Sandra Dughman & Rebecca Cook, *Amici Curiae* Brief Submitted to the Supreme Court of Argentina in proceedings "F, A. L. s/ Medida Autosatisfactiva," File Letter "F", N. 259, Book XLVI (Argentina), International Reproductive and Sexual Health Law Programme, Faculty of Law, University of Toronto, Canada, September 23, 2010. Official English translation by Hugo Leal-Neri, LL.B., LL.M., J.D., Fellow of the International Reproductive and Sexual Health Law Programme, Faculty of Law, University of Toronto, Canada.

Rebecca Cook
J.D., S.J.D.
Professor and Lecturer on International Human Rights Law
Co-Director, International Reproductive and Sexual Health Law Programme
Faculty of Law, University of Toronto
rebecca.cook@utoronto.ca

Sandra Dughman
Th.B., J.D., LL.M.
Fellow and Collaborator,
International Reproductive and Sexual Health Law Programme
Faculty of Law, University of Toronto
sandra.dughman@utoronto.ca

International Reproductive and Sexual Health Law Programme
Faculty of Law, University of Toronto
84 Queen's Park Crescent
Toronto ON Canada M5S 2C5
Tel: 416-978-1751, Fax: 416-978-7899
http://www.law.utoronto.ca/programs/reprohealth.html

<u>SUBMITTING THIS BRIEF AS *AMICI CURIAE*</u>

Most Hon. Supreme Court of Justice of the Nation:

The **International Reproductive and Sexual Health Law Programme** of the University of Toronto Faculty of Law, represented by Sandra Dughman (Th.B., J.D., LL.M., Fellow and Collaborator of the International Reproductive and Sexual Health Law Programme, University of Toronto Faculty of Law) and Rebecca Cook (J.D., S.J.D., Law Professor and Lecturer on International Human Rights Law, Co-Director of the International Reproductive and Sexual Health Law Programme, University of Toronto Faculty of Law), assisted by legal counsel María Mercedes Cavallo (T°106, F° 367, CPACF), and providing legal address for service the one located at 636 Marcelo T. de Alvear, 2° floor, Autonomous City of Buenos Aires, in the matter of **"F, A. L. s/ Self-executing measure," File Nº 259/2010, Volume: 46, Letter: F, Class: REX**, we appear before Your Excellencies and respectfully submit as follows:

A. OBJECTIVE

Pursuant to *Ruling 28/2004*, we submit this *Amicus Curiae* brief with the objective of presenting this Most Honourable Court with legal considerations pertaining to the various principles and arguments of constitutional law, domestic law and international law, relevant to the decision of the case at hand. We seek the rejection of the position taken by the Acting Defender General of the Province of Chubut, who filed, on behalf of the "unborn," an extraordinary appeal against the decision of the Superior Court of Justice (SCJ) of the province, which authorized a non-punishable abortion under paragraph 2, first part, of article 86 of the Penal Code (PC).

Based on the arguments presented below, we request that this Most Honourable Court grant legal standing to the undersigned, add this brief to the abovementioned record, and consider this brief at the time of rendering their decision.

B. ADMISSIBILITY OF THIS BRIEF

The present brief fully complies with the requirements established in Ruling 28/2004 in the following:

1) Time limit

Ruling 28/2004 authorizes the appearance of *Amici Curiae* with respect to cases currently before this Court, provided that such cases deal with questions of institutional

transcendence or public interest. Moreover, it establishes that *amicus curiae* briefs must be submitted not later than 15 days from the ruling remitting the record for decision. In the present case, this *amicus* is timely because the Court has not yet ordered that the record be remitted for decision.

Notwithstanding the foregoing, it should be noted that Ruling 14/2006 established a case status information system whereby pending cases are published on the website of the Supreme Court of Justice of the Nation (CSJN by its Spanish acronym) (provided for in ruling 1/2004) in order to effectuate this "fruitful instrument of citizen participation in the administration of justice." The creation of this system responded to the fact that persons who are not part of the proceedings—neither as parties nor as third parties—are allowed to intervene, and that the time limit to make submissions is brief and peremptory.

2) Undersigned Organization's Interest in the Outcome of this Case

The International Reproductive and Sexual Health Law Programme at the Faculty of Law,at the University of Toronto (hereinafter the Programme) is an academic program dedicated to legal research and especially designed to contribute to the advancement of women's rights in general and sexual and reproductive health rights in particular. Its legal expertise lies in the rights to equality and non-discrimination, and the rights of access to healthcare services. The Programme has collaborated with governmental and international agencies, non-government organizations, and academic institutions for the purpose of producing legal knowledge about these subjects, and has submitted briefs as *Amici* before different international and domestic courts, including the following: Inter-American Commission on Human Rights in the matter of Ana Victoria Sánchez Villalobos et al. vs. Costa Rica, 2009; Supreme Court of Nicaragua in support of unconstitutionality remedy N° 38-2008; Inter-American Court of Human Rights in the "Cotton Field" case: Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez (Cases number 12.496, 12.497 and 12.498) against the United Mexican States; the Mexican Supreme Court of Justice of the Nation in unconstitutionality application N° 146/2007; European Court of Human Rights in the matter of *R.R. v. Poland* Application No. *27617/04*; and the Constitutional Court of Colombia in support of unconstitutionality suit D 5764, among others.

3) Relationship to the Parties

The Programme, as submitter of the present document, declares that it has no relationship whatsoever to any of the parties to the dispute.

C. LEGAL GROUNDS

Argentina has incorporated into its domestic law, with constitutional rank, numerous international norms granting protection to a person's human rights.[1] Relevant

[1] The following International Treaties have constitutional hierarchy and are relevant to our submissions:

to this case is Argentina's recognition of the American Convention on Human Rights (ACHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), all of which are binding on the Republic. The authority that these international instruments have on Argentina's domestic law is demonstrated by the fact that every law of inferior rank must be pondered in accordance with the constitutional principles established by these international norms. Put differently, all legal norms must be consistent with the fundamental rights of women.

1) The legal norms seeking to protect the life of a fetus, particularly article 86 of the Argentine Penal Code (PC), must be applied in a manner consistent with the human rights of women.

The protection of the right to life, in general, from the moment of conception (pursuant to article 4 of the ACHR), and the "reservation" formulated by Argentina when it signed on to the CRC (whereby the term "child" was extended to include fetuses from

---

- **American Declaration of the Rights and Duties of Man**. Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.
- **Universal Declaration of Human Rights**. Adopted and proclaimed by resolution by resolution 217 A (III) of the United Nations General Assembly, on December 10, 1948.
- **American Convention on Human Rights**. Adopted at San José, Costa Rica, on November 22, 1969. Ratified by the Republic of Argentina through Law 23.054.
- **International Covenant on Economic, Social and Cultural Rights**. Adopted at the City of New York, United States of America, on December 19, 1966. Ratified by the Republic of Argentina through Law 23.313.
- **International Covenant on Civil and Political Rights**. Adopted at the City of New York, United States of America, on December 19, 1966. Ratified by the Republic of Argentina through Law 23.313.
- **Convention on the Elimination of Discrimination against Women.** Adopted by resolution 34/180 of the United Nations General Assembly on December 18, 1979. Signed by the Republic of Argentina on July 17, 1980. Ratified by Law 23.179.
- **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**. Adopted by the United Nations General Assembly on December 10, 1984, and ratified by the Republic of Argentina through Law 23.338 (sanctioned on July 30, 1986, enacted on August 19, 1986, and published in the Official Bulletin on February 26, 1987).
- **Convention on the Rights of the Child**. Adopted by the United Nations General Assembly in New York, United States of America, on November 20, 1989. Ratified by the Republic of Argentina through Law 23.849 (sanctioned on September 27, 1990, enacted on October 16, 1990, and published in the Official Bulletin on October 22, 1990).

Among the other international treaties which have been signed on and ratified by the Republic, and which have a normative hierarchy superior to that of ordinary laws, we find the **Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women** ("Convention of Belem do Para"), adopted at Belém do Pará, Brazil, on June 9, 1994, at the twenty fourth regular session of the General Assembly to the Organization of American States. Ratified by the Republic of Argentina through Law 24.632 (See Article 75, paragraph 22 of the Constitution of the Argentine Nation).

the moment of conception,[2] are arguments used to validate restrictive criminal laws on abortion. Such restrictive laws have a disproportionate impact on women's rights, such as a woman's right to life and her rights to health, personal integrity, equality and non-discrimination, as well as the guarantee against cruel, inhuman and degrading treatment.

Legal recognition of a certain right does not equate to an affirmation that such a right is absolute in nature. Rather, it has the purpose of protecting such right in accordance with the legal system in its entirety and the other rights and interests contained therein. In this regard, pursuant to article 14 of the Argentine Constitution, the exercise of rights is subject to the norms regulating their exercise.

The legitimacy of abortion regulation seeking to protect a certain interest (i.e., protect the life of the fetus) while limiting other rights or interests (for example, the rights to life, health, equality and non-discrimination, to be free from cruel, inhuman and degrading treatment, and to self-determination, among others), is subject to certain formal and substantive requirements. The formal requirements shall depend on the legal system at hand and will include that the limitation be sanctioned by law. The substantive requirements are assessments concerning the imperiousness of such limitation in a democratic society. In this regard, domestic and international courts[3] have developed a proportionality test. With small variations, the proportionality test provides that a regulation that restricts a right shall be legitimate if, in addition to being sanctioned by law, it complies with three copulative substantive requirements:

1. It must pursue a necessary objective in a democratic society: the State must demonstrate that the regulation restricting a right pursues a sufficiently important end for society.[4] In this sense, the restriction must be motivated by an imperious social need in a democratic society.[5]
2. The implementation of such objective must be made through adequate and effective means: the means are adequate and effective when they are rationally (i.e., logically) connected to the objective sought,[6] and infringe other rights as little as possible.[7] In this sense, the means are adequate when they are the most

---

[2] The text of the reservation is available online at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec

[3] I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5 at para. 46; and European Court of Human Rights, *Sunday Times v. the United Kingdom, Application no. 6538/74, April* 26, 1979.

[4] ECHR, *Open Door and Dublin Well Woman v. Ireland Judgment* – 246-A [1992] at para. 65 [*Open Door*]. See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 139 [*Big M Drug Mart*], and *R. v. Oakes,* [1986] 1 S.C.R. 103 at para. 69 [*Oakes*].

[5] See, for instance, ECHR, *Olsson v. Sweden* [1988]; and *Open Door*, *ibid*. at para. 70.

[6] *Open Door*, *ibid*. at paras. 75-76.

[7] ECHR, *Women on Waves v. Portugal* [2009]. See also *Big M Drug Mart*, *supra* note 4 at para. 139; *Oakes, supra* note 4 at para. 70; and *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*]. In *Morgentaler*, the law was struck down given that the means (authorization through a committee) were not rationally or

effective and benign, and are carefully designed on the basis of empirical evidence that demonstrates it.[8] Means that are arbitrary, discriminatory, very broad,[9] vague[10] or excessively detrimental to the rights of others[11] shall not be appropriate in accomplishing necessary and important objectives set out by the regulation.

3. The impact of the means used on other interests and rights must be proportionate: there is a negative or disproportionate impact when the regulation has harmful effects avoidable by other means, despite the fact that its necessary objectives are implemented in an appropriate fashion. Thus, a regulation will have a disproportionate impact when its adverse effects outweigh the benefits sought.[12]

In the instant case, the Public Prosecutor considers that the interpretation of article 86, paragraph 2 made by the SCJ of Chubut, which allows every woman who is pregnant as a result of rape to have an abortion, is illegitimate because it is contrary to the fetus's right to life enshrined in the ACHR (article 4) and in the reservation to the CRC. In his view, article 86, paragraph 2° only allows non-punishable abortions in the case of a rape committed against an "idiotic" or "demented" woman,[13] this being the only concrete case in which a restriction of the rights of women is not justifiable in a democratic society. Inversely, we can conclude from the Public Prosecutor's argument that the criminalization of an abortion where the pregnancy is the result of the rape of a healthy woman (who is neither "demented" nor "idiotic") does constitute a legitimate restriction of her rights.

If the legislative decision to punish the termination of a pregnancy resulting from the rape of a woman who is neither "idiotic" nor "demented" is in fact consistent with the proportionality test, then we must conclude that:

1. The objective of article 86, protection of the life of the fetus, is necessary, important and imperative in a democratic society.
2. The criminal prosecution provided for in article 86 is an adequate and effective means to protect the life of the fetus.
3. The impact that the criminal prosecution has on other interests and rights (rights to life, physical and psychic integrity, equality before the law and non-discrimination,

---

logically connected to the objective of the regulation (the protection of the fetus, and ultimately, of the woman's health).

[8] Parliamentary Assembly, Council of Europe, "Access to Safe and Legal Abortion in Europe" Resolution 1607 (2008) at section 7.5: "The Assembly invites the member states of the Council of Europe to: …adopt evidence-based appropriate sexual and reproductive health and rights strategies and policies, ensuring continued improvements and expansion of non-judgmental sex and relationships information and education, as well as contraceptive services, through increased investments from the national budgets into improving health systems, reproductive health supplies and information" (http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta08/ERES1607.htm). See *Irwin Toy Ltd v. Quebec* (Attorney General), [1989] 1 S.C.R. 927 at section VII, D, b, I [*Irwin Toy*].

[9] *Open Door*, *supra* note 4 at para. 74.

[10] See *Irwin Toy, supra* note 8 at section VII, B.

[11] See *Ford v. Quebec,* [1988] 2 S.C.R. 712 at para. 73; and *Oakes, supra* note 4 at para. 68.

[12] See *Oakes, ibid.* at paras. 70-71; and Lorraine Eisenstat Weinrib, "The *Morgentaler* Judgment: Constitutional Rights, Legislative Intention, and Institutional Design" (1992) 42 U. Toronto L.J. 22.

[13] TRANSLATOR'S NOTE: The archaic and derogatory terms "idiotic" (*idiota*) and "demented" (*demente*), are contained in Article 86 of the Argentine Penal Code (which dates back to the 1920s).

health, and to be free from cruel, inhuman and degrading treatment, enshrined in articles 1, 4, 5 and 7 of the ACHR, article 7 of the ICCPR, article 12 of the ICESCR, article 12 of the CEDAW, and article 37(a) of the CRC) is proportionate.

As we shall see below, a restrictive interpretation of article 86 of the PC that punishes abortions in the case of a pregnancy that is the product of a rape against a woman who is neither "demented" nor "idiotic," does not meet the proportionality test given that it fails on its second and third points above (namely means and impact), thus constituting an illegitimate restriction of the rights and interests of women as protected by the Constitution and International Law.

Protecting prenatal life is an important social value that deserves attention and respect. In this sense, the Spanish Constitutional Court stated in 1985 that the fetus is not a holder of rights, but that the provisions regarding the rights to life and human dignity establish a general norm of protection of prenatal life.[14] In this vein, the European Court of Human Rights (ECHR) stated that the induction of an abortion, even against the will of the woman, is not a homicide because the fetus is not a holder of the right to life.[15] In 2004, the Supreme Court of Costa Rica also found that although prenatal life is an interest that deserves protection, this interest yields in the cases of therapeutic abortion when the woman's health is in danger.[16] Moreover, based on the reasoning of the Spanish Constitutional Court, the Portuguese Constitutional Court held that although the fetus is not a holder of rights, it must be protected as an objective value.[17] It is clear that while the fetus does not hold the right to life, the State interest in protecting prenatal life is both necessary and important.

The great number of clandestine abortions practiced each year proves that the criminalization of abortion is not an adequate and effective mean to protect prenatal life. Both in Argentina and in other parts of the world, the criminalization of abortion does not deter women from its practice. Estimates of the Ministry of Health show that more than 450,000 clandestine abortions are performed in Argentina each year.[18]

Furthermore, its ineffectiveness and lack of empirical basis have a negative and disproportionate impact on other interests and rights. We can assert the following as an example:

- Laws that punish abortion infringe upon the rights to life and physical integrity of women (articles 4 and 5 of the ACHR). Figures from the Ministry of Health show that unsafe abortions in Argentina are the first cause of maternal mortality by causing the

---

[14] See Tribunal Constitucional de España, *Decision (Sentencia) N° 53/1985* of April 11, 1985, online: http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-1985-0053
[15] ECHR, *Vo v. France* [2004].
[16] Sala Constitucional, Corte Suprema de Justicia de Costa Rica, *Decision (Sentencia) N° 002792* in File (*Expediente*) N° 02-007331-0007-CO of March 17, 2004 (Res: 2004-02792), online: http://scij.org.poder-judicial.go.cr/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&nValor1=1&nValor2=267744&strTipM=T&strDirSel=directo
[17] See Portuguese Constitutional Court, *Decision* (*Acordao) N° 75/2010*, Cases (procesos) N° 733/07 and 1186/07.
[18] Edith Pantelides *et. al.*, "Estimación de la magnitud del aborto inducido," Preliminary Report Presented to the Commission "Salud Investiga," Ministry of Health of the Nation (2006).

deaths of more than 100 women per year.[19] In the rest of the world, more than half a million women die due to causes related to pregnancy and/or childbirth, and 13% of those deaths are attributed to unsafe abortions. This amounts to more than 70,000 yearly deaths due to abortions performed in risky conditions.[20]

- Criminal laws that are very restrictive with respect to abortion constitute a barrier to the exercise of women's right to health (articles 12 of the CEDAW, 12 of the ICESCR, and 24 of the CRC). Even in cases of non-punishable abortion, health professionals refuse to perform the procedure because of fear of criminal prosecution. Thus, criminalization pushes women to resort to clandestine procedures.[21]
- In addition, courts have recognized that forced pregnancy causes suffering and anxiety in women. In this sense, and as will be elaborated below, the Human Rights Committee of the United Nations (HRC) has stated that compelling a women to carry her pregnancy to term in certain situations constitutes cruel, inhuman and degrading treatment (articles 5 of the ACHR, and 7 of the ICCPR).[22]
- Lastly, restrictive abortion laws violate the right to equality and non-discrimination (article 1 of the ACHR) because, on the one hand, they only affect poor women who cannot pay for clandestine but safe abortions,[23] and on the other hand, because they criminalize a medical procedure that only women need.[24]

Consequently criminal law, due to its restriction of liberties and rights, can only be used as a last resort, namely once all other alternatives have been exhausted. The Constitutional Court of Colombia also expressed this view in declaring that while the legislator has broad discretion with respect to the regulation of abortion, such discretion is not unlimited given that it cannot disproportionately invade constitutional rights, nor leave them unprotected. It also recognized that "penal law, because of its restriction of liberties, must be used as a last resort."[25]

Thus, before resorting to the coercive penal power of the State, adequate means that effectively protect life must be pursued, namely policies seeking to:

---

[19] Ministerio de Salud, *Dirección de Estadísticas e Información de Salud* (Buenos Aires: Información Básica, 2007).

[20] Heather D. Boonstra *et. al., Abortion in Women's Lives* (New York: *Guttmacher Institute*, 2006) at 14, online: http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf [Boonstra]

[21] Studies show that of the 20 million unsafe abortions performed each year, 19 million take place in developing countries with restrictive penal legislation. Allan Guttmacher Institute, "Abortion: Worldwide Levels and Trends" (2007) (PowerPoint presentation) at 21 [Guttmacher, "Levels and Trends"]. For more information on the long-term safety of abortions, see Boonstra, *ibid.*

[22] *Karen Noelia Llantoy Huamán v. Peru*, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005) [*K.L. v. Peru*].

[23] See, for instance, Edith Pantelides *et. al., Morbilidad materna severa en la Argentina: trayectorias de las mujeres internadas por complicaciones de aborto y calidad de la atención recibida* (CEDES-CENEP, 2006).

[24] CEDAW, General Recommendation 24, UN GOAR, 1999, Doc. No. A/54/38/Rev. 1 at para. 14.

[25] Corte Constitucional de Colombia, *Decision (Sentencia) C-355/06*, in files (*expedientes*) D-6122, 6123 and 6124 at 235. Bogotá, Colombia, May 10, 2006.

- Implement adequate prenatal care to avoid spontaneous abortions[26] and thus reduce the yearly neonatal deaths that occur prior to the fourth week of life.[27]
- Improve the availability and accessibility of reproductive health services, both during and after the pregnancy,[28] for the purpose of reducing maternal mortality, now estimated in 529,000 yearly deaths of pregnant women.[29]
- Improve the socioeconomic and cultural factors that determine health, such as a reduction of the economic and social vulnerability suffered by pregnant women, including domestic and sexual violence, and particularly sexual abuse of adolescent women.[30]
- Regulate the termination of a pregnancy under a system of time limitations or indications. Consistent with public health policies that ensure safe pregnancies and deliveries, States have issued norms on the termination of a pregnancy consistent with the rights of women. For example in 1993, the German Constitutional Court used the principle of human dignity to require the protection of the fetus through systems of counselling that inform women about the implications of an abortion.[31] Other countries such as France,[32] Portugal,[33] and Spain[34] have also used pre-abortion counselling services to protect prenatal life instead of criminalizing the procedure. In 2010, the Constitutional Court of Portugal upheld the constitutionality of a 2007 law that allowed the termination of a pregnancy during the first 10 weeks, with pre-abortion counselling services and three days of reflection.[35]

Far from protecting neonatal life, the coercive force of the State would seem to be directed at the imposition of a model of conduct consistent with a patriarchal vision of

---

[26] Raj Rai & Lesley Regan, "*Recurrent Miscarriage"* (2006) 368 *The Lancet* 601; and I.A. Green, "Antithrombotic Therapy for Recurrent Miscarriage?" (2010) 362 *New England J. of Medicine* 1630.
[27] Joy E. Lawn *et al*., "4 Million Neonatal Deaths: When? Where? Why?" (2005) 365 *The Lancet* 891; and Gary L. Darmstadt *et al.,* "Evidence-Based, Cost-Effective Interventions: How Many Newborn Babies Can We Save?" (2005) 365 *The Lancet* 977.
[28] Oona M.R. Campbell & Wendy J. Graham, "Strategies for Reducing Maternal Mortality: Getting on with What Works" (2006) 368 *The Lancet* 1284.
[29] World Health Organization, "Maternal Mortality in 2000: Estimates Developed by WHO, UNICEF, UNFPA" (2004), online: http://www.who.int/reproductive-health/publications/maternal_mortality_2000/mme.pdf.
[30] Véronique Filippi *et al*., "Maternal Health in Poor Countries: The Broader Context and a Call for Action", (2006) 368 *The Lancet* 1535.
[31] German Constitutional Court, *Judgment of May 28*, 1993, 88 BverfGE 203 (F.R.G.). An English translation of the judgment is available online: http://www.bundesverfassungsgericht.de/en/decision/fs19930528_2bvfooo29oen.html.
[32] Law N° 75-17 of January 17, 1975, France, online: http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19750118&numTexte=&pageDebut=00739&pageFin=), as amended by *Law N° 79-1204* of December 31, 1979: http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19800101&pageDebut=00003&pageFin=&pageCourante=00003).
[33] *Law No. 16/2007*, Portugal, April 17, 2007.
[34] *Organic Law (Ley Orgánica) 2/2010* of March 3, 2010 on sexual and reproductive health and the voluntary termination of pregnancy. Official Bulletin of the State N° 55, Spain, March 4, 2010.
[35] *Law No. 16/2007*, *supra* note 33.

society.[36] Empirical studies demonstrate that in countries where early abortion has been decriminalized and where public health policies on birth control and sexual education have been implemented, the number of pregnancies has decreased substantially.[37] The Guttmacher research institute maintains that the legal status of abortion does not determine its incidence.[38] The lowest records of abortion are found in Europe, where the procedure is available and legal in the majority of countries.[39] Far from increasing the number of abortions, availability and access to legal abortion ensures that a greater number of abortions are safe abortions.[40] A good example of this fact, and of the counselling provided before the performance of an abortion (which gives more effective protection to prenatal life), is found in Spain's Organic Law N° 2/2010. It is asserted in its preamble that:

> Experience has demonstrated that the protection of prenatal life is more effective through active policies that support pregnant women and motherhood. Therefore, protection of this legal interest at the initial moment of gestation is articulated through the woman's will, and not against it. The woman will make her decision after having been informed of: all the benefits, assistance and rights to which she can gain access should she wish to continue with the pregnancy; the medical, psychological and social consequences derived from it; as well as the possibility of receiving counselling before and after the intervention. The Law provides for a reflection waiting period of at least three days and, in addition to requiring that the information be clear and objective, it imposes conditions for its provision in an ambit and in a manner free of pressure on the woman.[41]

---

[36] "According to available data on hospital discharges in 2005, 68,869 women received care in public hospitals for incomplete abortions. This number, together with estimates of abortions carried out in a clandestine manner … suggests that the deterring capacity of criminalization is low or directly null, and that it only serves to extend the unsafety of the procedure, which implies, in addition, a risk of death to the poorest women in our society. It is known that norms that criminalize abortion operate in a context in which judicial and police prosecution of the crime is of no consequence either. While there are no official reports on the topic, this conclusion derives from a significant observable difference between figures on clandestine abortions and figures on women imprisoned due to the crime of abortion. Therefore, reticence to amend the actual criminal norm despite its proven inefficiency is another reflection of the double standard in which the control of women's bodies, exercised through the criminalization of abortion, operates." Silvina Ramos *et al.*, "El acceso al aborto permitido por la ley: un tema pendiente de la política de derechos humanos en la Argentina," in *Derechos Humanos en Argentina. Informe 2009* (Buenos Aires: Centro de Estudios Legales y Sociales (CELS)-Siglo XXI Editores, 2009) at 481 [Silvina Ramos *et al.*].

[37] Guttmacher, *Levels and Trends*, *supra* note 21; and Alan Guttmacher Institute, *Sharing Responsibility: Women, Society and Abortion Worldwide* (New York: The Alan Guttmacher Institute, 1999) [Guttmacher, "Sharing Responsibility"].

[38] *Ibid.*

[39] *Ibid.*

[40] Rebecca Gomperts, Joanna Erdman & Susan Newell, "Legal Advocacy Letter to Google on behalf of Women on Waves," online: http://www.womenonwaves.org/download.php?id=2019; and David A. Grimes *et al.*, "Unsafe Abortion: the Preventable Pandemic" (2006) 368 *The Lancet* 1908 at 1910.

[41] *Organic Law 2/2010, supra* note 34, Sec.I at 21003.

In summary, this system requires that the woman, at the moment of making a decision on whether to have an abortion, be informed of:[42]

- Other alternatives to the termination of the pregnancy, such as adoption.
- Public assistance available to pregnant women, and healthcare coverage during pregnancy and delivery.
- The labour rights of pregnant women and mothers; public benefits and assistance for the care and attention of their sons and daughters; tax benefits and other relevant information on incentives and assistance for birth.
- Information on available centres where adequate information on birth control and safe sex can be received.
- Information on centres where the woman can voluntarily receive counselling both before and after the termination of her pregnancy.
- The medical, psychological and social consequences of the continuation of the pregnancy or its termination.

2) Forcing women to carry to term a pregnancy derived from a rape constitutes cruel, inhuman and degrading treatment in violation of articles 5 of the ACHR, and 7 of the ICCPR.

One of the constitutional principles with a clear duty of protection based on international norms is that of respect for the physical, psychic and moral integrity of all persons. As a consequence of this principle, no person may be subjected to cruel, inhuman or degrading treatment (articles 5 of the ACHR and 7 of the ICCPR).[43]

A woman is revictimized and injured both psychologically and morally when she is forced to endure in her body the consequences of a criminal act committed against her by another person. Consequently, she is subjected to cruel, inhuman and degrading treatment. This evident violation of international and Argentine law is worsened when the woman, notwithstanding the fact that she has met the legal requirements necessary to have a legal abortion, is refused such service or is confronted with barriers that are not established in the law, and as such, lack a supportable legal foundation.

Argentina, like every other State party to the ICCPR, has a duty to protect all of its female inhabitants against such abuse through legislative and other measures, regardless of whether the conduct is committed by persons who act on behalf of the State, in an official capacity, outside of this capacity or in a private manner.[44]

To force a woman to continue a pregnancy against her will, particularly when the sexual act giving origin to the gestation was not consented to, constitutes abuse,

---

[42] *Ibid.*, Art. 17.
[43] See Rebecca J. Cook, Bernard M. Dickens & Mahmoud F. Fathalla, *Salud Reproductiva y Derechos Humanos* (Bogotá: Profamilia Colombia, 2003) at 162-63 [Cook *et. al.*, "Salud Reproductiva"].
[44] CCPR General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 10/03/92 at para. 2 [*General Comment No. 20*].

namely cruel, inhuman and degrading treatment.[45] The HRC does not consider it necessary to have an exhaustive list of prohibited acts in order to establish what constitutes abuse. Rather, it provides general guidelines whereby an act can be characterized as abuse depending on its nature, purpose and gravity.[46] In addition, the injury or suffering caused can be both physical and psychological. The objective of protecting against and prohibiting abuse, and of the right to be free from cruel, inhuman or degrading treatment, is to protect the dignity and psychic integrity of the person.[47]

The HRC has stated that in order to establish whether article 7 of the ICCPR has been violated, it is necessary to take into account the circumstances of the particular case, namely the kind of abuse and its duration, its physical and psychological effects, and the victim's particular characteristics, such as gender, age and health condition.[48] In the case at hand, the girl, who was underage (15 years of age), was raped by her stepfather (with whom she lived), became pregnant, and spent more than two months in court requesting a judicial authorization to have a non-punishable abortion. Before granting such authorization, the various judicial levels of court involved subjected her to countless clinical and psychological studies. A large portion of the psychological studies showed that the minor exhibited depressive symptoms and suicidal thoughts in reaction to the humiliations and abuse to which she had been subjected by her stepfather since she was eleven years of age.[49] The mistreatment that began when her stepfather committed sexual abuse against her continued even after the information was laid with the public prosecutor, when she was forced to continue a pregnancy derived from rape while awaiting authorization to interrupt it.

The suicidal thoughts caused by a forced pregnancy are a form of cruel, inhuman and degrading treatment. Foreign tribunals such as a Northern Ireland court have found that a pregnant woman's risk of suicide constitutes a fact that threatens the woman's life, and that this threat consists not only of the physical injuries that the woman might experience in her own body, but also of the mental anguish that her suicidal state could cause.[50]

The HRC has considered that observance of and compliance with article 7 must be absolute and does not accept any kind of exception. Put differently, the prohibition of abuse does not admit any kind of justification, not even because of extenuating circumstances.[51] In 1997, with respect to Peru, this Committee expressed its ongoing concern about those penal laws that seek to criminally prosecute a woman who has had an abortion. It considered that such provisions and their fatal consequences could only mean that women were being subjected to inhuman treatment and that Articles 3, 6 and

---

[45] See IACHR, Ana, Beatriz and Cecilia González Pérez v. México, Report Nº 53/01, Case 11.565, April 4, 2001 at para. 27.
[46] *General Comment No. 20*, *supra* note 44 at para. 4.
[47] *Ibid.* at para. 2.
[48] *Vuolanne v. Finland*, Comm. No. 639/1995, Hum. Rts. Comm. (28 July 1997) at para. 9.2.
[49] Decision of Superior Court of Justice of the Province of Chubut (*Sentencia Superior Tribunal de Justicia de la Provincia de Chubut*) in file labelled (*en autos caratulados*): "F., A. L. s/ MEDIDA AUTOSATISFACTIVA" (File Nº 21.912-F-2010) of March 8, 2010.
[50] *Family Planning Association of Northen Ireland v. Minister for Health Social Services and Public Safety*, [2004] NICA 39 (Court of Appeal) at para. 52.
[51] *General Comment No. 20*, *supra* note 44 at para. 13.

7 of the ICCPR have been violated, thus recommending that the legislation be amended.[52]

Since at least 1949, the United Nations War Crimes Commission (UNWCC) has sharply condemned the instrumentalization of a woman's body for the purpose of serving the interests of the State. This condemnation includes both forced pregnancies and forced abortions because they constitute an attack on the autonomy and dignity of women as well as cruel, inhuman and degrading treatment.[53]

3) The State of the Republic of Argentina has an obligation to take all protection measures that an adolescent may require because of her status as a minor, without any discrimination whatsoever based on her social or economic condition (article 24 of the ICCPR).

Argentina's obligation to protect the adolescent girl by virtue of her underage status includes access to a safe, non-punishable abortion in compliance with the legal requirements. Such access cannot be restricted or liberalized depending on the economic capacity of the minor or her family. The Committee on the Rights of the Child has declared that pregnant adolescent girls must have access to healthcare services adequate to their particular rights and needs.[54] Likewise, it expressed its concern:

> at the high percentage of maternal deaths, especially of adolescent girls, related to abortions (28.31% in 2005) and at the lengthy procedures for legal termination of pregnancies resulting from rape, including due to article 86 of the PC.[55]

For these reasons, the Committee recommended that Argentina adopt measures to eliminate the existing inequality between the provinces with respect to access to healthcare services and that it:

> [t]ake urgent measures to reduce maternal deaths related to abortions, in particular ensuring that the provision on non-punishable abortion, especially of girls and women victims of rape, is known and enforced by the medical profession without intervention by the courts and at their own request; [and also that it r]eview article 86 of the Penal Code on a national level to prevent disparities in … existing provincial legislation with regard to legal abortion. [56]

---

[52] Peru, ICCPR, A/52/40 vol. I (1997) 28 at para. 160; Peru, ICCPR, A/56/40 vol. I (2001) 45 at para. 76(20).

[53] U.N. War Crimes Comm'n, Trial of Ulrich Greifelt and Others, 8 Law Reports of Trials of War Criminals 1–3 (1949).

[54] Committee on the Rights of the Child, "General Comment No. 4 (2003), Adolescent health and development in the context of the Convention on the Rights of the Child," July 1°, 2003, UN Doc. CRC/GC/2003/4 at para. 31.

[55] Committee on the Rights of the Child, "Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Argentina," Fifty-fourth Session, Geneva, June 11, 2010, UN Doc. CRC/C/ARG/CO/3-4 at para. 57.

[56] *Ibid*. at para. 58(d)-(e).

Countries that do not implement legal norms to protect adolescents from violence and discrimination violate article 24 of the ICCPR and articles 3, 19 and 24 of the CRC. To have the "best interests of the child" as a primary consideration means that Argentina has to ensure that its institutions, services and establishments comply with the legal framework in force, especially in the area of healthcare, by providing care and benefits to help the adolescent enjoy the highest possible level of health, including reproductive health (article 3 of the CRC in relation to article 24 of the same instrument). Accordingly, Argentina has a duty to adopt all legislative, administrative, social and educational measures appropriate to protect the adolescent girl against all prejudice, mistreatment and sexual abuses, among others (article 19 of the CRC).

Adolescent girls around the world have a high risk of suffering various forms of sexual abuse, including rape, incest, sexual exploitation and sexual slavery.[57] Instead of imposing a particular morality, social and governmental efforts should be directed at ending these flagrant violations of adolescent girls' sexual or reproductive rights.[58] Moreover, violence against adolescent girls manifests itself on two fronts: through sexual abuse *per se,* and by forcing her to maintain a condition—the pregnancy—that she is not emotionally prepared to assume in those circumstances.[59] It is the responsibility of the State to perform a direct role that enables it to ensure that minors are not exposed to experiences that exceed their developmental capacity, and at the same time to strike a balance between the child's right to receive protection and her right to participate in those decisions and actions that she has the maturity to confront.[60]

The sexuality of adolescent girls is built on the basis of traditional gender conceptions that clearly differentiate the expectations of men and women. Argentine penal legislation has recognized the vulnerability of adolescent girls by increasing the punishment for the sexual abuse of minors.[61] This vulnerability also manifests itself in that adolescent girls who are victims of rape do not even believe that they can oppose the sexual abuse.[62]

Adolescent girls are the ones who are disproportionately affected by not having access to comprehensive services and information on sexual and reproductive health, given that they are the ones who will face the social stigma of an early pregnancy (which carries an assumption of having had sexual relations at an early age and outside

---

[57] Center for Reproductive Rights, "Implementing Adolescent Reproductive Rights Through the Convention on the Rights of the Child," Briefing Paper (September 1999) at 18.
[58] *Ibid*.
[59] The Center for Reproductive Law and Policy & Estudio para la Defensa de los Derechos de la Mujer (DEMUS), *Women of the World: Laws and Policies Affecting Their Reproductive Lives. Latin America and the Caribbean. Progress Report 2000* (New York: Center for Reproductive Law and Policy, 2001) at 10 [Center for Reproductive Law and Policy & DEMUS].
[60] Gerison Lansdown, *Innocenti Insight: La Evolución de las Facultades del Niño* (Florencia, Italia: Centro de Investigaciones-UNICEF, 2005) at 51.
[61] See art. 125 of the PC as amended by art. 5 of Law 25.087, Official Bulletin of May 14, 1999.
[62] Center for Reproductive Law and Policy and DEMUS, supra note 59 at 14. See Cook *et. al.*, "Salud Reproductiva," *supra* note 43 at 270-91.

of marriage). A government that does not provide such services or information violates every adolescent girl's right to be free from discrimination.[63]

Moreover, the protection that the Republic of Argentina is obligated to provide to every minor encompasses, by virtue of article 37(a) of the CRC, the States Parties' obligation to ensure that "[n]o child shall be subjected to … cruel, inhuman or degrading treatment or punishment." To force an adolescent girl to continue her pregnancy against her will is a form of inhuman treatment. In this regard, the HRC condemned Peru for having denied access to legal abortion services to an adolescent girl (K.L.) who met all the requirements which the Peruvian legislation established for its performance.[64] She was forced to carry the pregnancy to term, to give birth, and to breastfeed the newborn notwithstanding that a prenatal examination had revealed that the fetus was anencephalic and that, should it be born alive, it would not be viable. The newborn died four days after its birth. The Committee declared that pursuant to the ICCPR, the forced treatment to which this young woman had been subjected directly violated her right to be free from cruel, inhuman and degrading treatment as well as the protective measures that her status as a minor required.

4) Argentina has a duty to grant the equal protection of the law to a woman's moral autonomy and agency (articles 24 of the ACHR and 26 of the ICCPR), thereby eliminating gender stereotypes (article 5(a) of the CEDAW).

Gender stereotyping alludes to a social and cultural construction of what a woman is, based on her physical, biological, and sexual characteristics, and on her function or role in society. These stereotypes become discriminatory when they operate "to ignore individuals' characteristics, abilities, needs, wishes, and circumstances in ways that deny individuals their human rights and fundamental freedoms, and when [they] create gender hierarchies."[65] Thus, understanding how the law reproduces, perpetuates, and contributes to gender stereotyping is understanding how women experience gender inequality.[66]

Article 5(a) of the CEDAW imposes an obligation on States Parties, including the Republic of Argentina, to identify, recognize and eliminate stereotypes by taking all appropriate measures to modify social and cultural patterns of conduct in order to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[67] This article clearly condemns gender stereotyping because it discriminates against women.

---

[63] See Chapter X: Adolescents' Reproductive Rights in Center for Reproductive Rights, *Gaining Ground. A Tool for Advancing Reproductive Rights Law Reform* (New York: Center for Reproductive Rights, 2006) at 99.

[64] *K.L. v. Peru, supra* note 22.

[65] Rebecca J. Cook & Simone Cusack*, Gender Stereotyping: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2010) at 20 [Cook & Cusack].

[66] *Ibid*.

[67] CEDAW, Introduction, online: http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm

A restrictive interpretation of article 86 of the PC, namely one that criminalizes the termination of a pregnancy resulting from the rape of a woman who is neither "idiotic" nor "demented," shows a failure to recognize the moral autonomy of women. In addition, it reveals a model of the woman that reflects cultural beliefs based on oppressive gender structures and religious fundamentalism. According to this system, this is the only socially acceptable model. This model is based on two identifiable stereotypes:

1. The woman as a reproductive vessel of humanity: this stereotype is based on a woman's biological and physiological characteristics that allow her to get pregnant. The language of article 86 reflects an ontological conception and definition of the woman based on the characteristics that define her reproductive role.[68] Paragraph 1° uses the term "mother" to refer to the pregnant woman, thus considering that by the mere fact of being pregnant, a woman automatically becomes a mother. The word "mother," used instead of the word "woman," insinuates that motherhood is intrinsic and natural to the female condition, giving it meaning on the basis of her reproductive function.[69]
2. The selfless woman/mother willing to sacrifice herself: this stereotype is based on the role assigned to a woman in society because of her reproductive capacity, where a social expectation exists that she privilege her motherhood to any other life plan and, that if she does not do so, that she receive a clear sanction.[70] A restrictive interpretation of article 86, paragraph 2° reflects oppressive notions about the adequate social role for women and about women's true nature. Such nature must lead a woman to sacrifice, even at the cost of sacrificing her own mental sanity in favour of a potential future child. The woman who fits into this stereotype is eager to withdraw herself from the world and to abandon her own interests to devote herself exclusively to the welfare of her children and the continuation of humankind. Thus, women who have abortions are considered selfish and morally inferior to those who do not.[71]

Moral autonomy, which is possessed by a woman by the mere fact of belonging to the human species, is questioned when she is pregnant. Reva Siegel asserts that a latent assumption that motherhood is a "normal" and "deserved" female condition

---

[68] The Constitutional Court of Colombia stated that "when adopting norms of penal character, the legislator cannot ignore that the woman is a fully dignified human being and therefore it must treat her as such, instead of considering her and turning her into a mere instrument for the reproduction of the human species, or of imposing on her in certain cases, against her will, the character of an effectively useful tool for procreation." *Decision C-355/06, supra* note 25 at 246.

[69] Diana Maffía, "Aborto no punible: ¿Qué dice la Ley Argentina?," in Susana Checa, ed., *Realidades y Coyunturas del Aborto: Entre el Derecho y la Necesidad* (Buenos Aires: Editorial Paidós, 2006) at 150.

[70] According to the Constitutional Court of Colombia, human dignity as a value intrinsic to every human being protects: "(i) the autonomy or possibility of designing a life plan and of determining one's life in accordance with one's characteristics (i.e., to live as one wishes), (ii) certain concrete material conditions of existence (i.e., to live well), (iii) the intangibility of non-material goods, physical and moral integrity (i.e., to live without humiliations)." Moreover, the Court recognized that among the decisions that inform a life plan is reproductive autonomy, which manifests itself concretely as a prohibition on assigning a woman stigmatizing gender roles or on infringing a deliberate moral pain upon her. *Decision C-355/06, supra* note 25 at 243-45.

[71] Mary Boyle, *Re-thinking Abortion: Psychology, Gender, Power, and the Law* (London: Routledge, 1997)

makes governments overlook the enormous consequences and costs that it implies for women and which legislation inflicts on them.[72] These assumptions become apparent in cases of non-punishable abortion. In the case of therapeutic abortion, for example, women can only avoid the imposition of motherhood when they are physically incompetent for it. Similarly, by restricting the interpretation of paragraph 2° of article 86 of the PC to the case of an "idiotic" or "demented" woman, women are placed under the wing of a paternalistic State, which due to eugenic reasons related to the protection of the fetus and the assumed incompetence of the mother, does allow her to eliminate the product of conception. It would appear that the non-punishability of abortion is linked to: a determination that the criminal act is reproachful, where the rape of a woman with full mental capacity is less reproachful than that of a woman without it; the capacity or incapacity of the future mother; and the kind of citizen created for society, given the possibility that they will too be "idiotic" or "demented."

Use of the state apparatus or of any other coercive force to compel women to continue their pregnancies is a form of legal oppression analogous to violence against women. In fact, forced pregnancy has been compared to rape, insofar as it compels women, against their will, to serve the interests of the one who wields force and power over them through their bodies.[73] In the case at hand, because the adolescent girl did not consent to the sexual relation, her moral autonomy and sexual self-determination have already been violated. In addition, the one who perpetrated this despicable act had a relationship of cohabitation with her, based on power and authority, and represented a paternal figure and the main model of masculinity in her life. After the sexual abuse ended, she sought to exercise a legally acquired right (to a non-punishable abortion, in a public healthcare facility, in a safe and sanitary fashion), but was forced to go through three levels of court for the purpose of obtaining a judicial dispensation to exercise a right recognized by law.[74] This ambiguous model recognizes a right but does not allow for its prompt and effective exercise. In spite of knowing that the consequences of the pregnancy and of the subsequent motherhood will exclusively fall upon the woman, this model values her will as being of lesser importance during its decision-making process on the issue of abortion.

The lack of recognition of a woman's moral autonomy, derived from the criminalization of abortion, has, in addition, a pernicious effect on women's participation in the country's political, social and economic life: women are seen as incapable of correctly exercising the public function because they naturally belong to the domestic sphere. The elimination of factors that restrict a woman's development and advancement, both in the public and private spheres, is an obligation that Argentina has under article 3 of the CEDAW, insofar as it requires that it take "in all fields, in particular

---

72 Reva Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection" (1992) 44 Stan. L. Rev 261 at 362–63.

73 Ellen Willis, "Abortion: Is a Woman a Person?," in Ann Snitow, Christine Stansell & Sharon Thompson, eds., *Powers of Desire: The Politics of Sexuality* (New York: Monthly Review Press, c1983) at 460, 473. For more information on gender stereotyping, see Mabel Bellucci, "Women's Struggle to Decide about Their Own Bodies: Abortion and Sexual Rights in Argentina" (1997) 5(10) Reprod. Health Matters 99.

74 In this regard the Colombian Constitutional Court has noted that, in cases of rape, "a pregnant woman's good faith and responsibility are presumed," thus requiring only a copy of the information laid before the penal authorities. *Decision C-355/06, supra* note 25.

in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

To require that a woman continue a pregnancy against her will implies imposing a heroic standard of conduct that is not in accordance with her value system, but rather with an external and perfectionistic social expectation.[75] In particular, forcing a woman to continue an unwanted pregnancy that has resulted from a rape implies utilizing and objectivizing her body in fulfillment of alien ideologies, thus negating her equality in rights and dignity, and diminishing—almost to the point of annulment—her agency to make decisions relevant to her life project. This State conduct constitutes a violation of articles 24 of the ACHR, 26 of the ICCPR, and 14 of the Constitution.

Ideological commitments, whatever their origin, are not a valid legal justification to deny a health service that complies with the legal requirements established for its performance. For example, in a friendly settlement before the Inter-American Commission on Human Rights (IACHR), Mexico acknowledged its responsibility for having denied a legal abortion to an adolescent girl who was the victim of sexual abuse, due to the hospital's ideological commitments to the Catholic religion.[76]

The European Commission on Human Rights has ruled that in cases of non-punishable abortion, third parties must not interfere with or obstruct a woman's decision to have an abortion through the grant of authorizations, or by denying such authorizations and consequently forcing her to continue the pregnancy against her will.[77] These kinds of interference affect the agency of women without economic resources who go to public health facilities in search for care, as well as their right to self-determination and to exercise their autonomy in their reproductive decisions.

Argentina has recognized in different judicial legal proceedings that it is not legally incumbent to require a judicial authorization for the performance of a non-punishable abortion, it "not being appropriate to issue an order prohibiting the procedure to interrupt a pregnancy as long as medical professionals decide whether or not to carry out the intervention in accordance with their rules on the art of healing…"[78] However, the fact that requests for authorization for the performance of abortions continue to be filed with the superior courts of the various provinces, suggests that it is necessary to establish a unified national criterion that explains and sets out a clear protocol with

---

[75] *Ibid*. at 98.

[76] *Annual Report of the Inter-American Commission of Human Rights*, Friendly Settlement, Petition 161-02, Paulina (Mexico).

[77] See *Paton vs. United Kingdom*, Application No. 8416/78 before the European Commission on Human Rights. See also Rebecca J. Cook, Bernard M. Dickens & Mahmoud F. Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Oxford; New York: Clarendon Press, 2003) at 177 [Cook et. al., "Reproductive Health"].

[78] See Government of the Republic of Argentina, "VI Informe periódico sobre el cumplimiento de la Convención sobre la eliminación de todas las formas de discriminación contra la mujer presentado ante el CEDAW. Periodos 2004-2007," in CEDAW, "Examen de los informes presentados por los Estados partes en virtud del artículo 18 de la Convención sobre la eliminación de todas las formas de discriminación contra la mujer. Sextos informes periódicos de los Estados partes: Argentina," September 8, 2008 (CEDAW/C/ARG/6).

respect to how to comply with the requirements of article 86, paragraph 2°, and how services for the termination of an abortion must be provided so as to be coherent with women's human rights.

The same view has been expressed by the Constitutional Court of Colombia, which has declared that sexual and reproductive rights are based on the principle of dignity of all persons and on their rights to autonomy and privacy, one of their essential components being the right of all women "to reproductive self-determination and to freely decide on the number and spacing of their children, as it has been recognized by the various international conventions."[79] In order to effectively enshrine and protect them, it is necessary that a woman's equality, gender equality and freedom be essential to the development of society, to promoting the dignity of all members of the human species, and to the progress of humanity based on social justice.[80]

From another perspective, the instrumentalization of women is evident where, through the law, the State forces women to give up their bodies to their children before they are born, without requiring an equal instrumentalization from the fathers. Despite recognition of the legal principle whereby the same provision must exist where the same rationale exists, a man is never legally obligated to sacrifice his body for the welfare of his children. Even if the survival of a child depended on a blood transfusion or a bone marrow donation that the father could provide, there are no legal provisions requiring the father to donate.[81] Therefore, legal protection of fathers' physical integrity and autonomy following the child's birth is not equivalent to the legal protection of mothers before childbirth, even though the risks derived from a blood or bone marrow donation are much lesser than those derived from gestation and childbirth. This clearly violates a legal protection and requirement that must be carried out in conditions of equality (article 14 of the Constitution).

The jurisprudence and legislation of many countries have recognized a man's right to withdraw his consent for the implantation of embryos already fertilized with his semen.[82] Throughout the world, courts of law have not had any problem affirming men's freedom to not become fathers. A man's "forced" paternity in the circumstances described implies authorizing that his genetic material be used in the manner that he had previously consented to when the fertilization was carried out, whereas a woman's forced maternity entails considerable physical and emotional demands during pregnancy, childbirth and child upbringing, and very often involves the use of her genetic material in ways that she never consented to.[83]

---

[79] *Decision C-355/06, supra* note 25 at 234.
[80] *Ibid.* at 235.
[81] *See McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (Allegheny County Ct. Com. Pl. 1978); see also Katherine A. Taylor, "Compelling Pregnancy at Death's Door," (1997) 7(1) Colum. J. Gender & L. 85 at 125.
[82] *A.Z. v. B.Z.*, 725 N.E. 2d 1051, 1058 (Mass. 2000); see also, *Evans v. U.K.*, 6339/05 Eur. Ct. H.R. (2006); *cfr.:* CA 2401/54 *Nachmani v. Nachmani* [1996] IsrSC 50(4) 661.
[83] Rebecca Cook & Susannah Howard, "Accomodating Women's Differences under the Women's Anti-Discrimination Convention" (2007) 56 *Emory Law Journal* 1039 at 1075 [Cook & Howard].

5) The Republic of Argentina has domestic and international obligations to guarantee legal security and certainty in the law so that every woman who meets the requirements established therein may have equal, effective and prompt access to the reproductive health services that she is entitled to.

The right of every woman to plan her life in accordance with her own priorities and aspirations is also based on her trust in, and the legal certainty of, the Argentine rule of law. This certainty and trust are based on the premise that the same rules apply to everyone, without gender or socioeconomic distinctions. The criminalization of abortion violates a woman's right to health in discriminatory ways: it denies access to abortion to disadvantaged women (thus establishing a *de facto* discrimination between women of different socioeconomic conditions), and criminalizes a procedure that only women need (thus establishing *de jure* and *de facto* discrimination between men and women).

The criminalization of abortion establishes a *de facto* discrimination between women of different socioeconomic conditions given that it mainly affects access to abortion-related reproductive health services on the part of women who are in a disadvantaged situation, due to their lack of information and inability to pay for a safe abortion without questions and without "judicialization" in the private healthcare system. Discrimination of access to abortion services between rich and poor women is attributable to the Argentine State. The "judicialization" of non-punishable abortion in public hospitals is an illegitimate practice that is not required by the PC and that imposes the burden of going through a bureaucratic, cumbersome, and long process that only affects women who cannot afford to have an abortion in a private clinic.[84]

In Argentina, the great majority of women who request non-punishable abortions in public hospitals are subjected to long judicial proceedings to obtain an authorization to access the procedure. These proceedings, in addition to being bureaucratic and dilatory, are illegal because they represent the imposition of a *de facto* requirement that the PC does not prescribe. The deterrent effect that criminalization has on health professionals has been reported by research institutes[85] and considered by international[86] and domestic[87] courts.

The difference in treatment given to women from different socioeconomic strata cannot be justified on the basis of formal equality arguments. While the norm itself does not make any distinction whatsoever with respect to treatment, and even imposes the same requirements on all women, the fact that in practice economic resources allow some women to have an abortion in the private healthcare sector without questions or unnecessary delays, constitutes an evident form of discrimination. Moreover, it leads to the conclusion that only some women have the capacity to take control of their lives in accordance with their own principles, values or aspirations, whereas others must content themselves with submitting to the values and aspirations of health providers.

---

[84] Cynthia Steele & Susana Chiarotti, "With Everything Exposed: Cruelty in Post-Abortion Care in Rosario, Argentina" (2004) 12(24) Reprod. Health Matters 39 at 40.
[85] Guttmacher, "Sharing Responsibility," *supra* note 37 at 23.
[86] *Tysiac v. Poland*, App. No. 5410/03 (2007) (European Court H.R.) at para. 56 [*Tysiac v. Poland*].
[87] See, for instance, Cámara de Apelación en lo Civil y Comercial de Mar del Plata, Sala II, "O., M.V. s/ víctima de abuso sexual" (21/02/2007), voto del juez Loustaunau [Justice Loustaunau opinion].

The Colombian Constitutional Court has declared that when abortion is criminalized and poorly regulated, women who are poor, underage, indigenous, or who live in rural areas or in situations of forcible displacement, are disproportionately affected. This is also true of Argentina, where maternal mortality in the City of Buenos Aires amounts to 1.8 in every 10,000 live births, but in significantly poorer provinces, such as Formosa, the rate is 16.5 in every 10,000 live births.[88]

Similarly, the criminalization of abortion establishes *de jure* and *de facto* discrimination between women and men, given that it criminalizes a medical procedure and health service that only women need. The problem of criminalizing abortion can be characterized as "societies' inability to accommodate women's biological differences and to redress the social discrimination women face based on those differences."[89] Currently no necessary medical procedure to preserve the health of men is criminalized by the Argentine legal system. The criminalization of a medical procedure that only women need constitutes a violation of article 2(f) of the CEDAW, given that States Parties have a duty to adopt all appropriate measures to modify or abolish every legal norm, regulation, custom and practice which constitutes discrimination against women.

The World Health Organization (WHO) has stated that the rights to non-discrimination and equality mean that States must recognize the differences between the needs of different groups, and provide health services in accordance with those differences.[90] Given their biological differences, women as a group have specific needs in relation to their health which are different from those of men; but in addition, they are more prejudiced than men by determined social factors. Concretely, the prevalence of poverty and economic dependence suffered by women as compared to men, and their experience with gender violence and additional discrimination on the basis of racial or ethnic factors,[91] diminish their power to negotiate their sexuality and other matters concerning their lives, all of which eventually has a negative impact on their health.[92]

The CEDAW has declared that denying the provision of health services that only women need, such as obstetric care, cervical cancer treatment, emergency contraception, and safe abortion services, is a form of discrimination that States must remedy.[93] In addition, requiring a judicial authorization for the performance of a medical procedure exclusive to women where such authorization is not expressly required by law, is simply an unnecessary and arbitrary barrier that interferes with their right to receive medical treatment in equal conditions as men. Men are never required to obtain a judicial authorization prior to having a medical procedure, regardless of the consequences it may have.

---

[88] Equipo Latinoamericano de Justicia y Género (ELA), *Derechos de las Mujeres y Discurso Jurídico. Informe Anual del Observatorio de Sentencias Judiciales* (Buenos Aires: ELA, 2009). Based on data from the Ministry of Health.
[89] Cook & Howard, *supra* note 83 at 1040.
[90] World Health Organization, "The Right to Health," Factsheet 31 at 7-8, online: http://www.ohchr.org/Documents/Publications/Factsheet31.pdf [WHO].
[91] See the particular situation of Roma women in, for instance, *AS v. Hungary* [2006] UN Committee on the Discrimination against Women.
[92] WHO, *supra* note 90 at 12.
[93] CEDAW, *supra* note 24 at para. 11.

The stigma suffered by women who have an abortion or by the physicians who perform it, due to its punitive sanction, deters women from seeking medical assistance and health professionals from providing timely assistance. The criminalization of abortion has a very strong symbolic effect in its moral qualification, given that in spite of the ineffectiveness of criminalization in the protection of life and other conflicting rights and interests, it gives the impression of safeguarding a determined moral order that allows ignorance of the factual consequences of criminalization, namely: a high number of clandestine abortions in unsafe and unsanitary conditions.[94] Thus, the inherent immorality attributed to its practice serves as justification for the use of mechanisms and barriers that prevent the provision of related health services.

Physicians' lack of information and certainty about what the law says often permits stereotypical attitudes toward women who request abortions, even when those abortions are legal.[95] Thus, the stigmatization of abortion determines the kind of medical assistance received by women: the quality is deficient and women are victims of institutional violence.[96]

Performance of a non-punishable abortion to which a woman is entitled pursuant to the Constitution and its laws cannot depend on the public health service providers' or on their representatives' interpretative criteria. Health service providers and their representatives are not qualified to interpret the law. For this reason, the fact that there is no clear and uniform guideline from a federal legal institution for the interpretation of this norm has resulted in an interpretation of article 86 of the PC that is subordinated to personal principles and assessments.

There are notable cultural differences between Argentina's provinces: there are provinces that are more noticeably conservative and religious, which affects the availability of health professionals willing to perform abortions. Nevertheless, the ECHR has recognized that health providers' freedom of conscience is not unlimited, but can and should be restricted when colliding with reproductive health services.[97]

Abandonment of the legal security provided by a uniform and authoritative interpretation to make way for the instability of an amorphous variety of laypersons' interpretations, has resulted in a situation in which, on certain occasions, an act is considered to be within the confines of institutional legality, whereas on others it is considered to be a wrongful act with possible punitive sanctions.[98] Moreover, in certain

---

[94] Lidia Casas, "Capítulo Cuatro: Salud," in Cristina Motta & Macarena Saez, eds., *La Mirada de los Jueces: Género en la Jurisprudencia Latinoamericana* (Tomo I) (Bogotá: Siglo del Hombre Editores, 2008) at 401.

[95] Silvina Ramos *et. al.*, *supra* note 36 at 478-79.

[96] Silvina Ramos *et al.*, *Los Médicos Frente a la Anticoncepción y el Aborto: ¿Una Transición Ideológica?* (Buenos Aires: CEDES, 2001) at 48-49.

[97] See *Pichon and Sajous Vs. Francia* (2001), App. N° 49853/99, Eur. Ct. H. R. 2001-X, decisión on admissibility.

[98] The Human Rights Committee expressed "its concern at the restrictive legislation on abortion contained in article 86 of the Criminal Code and at the inconsistency in the courts' interpretations of the grounds for exemption from punishment set out in this article (articles 3 and 6 of the Covenant). The State party should amend its legislation so that it effectively helps women to prevent unwanted pregnancies and protects them from having to resort to clandestine abortions that could endanger their lives. The State

provinces, some women are prevented from having an abortion whereas others are authorized to have one, which could even mean that certain women are punished for the same actions and under the same penal definition, while others are not. In this sense, the whimsical interpretation of whoever may be on duty in a public hospital, together with the economic condition of the patient seeking to have the medical intervention cannot be the factor that determines the lawfulness or unlawfulness of a conduct.

An interpretation of article 86 of the PC that is consistent with the definition of health promoted by the WHO is urgently needed. The right to health is considered a fundamental human right indispensable for the exercise of other human rights.[99] In accordance with article 12 of the ICESCR, everyone has the right to enjoy the highest attainable standard of physical and mental health. Such enjoyment must be conducive to living a dignified life and guarantee that the right will be exercised without discrimination of any kind.[100]

The minimum obligations imposed on States Parties by the ICESCR require the Republic of Argentina <u>to respect women's right to health</u>. This means that the State must prevent discriminatory practices from becoming reinforced as public policies that deny or limit everyone's equal access to health services, and especially to those services and needs that are particular to women.[101] In the case of rape, the right of every Argentine woman to not endure in her body the consequences of a crime committed against her body, without distinction of economic class or position, contributes to preserving her mental health, which has already been affected by the violent act of sexual abuse.

The Argentine State also has an obligation <u>to protect women's right to health</u>. Protection implies a positive act on the part of Argentina to take the necessary measures to prevent third parties from interfering with the enjoyment of the right to health.[102] Thus, the State must adopt legislation and every other practical and legal measure necessary to ensure that all women, regardless of social origin or economic position, have equal access to health services necessary for the preservation of their mental health, in this case to an abortion.[103]

Accordingly, the Republic of Argentina also has an obligation <u>to realize women's right to health</u>. This implies recognition of the right to health in national public policies and in the legal system, through legislative implementation that adopts uniform policies

---

should also adopt measures for educating judges and health workers about the scope of article 86 of the Criminal Code." Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations by the Human Rights Committee: Argentina. Ninety-eighth session, New York, March 31, 2010 (CCPR/C/ARG/CO/4) at para. 13.

[99] Committee on Economic, Social and Cultural Rights, "The right to the highest attainable standard of health. *General Comment No. 14*, Twenty-second session, Geneva, April 25-May 12, 2000 (E/C.12/2000/4) at para. 1.

[100] *Ibid*. at para. 30.

[101] *Ibid*. at para. 34.

[102] *Ibid*. at para. 33.

[103] *Ibid*. at para. 35.

within the framework of a detailed national plan binding on all public hospitals and health service providers.[104]

6) Argentina has a duty to eliminate all undue barriers, burdens and delays, particularly those resulting from an ambiguous interpretation of the criminal norms regulating abortion, through the adoption and implementation of uniform guides and protocols binding on all public health service providers.

The interpretation of legal norms in a changing manner causes legal uncertainty and creates a serious barrier of access to legal abortion services.[105] Argentine health professionals, sheltered by the lack of clear public guides and policies with respect to the termination of abortions, refuse to perform non-punishable abortions or request judicial authorization to avoid being penally prosecuted.[106] In this case, the interpretation of such norms should follow the principle of criminal law *in dubio pro reo*: where there is doubt as to whether or not the definition of a crime covers an act, a correct and restrictive interpretation of the norm that favours the accused person would exclude such conduct from the norm's purview.

In Argentina, the vast majority of women who request non-punishable abortions in public hospitals are subjected to long judicial proceedings in the search for an authorization. In addition to being bureaucratic and dilatory, these proceedings are illegal because they represent the imposition of a *de facto* requirement that the PC does not prescribe. As we already analyzed in the previous section, the deterrent effect that criminalization has on health professionals has been reported by research institutes[107] and considered by international[108] and domestic[109] courts.

An objective of public policy is to put into practice, in the most efficient manner possible, the norms of a Nation. Very often, public policies inform the content of norms, especially where the norms are not clear as to how to comply with them in practice. When such policies are not expressly established, practices end up replacing them, which in turn endangers the State's institutional structure and the rule of law. In the case at hand, the refusal of public service providers to perform a service because of fear of criminal prosecution or personal ideologies regarding the morality of the service has resulted in requiring a judicial authorization in order to perform a non-punishable abortion, despite the fact that the law does not require it.

Lack of a uniform and binding interpretation of article 86 worsens a woman's social inequality, given that it imposes undue barriers, burdens and delays on her ability to access a health service to which she is entitled, thus endangering her physical and mental health. Her physical health is endangered because performance of the abortion is delayed to a more advanced stage of her pregnancy. Her mental health is endangered because she is forced to endure, against her will, a pregnancy that is the

---

[104] *Ibid*. at para. 36.
[105] Cook et. al., "Reproductive Health," *supra* note 77 at 345.
[106] *Ibid*.
[107] Guttmacher, "Sharing Responsibility," *supra* note 37 at 23.
[108] *Tysiac v. Poland*, *supra* note 86 at para. 56.
[109] See, for instance, Justice Loustaunau opinion, *supra* note 87.

product of a criminal act such as sexual abuse. While the delay might not seem to be excessively long, in the particular case of an abortion it could cause a serious injury to the woman, especially considering that more complex techniques will be required to perform an abortion at more advanced stages of gestation, thus making the abortion less safe to her.[110] In this regard, the Supreme Court of Canada has declared that:

> Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person.[111]

The only attempt to unify interpretative criteria through regulations is found in the Technical Guide for Integral Non-Punishable Abortion Care,[112] the implementation of which was twice left incomplete, most recently this year. States cannot legally recognize a right and then structure its normative framework, through regulations or the lack thereof, in such a way that impedes the exercise of a right to a service recognized by the law.[113] The government has an obligation to operationalize the defences in article 86 through the development of protocols, technical guides and regulations that are clear to both health service providers and women.

While each province maintains relative legal independence from one another, Argentina's responsibility vis-à-vis the international community with respect to promoting and guaranteeing human rights is unitary. This makes it urgently necessary to standardize the perspective of interpretation of the criminal legal framework. Article 86 of the PC applies throughout the country. To ensure that it protects the right to equality before the law of all women throughout the Nation, it is indispensable to define what the law really requires from both women and public health providers. Through the implementation of guides, protocols and other provisions, Argentina can ensure that it does not incur state responsibility by ensuring that both health professionals and facilities, as well as the women who go to them, have sufficient information to perform or request a non-punishable abortion.[114]

When countries fail to implement guides aimed at clarifying the letter of the law and explaining how to apply it in a manner consistent with constitutional and international human rights principles, cases can be brought against them before international courts. These courts may in turn assign responsibility to the State and order that such countries implement those norms. For instance, in *Tysiac v. Poland*, the ECHR found that states must expressly establish in their legal framework the manner in which women shall have access to medical services related to the performance of non-

---

[110] *Morgentaler*, *supra* note 7 at paras. 27-28.
[111] *Ibid*. at paras. 56-57.
[112] Mariana Romero, *Guía Técnica para la Atención Integral de los Abortos No Punibles* (Buenos Aires: Ministerio de Salud y Ambiente de la Nación, 2007), online: http://www.despenalizacion.org.ar/pdf/Pol%C3%ACticas_Publicas/Protocolos%20de%20Atenci%C3%B3n/Guia_Tecnica_para_la_Atencion_Integral_de_los_Abortos_No_Punibles.pdf
[113] In this regard, the decision of the European Court of Human Rights in the case of *Tysiac v. Poland* is noteworthy. Making a rule of law argument, the decision states that once the State grants a right, it cannot structure its regulations in such a way as to prevent the exercise of such right. *Tysiac v. Poland*, *supra* note 86 at para. 116.
[114] Cook & Howard, *supra* note 83 at 1055-56.

punishable abortions, in order to prevent physicians from refusing to provide such services due to fear of committing a criminal offence.[115]

[115] *Tysiac v. Poland*, *supra* note 86 at para. 116.

D. RELIEF SOUGHT

For the reasons set out above, we respectfully request that this Most Hon. Court:

1) Declare the admissibility of this *Amicus Curiae* brief pursuant to Ruling 28/2004.
2) Recognize the appointment of María Mercedes Cavallo as counsel for the *Amici Curiae*.
3) Add the present brief to the record and, should this Hon. Court consider it appropriate, serve the other parties with a copy thereof.
4) Take into account the legal arguments made in these submissions at the time of rendering a decision in this case.

May this Most Hon. Court decide in the manner requested,

SO THAT JUSTICE BE DONE