN/CO/2-3 (2017); Paraguay, UN Doc. CEDAW/C/PRY/CO/7 (2017); Costa Rica, UN Doc. CEDAW/C/CRI/CO/7 (2017); Niger, UN Doc. CEDAW/C/NER/CO/3-4 (2017); Nigeria, UN Doc. CEDAW/C/NGA/CO/7-8 (2017); El Salvador, UN Doc. CEDAW/C/SLV/CO/8-9 (2017); Ireland, UN Doc. CEDAW/C/IRL/CO/6-7 (2017); Jordan UN Doc. CEDAW/C/JOR/CO/6 (2017); Micronesia, UN Doc. CEDAW/C/FSM/CO/1-3 (2017); Rwanda, UN Doc. CEDAW/C/RWA/CO/7-9 (2017); Sri Lanka, UN Doc. CEDAW/C/LKA/CO/8 (2017); Argentina, UN Doc. CEDAW/C/ARG/CO/7 (2016); Bangladesh, UN Doc. CEDAW/C/BGD/CO/8 (2016); Bhutan, UN Doc. CEDAW/C/BTN/CO/8-9 (2016); Burundi, UN Doc. CEDAW/C/BDI/CO/5-6 (2016); and Honduras, UN Doc. CEDAW/C/HND/CO/7-8 (2016).

⁴² See discussions above under “the right to life.”

discontinuation of their studies and/or forced release of their children for adoption.” It recommended that South Korea:

[R]eview its legislation on abortion with a view to ensuring that it is in full compliance with the principle of the best interests of the child, including by ensuring that single adolescent mothers are allowed access to safe abortions and adequately protected from the risks of illegal abortions and the forced adoption of their children.⁴³

The Special Rapporteur on the right to health has also recommended that states decriminalize abortion.⁴⁴ He has stated that “criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women’s right to health and must be eliminated,” and that the criminalization of abortion has a “severe impact on mental health.”⁴⁵

Right to be free from torture and other cruel, inhuman or degrading treatment or punishment

The right to be free from cruel, inhuman or degrading treatment or punishment is protected by human rights treaties, including the ICCPR and CAT, and by customary international law.

Criminalization and inaccessibility of abortion can amount to cruel, inhuman, or degrading treatment and violate the right to freedom from torture and other cruel, inhuman, or degrading treatment or punishment. The UN Committee against Torture has said that criminalization of abortion with few exceptions may result in women experiencing severe pain and suffering if they are compelled to continue pregnancy. It has expressed concern at the severe physical and mental anguish and distress experienced by women and girls due to abortion restrictions.

The Committee has called on governments to “allow for legal exception to the prohibition of abortion in specific circumstances in which the continuation of pregnancy is likely to result in severe pain and suffering, such as when the pregnancy is the result of rape or

⁴³ CRC, concluding observations on the Republic of Korea, UN Doc. CRC/C/KOR/CO/3-4 (2012), paras. 10 and 11.

⁴⁴ Report of the UN Special Rapporteur on the Right to Health, UN Doc. A/66/254, para. 65(h).

⁴⁵ *Ibid.*, para. 36.

incest or in cases of fatal fetal impairment.”⁴⁶ It has also criticized restrictions on access to legal abortions in cases in which laws are unclear, abortions require third party authorizations, or physicians or clinics refuse to perform abortions on the basis of conscientious objection.⁴⁷

Similarly, the Human Rights Committee has ruled in individual cases against Ireland, Peru, and Argentina that the governments violated the right to freedom from torture or other cruel, inhuman or degrading treatment by failing to ensure access to abortion services in these cases.⁴⁸ It pointed out that this right relates not only to physical pain, but also to mental suffering.⁴⁹

The CEDAW Committee has also described criminalization of abortion and denial or delay of access to legal abortion as “forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.”⁵⁰

Similarly, the Committee on Economic, Social and Cultural Rights has also said that denial of abortion “in certain circumstances can amount to torture or cruel, inhuman or degrading treatment.”⁵¹

The UN special rapporteur on torture has said, “Highly restrictive abortion laws that prohibit abortions even in cases of incest, rape or fetal impairment or to safeguard the life or health of the woman violate women’s right to be free from torture and ill-treatment.”⁵² He continued:

The denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill-treatment. States have an

⁴⁶ See, for example, concluding observations of the Committee against Torture on Timor-Leste, UN Doc. CAT/C/TLS/CO/1 (2017); Ireland, UN Doc. CAT/C/IRL/CO/2 (2017); and Ecuador, UN Doc. CAT/C/EQU/CO/7 (2016).

⁴⁷ See, for example, concluding observations of the Committee against Torture on Macedonia, UN Doc. CAT/C/MKD/CO/3 (2015); Peru, UN Doc. CAT/C/PER/CO/5-6 (2013); Bolivia, UN Doc. CAT/C/BOL/CO/2 (2013); Poland, UN Doc. CAT/C/POL/CO/5-6 (2013); and Kenya, UN Doc. CAT/C/KEN/CO/2 (2013).

⁴⁸ *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017); *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016); *K.L. v. Peru*, CCPR/C/85/D/1153/2003 (2005); and *L.M.R. v. Argentina*, CCPR/C/101/D/1608/2007 (2011).

⁴⁹ *Ibid.* See also HRC General Comment No. 20 on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, UN Doc. HRI/GEN/1/Rev.1 (1994), para. 5.

⁵⁰ CEDAW Committee, General Recommendation 35 on gender-based violence against women (2017), para. 18.

⁵¹ CESCR, General Comment 22, para. 10.

⁵² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/31/57 (2016), para. 43.

affirmative obligation to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women safe access and care...⁵³

Rights to nondiscrimination and equality

The rights to nondiscrimination and equality are set forth in all major international human rights treaties.⁵⁴ CEDAW prohibits discrimination against women in all spheres, including in the field of health care. It requires that states “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”⁵⁵

In a 2014 statement, the CEDAW Committee observed that “failure of a State party to provide services and the criminalization of some services that only women require is a violation of women's reproductive rights and constitutes discrimination against them.”⁵⁶ In its General Recommendation on women and health, the CEDAW Committee noted 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.”⁵⁷ Furthermore, in country-specific concluding observations, the CEDAW Committee has often stated that restrictive abortion laws constitute discrimination against women.⁵⁸

Moreover, the Human Rights Committee has held that lack of availability of reproductive health information and services, including abortion, undermines women’s right to nondiscrimination.⁵⁹ In the case *Whelan v. Ireland*, it found that the state had violated the claimant’s right to nondiscrimination by failing to provide access to abortion services.⁶⁰

⁵³ Ibid., para. 44.

⁵⁴ For example, ICCPR, art. 2 and ICESCR, art. 2.

⁵⁵ CEDAW, art. 2(f).

⁵⁶ CEDAW Committee, “Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review” (Feb. 2014).

⁵⁷ CEDAW Committee, General Recommendation 24, para. 14.

⁵⁸ See, for example, the CEDAW Committee concluding observations noted under the analysis of the right to life and right to health above.

⁵⁹ See, for example, HRC concluding observations on the Philippines, UN Doc. CCPR/C/PHL/CO/4 (2012); Paraguay, UN Doc. CCPR/C/PRY/CO/3 (2013); Peru, UN Doc. CCPR/C/PER/CO/5 (2013); and Ireland, UN Doc. CCPR/C/IRL/CO/4 (2014). See also L.M.R. v. Argentina, UN Doc. CCPR/C/101/D/1608/2007 (2011).

⁶⁰ *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017), para. 7.12.

Similarly, the Committee on the Rights of the Child has also said that punitive abortion laws constitute a violation of children’s right to freedom from discrimination.⁶¹ The Committee on Economic, Social and Cultural Rights has said, “A wide range of laws, policies and practices undermine the autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health, for example criminalization of abortion or restrictive abortion laws.”⁶² It has also noted that abortion restrictions particularly affect poor and less educated women.⁶³

Right to privacy

The ICCPR provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation,”⁶⁴ and other treaties and authoritative interpretations reinforce the right to privacy and medical confidentiality.

The CEDAW Committee has noted that policies that require spousal authorization for abortion impinge on women’s right to privacy,⁶⁵ and has recommended that states adopt policies guaranteeing the right to privacy or medical secrecy for patients who undergo or providers who perform abortions.⁶⁶ Its 2014 statement on sexual and reproductive health and rights emphasized women’s “right to access sexual and reproductive health information and services with the consent of the individual alone.”⁶⁷ It has also called for access to confidential abortion and post-abortion care services, even if the abortion is not legal.⁶⁸

The Committee has also stated that while breaches of patient confidentiality affect both men and women, they may deter women from seeking advice and treatment for diseases

⁶¹ See, for example, CRC concluding observation on Namibia, UN Doc. CRC/C/NAM/CO/2-3 (2012).

⁶² CESCR General Comment No. 22, para. 34.

⁶³ See, for example, CESCR concluding observations on El Salvador, UN Doc. E/C.12/SLV/CO/3-5 (2014); and Nepal, UN Doc. E/C.12/NPL/CO/3 (2014).

⁶⁴ ICCPR, art. 17(1).

⁶⁵ See, for example, CEDAW Committee concluding observations on Turkey, UN Doc. CEDAW/C/TUR/CO/7 (2016); and Indonesia, UN Doc. CEDAW/C/IDN/CO/6-7 (2012).

⁶⁶ See, for example, CEDAW Committee concluding observations on Turkey, UN Doc. CEDAW/C/TUR/CO/7 (2016); El Salvador, UN Doc. CEDAW/C/SLV/CO/8-9 (2017); and Peru, UN Doc. CEDAW/C/PER/CO/7-8 (2014).

⁶⁷ CEDAW Committee, “Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review.”

⁶⁸ See, for example, CEDAW Committee concluding observation on Monaco, UN Doc. CEDAW/C/MCO/CO/1-3 (2017); and El Salvador, UN Doc. CEDAW/C/SLV/CO/8-9 (2017).

of the genital tract, contraception, incomplete abortion, and in cases where they have suffered sexual or physical violence.⁶⁹

The Human Rights Committee has remarked that “where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone **abortion,**” this may constitute a violation of a woman’s right to privacy.⁷⁰ The HRC’s draft General Comment on the right to life reiterates that any restrictions on abortion must not interfere with the right to privacy.⁷¹ In several individual cases, the HRC has found that criminalization of abortion, or a **state’s refusal to act in accordance with a woman’s** decision to undergo a legal abortion, constituted a violation of the right to privacy.⁷² It has also called for respect for professional secrecy of health providers and confidentiality for patients who undergo abortion.⁷³

The Committee on the Rights of the Child has emphasized, “All adolescents must have access to confidential adolescent-responsive and non-discriminatory reproductive and sexual health information and services, available both on and off-line, including ... **safe abortion services.**”⁷⁴ It has recommended that governments ensure that children have access to confidential medical counsel and assistance without parental consent, including for reproductive health services.⁷⁵ It has specifically called for confidential access for adolescent girls to legal abortions.⁷⁶

The CESCR has recommended that states ensure that the personal data of patients undergoing abortion remain confidential and has commented on the problem of women seeking health care for complications from unsafe abortions being reported to

⁶⁹ CEDAW Committee, General Recommendation 24, para. 12(d).

⁷⁰ HRC, General Comment 28 on equality of rights between men and women (2000), para. 20.

⁷¹ Draft General Comment on the right to life, op. cit.

⁷² See *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017); *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016); *K.L. v. Peru*, CCPR/C/85/D/1153/2003 (2005); and *L.M.R. v. Argentina*, CCPR/C/101/D/1608/2007 (2011).

⁷³ See, for example, HRC concluding observation on El Salvador, UN Doc. CCPR/C/SLV/CO/7 (2018).

⁷⁴ CRC General Comment No. 20 on the implementation of the rights of the child during adolescence (2016), para. 64.

⁷⁵ See, for example, CRC concluding observations on Poland, UN Doc. E/C.12/POL/CO/6 (2016); Indonesia, UN Doc. CRC/C/IDN/CO/3-4 (2014); Venezuela, UN Doc. CRC/C/VEN/CO/3-5 (2014); and Morocco, UN Doc. CRC/C/MAR/CO/3-4 (2014).

⁷⁶ See, for example, CRC concluding observations on Sri Lanka, UN Doc. CRC/C/LKA/CO/5-6 (2018); and India, UN Doc. CRC/C/IND/CO/3-4 (2014).

authorities.⁷⁷ Likewise, the Committee against Torture has called for protection of privacy for women seeking medical care for complications related to abortion.⁷⁸

Right to Information

The right to information is set forth in the ICCPR and is directly related to rights under other treaties.⁷⁹ For example, CEDAW provides that states must eliminate discrimination **against women in order to ensure “[a]ccess to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning”⁸⁰ and provide “[t]he 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.”⁸¹**

The right to information includes both a negative obligation for states to refrain from interference with the provision of information by private parties and a positive responsibility to provide complete and accurate information necessary for the protection and promotion of rights, including the right to health.⁸²

The Human Rights Committee has called on states to facilitate public information on access to legal abortion and ensure that health care providers who offer information about abortion are not subject to criminal sanctions.⁸³

The CESCR has stated that the right to health includes the right to health-related education and information.⁸⁴ It has said, **“Information accessibility includes the right to seek, receive, and disseminate information and ideas concerning sexual and reproductive health issues.... All individuals and groups, including adolescents and youth, have the right to evidence-based information on all aspects of sexual and reproductive health,**

⁷⁷ See, for example, CESCR concluding observations on El Salvador, UN Doc. E/C.12/SLV/CO/3-5 (2014); and Slovakia, UN Doc. E/C.12/SVK/CO/2 (2012).

⁷⁸ See, for example, CAT concluding observations on Paraguay, UN Doc. CAT/C/PRY/CO/4-6 (2011); and Peru, UN Doc. CAT/C/PER/CO/5-6 (2013).

⁷⁹ ICCPR, art. 19(2).

⁸⁰ CEDAW, art. 10(h).

⁸¹ *Ibid.*, art. 16(e).

⁸² See ICESCR, art. 2(2). See also CESCR General Comment No. 14 on the right to the highest attainable standard of health (2000); and CESCR General Comment No. 22 on the right to sexual and reproductive health (2016).

⁸³ See HRC concluding observations on Colombia, UN Doc. CCPR/C/COL/CO/7 (2016); Burkina Faso, UN Doc. CCPR/C/BFA/CO/1 (2016); and Ireland, UN Doc. CCPR/C/IRL/CO/4 (2014).

⁸⁴ CESCR General Comment No. 14, para. 11.

including ... safe abortion and post abortion care.”⁸⁵ The Committee has called on states to ensure that information on sexual and reproductive health, including abortion, is available without discrimination.⁸⁶

The CEDAW Committee has urged states to raise awareness among women and girls about when abortion is legal, and to provide comprehensive information on sexual and reproductive health.⁸⁷ The CRC has also called on states to ensure that children have access to reproductive and sexual health education and information, including in schools.⁸⁸ It has recommended that states “adopt or integrate a comprehensive gender-sensitive sexual and reproductive health policy for adolescents, emphasizing that unequal access by adolescents to such information and services amounts to discrimination.”⁸⁹

Right to decide the number and spacing of children

CEDAW provides that “States Parties shall ... ensure, on a basis of equality of men and women.... 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.”⁹⁰

The CEDAW Committee has called on states to increase access to high-quality contraception methods as a means to prevent unwanted pregnancy and reduce the use of abortion as a method of family planning.⁹¹ However, in certain circumstances, abortion may be the only way for a woman or girl to exercise her right to decide the number and spacing of children, particularly if she becomes pregnant through rape or incest. The CEDAW Committee has noted that “[d]ecisions to have children or not, while preferably

⁸⁵ CESCR General Comment No. 22, para. 18.

⁸⁶ See CESCR concluding observations on Colombia, UN Doc. CCPR/C/COL/CO/7 (2016); the Philippines, UN Doc. E/C.12/PHL/CO/5-6 (2016); and Honduras, UN Doc. E/C.12/HND/CO/2 (2016).

⁸⁷ See, for example, CEDAW Committee concluding observations on Burkina Faso, UN Doc. CEDAW/C/BFA/CO/7 (2017); Costa Rica, UN Doc. CEDAW/C/CRI/CO/7 (2017); Ireland, UN Doc. CEDAW/C/IRL/CO/6-7 (2017); and Uruguay, UN Doc. CEDAW/C/URY/CO/8-9 (2016).

⁸⁸ See, for example, CRC concluding observations on Guatemala, UN Doc. CRC/C/GTM/CO/5-6 (2018); Panama, UN Doc. CRC/C/PAN/CO/5-6 (2018); and Sri Lanka, UN Doc. CRC/C/LKA/CO/5-6 (2018).

⁸⁹ CRC General Comment No. 20, para. 64. See also para 61, where the Committee notes that “[a]ge-appropriate, comprehensive and inclusive sexual and reproductive health education, based on scientific evidence and human rights standards and developed with adolescents, should be part of the mandatory school curriculum and reach out-of-school adolescents.”

⁹⁰ CEDAW, article 16(1).

⁹¹ See CEDAW Committee, “Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review”; CEDAW Committee concluding observations on Cuba, UN Doc. CEDAW/C/CUB/CO/7-8 (2013); and CEDAW Committee concluding observations on Eritrea, UN Doc. CEDAW/C/ERI/CO/5 (2015).

made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government.”⁹² Moreover, it has called on states to “address the power imbalances between men and women, which often impede women’s autonomy, particularly in the exercise of choices on safe and responsible sex practices.”⁹³

III. Conclusion

Human Rights Watch urges the Constitutional Court to take into account the Republic of Korea’s international legal obligations during its deliberations. It should guarantee that those obligations are met by ensuring the decriminalization of abortion, and that Republic of Korea’s laws grant and protect safe, legal access to the procedure.

⁹² CEDAW Committee, General Recommendation no. 21, on equality in marriage and family relations, para. 22.

⁹³ CEDAW Committee, “Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review.”