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Presenting Judge: Antonio José Lizarazo Ocampo
Corte Constitucional de Colombia

Reference: FILE.D- 13956 LAW 599 OF 2000, ARTICLE 122

Expert Opinion of Prof. Joanna N. Erdman (Dalhousie University, Canada), and Prof. Rebecca Cook (University of Toronto, Canada)

I. Introduction

1. We, Professors Joanna N. Erdman and Rebecca J. Cook respectfully submit this expert opinion to the Constitutional Court of Colombia in the matter of File.D-13956 LAW 599 of 2000, Article 122.
2. Professor Joanna N. Erdman, B.A. (Toronto), LL.M. (Harvard) is an Associate Professor and the MacBain Chair in Health Law and Policy at the Schulich School of Law, Dalhousie University. Professor Rebecca J. Cook, A.B. (Barnard), M.P.A. (Harvard), J.D. (Georgetown), J.S.D. (Columbia) is Professor Emerita at the Faculty of Law, the Faculty of Medicine and the Joint Centre for Bioethics, University of Toronto. We are internationally recognized experts in reproductive health and human rights, and we have acted as third-party experts in constitutional and human rights cases before domestic, regional and international tribunals on comparative and international abortion law.
3. This opinion addresses the consensus on the decriminalization of abortion in international human rights law. This consensus is based on the human rights standards of U.N. treaties as interpreted in the general comments and recommendations, and individual communications of U.N. treaty bodies, and as elaborated in the reports of U.N. special procedures.¹

4. The international human rights consensus on abortion decriminalization includes the following propositions, as elaborated in this expert opinion:
 - The international consensus has evolved from the withdrawal of punitive measures for abortion, to the expansion of grounds and protective measures for lawful abortion, to the decriminalization of abortion as a human rights imperative (section II)
 - The international consensus is based on the secondary and inherent harms of abortion criminalization and associated violations of the rights to life, health, privacy, equality and non-discrimination, and freedom from gender-based violence, and inhuman and degrading treatment (section III).
 - The international consensus is supported by general human rights principles of non-arbitrariness and proportionality that limit state power (section IV).
5. High courts in Latin America have increasingly referenced human rights standards in their review of national abortion laws,² including:
 - The Supreme Court of Justice in Argentina in support of an interpretation of the penal code that decriminalized abortion in all cases of rape,³
 - The Constitutional Court of Chile to allow for abortion on legal grounds of risk to life, and in cases of rape and fatal fetal anomaly,⁴
 - The Supreme Court of Brazil in support of the decriminalization of abortion on the ground of fatal fetal anomaly,⁵ and
 - This Honourable Court to recognize the fundamental right to abortion on grounds of risk to life and health, sexual crime, and fatal fetal malformation in declaration that an absolute prohibition on abortion is unconstitutional.⁶
6. As a State Party to the U.N. human rights treaties referenced in this expert opinion, the Republic of Colombia has accepted these human rights standards as part of its constitutional framework. Given the consensus on abortion decriminalization, Art. 122 of the Penal Code constitutes a breach of its state obligations pursuant to international human rights law.

II. The International Human Rights Consensus on Abortion Decriminalization

7. Since the mid-1990s, abortion law and policy has been a matter of international concern.⁷ Human rights standards first supported the depenalization of abortion and later the liberalization of criminal abortion laws. However, the international consensus on abortion criminalization has continued to evolve. A strong consensus in international human rights law now supports the full decriminalization of abortion.⁸
8. Early international human rights standards called for the depenalization of abortion, or the removal of all criminal penalties for abortion while retaining the formal prohibition. States

parties were first advised “when possible” to amend “legislation criminalizing abortion ... to remove punitive provisions imposed on women who undergo abortion.”⁹ The contribution of criminal abortion laws to women’s imprisonment is well-recognized, and so too, the critical need to repeal these laws to keep women out of the criminal justice system in protection of their right to health.¹⁰ Human rights standards now mandate that criminal sanctions not be applied against any person for having terminated their pregnancy.¹¹

9. Nonetheless, by retaining abortion as a crime, although unpunished, depenalization could not adequately protect health and human rights.¹² Human rights standards thus evolved to support abortion liberalization, specifically the reform of criminal laws to introduce or broaden legal grounds for abortion.¹³ Legal grounds describe the “circumstances under which abortion is lawful, that is, allowed or not contrary to law, or explicitly permitted or specified by law” against an otherwise general prohibition on abortion.¹⁴
10. Human rights standards required that abortion be lawful, at a minimum, on three grounds: where pregnancy presents a risk to the life or health of the pregnant person, where pregnancy results from sexual crime (i.e., rape, sexual assault, or incest), and where there is a risk of serious fetal impairment. Criminalization of abortion in these circumstances was deemed an arbitrary and discriminatory denial of access to health care, causing disproportionate harm in violation of the rights to life, health, privacy and equality, and freedom from inhuman and degrading treatment.¹⁵
11. Legal grounds, however, proved insufficient to guarantee access to services as exceptions to a general criminal prohibition on abortion. Human rights standards therefore evolved to require affirmative measures to ensure access to lawful services, especially for socially vulnerable and disadvantaged groups.¹⁶ Human rights standards specifically required an adequate legal and procedural framework to guarantee real and effective exercise of the right to lawful abortion. This framework included regulatory, policy and other measures to simplify and make publicly known entitlements to care, and procedures to safeguard these entitlements, including rights to information, the right to be heard, mechanisms of appeal and review of denials, and timely and immediate access to services as needed. These measures were intended to protect rights to life and health by ensuring access to services, but also rights to dignity and equality by ensuring respectful and humane care.¹⁷
12. Abortion liberalization through legal grounds and protective measures again proved inadequate to alleviate the harmful health and human rights effects of criminalization. Accepting the deep and enduring dysfunctions of criminal abortion laws, human rights standards further evolved to require the decriminalization of abortion, that is, the repeal of criminal abortion offenses and the removal of abortion generally from the purview of the criminal law.¹⁸
13. The consensus on the decriminalization of abortion in international human rights law is based on the harms of abortion criminalization and associated human rights violations (see section III) and supported by general human rights principles of non-arbitrariness and proportionality that limit state power (see section IV).

III. The Harms and Human Rights Violations of Abortion Criminalization

14. Criminal abortion laws involve a legal prohibition that directly outlaws particular conduct, but human rights standards recognize that “[i]n practice, these laws affect a wide range of individuals, including women [and all those] who attempt to undergo abortions; ... friends or family members who assist women to access abortions; practitioners providing abortions; [and] ... human rights defenders advocating for sexual and reproductive health rights”¹⁹
15. Criminal abortion laws jeopardize peoples’ health and lives, subject them to physical and mental pain and suffering, invite all manner of arbitrary state interference and indignity into their lives, and create gross social inequality and injustice in violation of rights to life, health, privacy, equality/non-discrimination, and freedom from gender-based violence, and inhuman and degrading treatment. Human rights standards recognize diverse and multiple harms secondary and inherent harms of abortion criminalization, and on the basis of these harms, mandate the decriminalization of abortion.²⁰

Criminalization and unsafe abortion

16. Human rights standards recognize criminalization as a key social determinant of unsafe abortion, endangering the lives of people.²¹ Countries where abortion is criminalized with minimum legal grounds have higher rates of unsafe abortion and related-mortality.²² Human rights standards thus support decriminalization to ensure people “do not have to undergo life-threatening clandestine abortions” in violation of rights to life, health and non-discrimination.²³
17. Human rights standards have also evolved from an exclusive focus on saving lives from unsafe abortion to recognizing the broader social effects of criminalization that create risk and unsafe conditions. For those seeking abortion, legal restrictions “must not, among other things, jeopardize their lives, subject them to physical or mental pain or suffering ... [or] discriminate against them or arbitrarily interfere with their privacy.”²⁴ Decriminalization is thus an essential part of the structural prevention of unsafe abortion.
18. Abortion criminalization limits peoples’ access to safer-use information and quality goods (including medicines) necessary to protect their health and well-being when seeking or having abortions outside formal health care systems.²⁵ “Poor quality health-care goods and services” is a “major problem arising from legal regimes criminalizing abortion.”²⁶ Abortion criminalization also deters people from seeking and providing information on safe abortion and generally prohibits an open exchange of public health information on safe abortion.²⁷ The right to health is an inclusive right that encompasses not only access to health care services, but the right to seek, receive, and impart information and support necessary to protect and promote health and well-being.²⁸ Neglecting specific health needs in relation to pregnancy is a form of gender-based discrimination,²⁹ but so too is obstructing action taken by women in pursuit of their health goals.³⁰

19. Overall, abortion criminalization deters people from taking steps to protect their health. People cannot act openly and freely to support safe abortion, nor allow the enactment of positive government policy to promote and protect the health and lives of all people who seek or have abortions. Any law likely to result in bodily harm, unnecessary morbidity, or preventable mortality constitutes a violation of the rights to life and health.³¹

Criminalization and stigma

20. Human rights standards acknowledge the harmful influence of criminalization on public understandings and perceptions of abortion, and the role of criminal law in perpetuating abortion stigma.³² While the formal criminal law on abortion may be only partial in its prohibition, the informal practice of abortion criminalization carries far greater effects for individuals, groups and the wider society.
21. Abortion criminalization and associated stigma interfere with health system planning and management “by stigmatising a safe and needed medical procedure.”³³ Stigmatization leads to the overmedicalization of abortion care through the arbitrary and otherwise unreasonable regulation of where, how, and by whom abortions may be performed, thereby reducing the availability and distribution of lawful services contrary to the right to health.³⁴ Human rights standards also recognize the harms of unnecessarily requiring people to travel for care, separated from and without the support of family and community.³⁵ Abortion received receives more scrutiny than it warrants and more regulation than it needs as a health care practice. The criminalization of abortion leads to training, infrastructure and protocols that are unnecessary for or even counterproductive to safe delivery and access.
22. Abortion criminalization and associated stigma also create a “chilling effect” leading to an overbroad application of criminal abortion laws and excessive access restrictions. Criminal laws with exceptions for lawful abortion granted through legal grounds or time-based limits necessarily afford excessive discretion in their interpretation and application. Against criminal sanction and social censure, health professionals are more cautious in assessments and unnecessarily deny or restrict access to lawful services.³⁶
23. Abortion stigma leads to the misuse and exploitation of vague provisions to frustrate access to lawful abortion and other services as a form of informal punishment.³⁷ Human rights standards recognize that “[w]omen face a disproportionate risk of being subjected to humiliating and degrading treatment in health-care facilities, especially during pregnancy ... as a way of punishing what is considered ‘immoral’ behaviour.”³⁸ Human rights standards expressly recognize these harms of *de facto* criminalization. Conditioning post-abortion care on confession or denunciation, and reporting suspected illegal abortion to engage criminal proceedings, constitute inhuman and degrading treatment and violate the right to privacy.³⁹ The direct link between abortion criminalization and stigma denies access to an array of rights related to health services and social support.
24. Abortion criminalization stigmatizes and marginalizes all those associated with abortion, inhibiting their constructive participation in social and political life, “distorting the balance

of care, seeking to silence those who wish to speak frankly and competently about, or wish to advocate for, legal and safe abortion while giving an advantage to those who wish to organize in opposition to abortion.⁴⁰ The social impact of abortion criminalization thus carries significant implications for a range of human rights.

Criminalization and social inequality

25. Human rights standards recognize the discriminatory impact of criminal abortion laws on socially disadvantaged and marginalized persons, including women living in poverty, people with disabilities, migrants, adolescents, and people living HIV/AIDS.⁴¹ Abortion criminalization results in the disproportionate deprivation of human rights for vulnerable persons through the perpetuation of discrimination and compounded stigma.
26. Abortion criminalization places heavier burdens on people living in poverty who are more likely to seek and have abortions outside formal health care systems by criminalizing life sustaining activities to reduce risk and avoid unsafe conditions.⁴² “By restricting access to sexual and reproductive healthcare goods, services and information,” criminal abortion laws “have a discriminatory effect, in that they disproportionately affect those in need of such resources.”⁴³
27. Socially vulnerable women and girls are also at greater risk of arbitrary denials of lawful abortion services, and discriminatory enforcement of criminal abortion laws, with higher prosecution rates and heavier penalties.⁴⁴ Decriminalization is thus a necessary measure towards ensuring equal protection under the law, and to the guarantee of “a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”⁴⁵

Criminalization and inherent harms

28. Human rights standards accept that the criminalization of abortion specifically targets and limits the exercise of the human right to decide whether and when to reproduce, a right integral to physical and mental integrity and to human dignity and worth.⁴⁶ This right is infringed even where criminal abortion offenses are not enforced. The very existence of the criminal prohibition constitutes an interference this right. To gestate and to birth a child is a profound human act, enlisting the whole of a person and their full faculties of mind and body. It is an act that carries serious lifelong consequences for a person, hence reflecting and influencing the way they think about themselves and their relationships with family, community, and society. By restricting this freedom, criminal abortion laws inflict mental and physical suffering, constitute a form of violence, and amount to inhuman and degrading treatment in the affront to dignity and personhood that they represent. Abortion criminalization constitutes a profound violation of respect for human dignity, which is fundamental to the realization of all human rights, and to participation in social and political life.
29. Human rights standards further characterize abortion criminalization as “one of the most damaging ways of instrumentalizing and politicizing women's bodies and lives,”⁴⁷ and as

inherently discriminatory because of the sex and gender bias inscribed into their structure and purpose.⁴⁸ Abortion criminalization in effect punish women for transgressing gender norms by refusing to legally provide a form of health care.⁴⁹ For these reasons, human rights standards further characterize abortion criminalization is a form of gender-based violence.⁵⁰ The inherent right to decide whether or not reproduce is fundamental to the equality of women affecting the full range of their human rights.

IV. The Human Rights Principles of Abortion Decriminalization

30. Human rights standards recognize that criminal abortion laws can serve legitimate objectives, including public health protection and the protection of morals, of which the protection of unborn life may be one aspect. However, international human rights law also sets limits on the state power to criminalize, even for legitimate objectives, granting no unfettered power to do so. Criminal abortion laws violate these limits because of their harms and human rights violations. These limits are rooted in principles of non-arbitrariness and proportionality.
31. Human rights standards define a criminal law as arbitrary if it inflicts harm or interferes with a human right without reason, or if its prohibition is ineffective in achieving or even undermines its objectives.⁵¹ Abortion criminalization is ineffective, counterproductive, and causes more harm than it prevents. Criminal abortion laws increase rather than decrease abortion incidence and are therefore counter-effective to their prohibitionist objectives. Criminalization is also inefficacious because it creates unsafe conditions and deters health-seeking behavior. Moreover, the broad and vague terms of liberalized criminal laws on abortion lead to their arbitrary enforcement in the denial and frustration of access to lawful health care. Last, the crime of abortion is arbitrary in an inherent sense because it is defined in an explicitly discriminatory way. Given the sex discrimination inherent to all criminal abortion laws, abortion criminalization violates the principle of non-arbitrariness.
32. Human rights standards define a law as disproportionate if the harms that it inflicts are disproportionate to its objectives.⁵² The harms that criminalization produces are disproportionately greater than the harms it protects against. A symbolic objective in the protection of morals cannot justify the real and material harms of criminalization. The principle of proportionality also encompasses overbroad criminal laws, or those which exert a significant ‘chilling effect’ on the exercise of a protected right. By restricting access to lawful abortion care and other related health care services, abortion criminalization violates this principle of proportionality.
33. Last, the principle of proportionality requires that the criminal law be used as a last resort, representing the most severe and intrusive power of the state. Criminal abortion law must not only serve a legitimate objective, human rights principles also require that they be a necessary means to achieve the objective. This standard cannot be met with criminal abortion laws. Less intrusive means to achieve legitimate objectives in abortion regulation include the provision of economic and social support for people who wish to reproduce. The protection of adolescents’ health and well-being is also best protected by ensuring and supporting them to make their own autonomous and informed decisions.⁵³ Health

regulation and social policy that ensures the availability of safe drugs, information and support, and access to health care services where desired or needed are more effective means to ensure safe abortion. Where there is concern regarding abortion for reason of fetal diagnosis, human rights standards affirm that disability rights cannot be used to justify the criminalization of abortion.⁵⁴

IV. Conclusion

34. The international human rights consensus on abortion law and policy has evolved from the withdrawal of punitive measures for abortion, to the expansion of grounds and protective measures for lawful abortion, to the full decriminalization of abortion as a human rights imperative. This consensus is based on the inherent and secondary harms of abortion criminalization and supported by general human rights principles of non-arbitrariness and proportionality. These human rights standards form part of the constitutional framework of the Republic of Colombia and require the repeal of Art. 122 of the Penal Code. By declaring the criminal abortion law unconstitutional, this Court would fulfill the obligations of the Republic of Colombia under international human rights law, specifically the United Nations treaties that it has ratified.

Signed

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References

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- ³ National Supreme Court of Justice of Argentina. Corte Suprema de Justicia de la Nacion, F, A. L. s/Medida Autosatisfactiva, Expediente Letra “F”, No. 259, Libro XLVI. 13 March 2012.
- ⁴ Constitutional Court of Chile. STC Rol No. 3729(3751)-17 CPT. 2017.
- ⁵ Supreme Court of Brazil. Sentence. Claim of non-compliance with fundamental Precept no.54. Judge-rapporteur: justice Marco Aurelio. Vote: justice Rosa Weber. Brasília, DF. April 30 2013.
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¹⁷ UN Committee on Economic, Social and Cultural Rights. General comment no. 14. E/C.12/2000/4. 2000 ¶13; UN Committee on Economic, Social and Cultural Rights. General comment no. 22. E/C.12/GC/22. 2016 ¶29; UN Committee on the Elimination of Discrimination against Women. General recommendation no. 24. A/54/38/ Rev. 1. 1999 ¶22.

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³⁵ UN Human Rights Committee. *Mellet v. Ireland*. CCPR/C/116/D/2324/2013. 2016. ¶¶7.2,7.4,7.8; UN Human Rights Committee. *Whelan v. Ireland*. CCPR/C/119/D/2425/2014. 2017. ¶¶7.5,7.11.

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³⁸ UN Working Group on Discrimination against Women. Report of the working group on the issue of discrimination against women in law and in practice. A/HRC/32/44. 2016. ¶¶17.

³⁹ UN Human Rights Committee. General comment no. 28. CCPR/C/21/Rev.1/Add. 10. 2000. ¶20; UN Committee on Economic, Social and Cultural Rights. General comment no. 14. E/C.12/2000/4. 2000. ¶34; Report of the Special Rapporteur on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health. A/66/254. 2011. ¶¶21-36; UN Committee on the Rights of the Child. General comment no. 15. CRC/C/GC/15. 2013. ¶70; UN Committee on Economic, Social and Cultural Rights. General comment no. 22. E/C.12/GC/22. 2016. ¶28; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/HRC/22/53. 2013. ¶¶46, 50, 90; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/HRC/31/57. 2016. ¶¶42,44, 46, 47, 70(k), 72; UN Committee on the Elimination of Discrimination against Women. General recommendation 34. CEDAW/C/GR/34. 2016 ¶39; UN Working Group on Discrimination against Women. Report of the working group on the issue of discrimination against women in law and in practice. A/HRC/32/44. 2016. ¶¶79; UN Committee on the Elimination of Discrimination against Women. General recommendation no. 35. CEDAW/C/GC/35. 2017. ¶18; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and

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⁴⁰ Report of the UN special rapporteur on extrajudicial, summary or arbitrary executions: note by the secretary-general. A/73/314. 2018. ¶79.

⁴¹ UN Committee on Economic, Social and Cultural Rights. General comment no. 22. E/C.12/GC/22. 2016. ¶30.

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⁴³ Report of the Special Rapporteur on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health. A/66/254. 2011. ¶17.

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⁴⁵ UN Committee on Economic, Social and Cultural Rights. General comment no. 14. E/C.12/2000/4. 2000. ¶8.

⁴⁶ Report of the Special Rapporteur on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health. A/66/254. 2011. ¶50.

⁴⁷ UN Human Rights Committee, General Comment No. 16. CCPR/C/GC/16. 1988. ¶4; UN Working Group on Discrimination against Women. Report of the working group on the issue of discrimination against women in law and in practice. A/HRC/32/44. 2016. ¶79; Report of the Special Rapporteur on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health. A/66/254. 2011. ¶12.

⁴⁸ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/HRC/22/53. 2013. ¶¶37,46; Committee on the Elimination of Discrimination against Women. General recommendation no. 33. CEDAW/C/GC/ 33. 2015. ¶21.

⁴⁹ UN Human Rights Committee. General comment no. 28. CCPR/C/21/Rev.1/Add. 10. 2000. ¶10; UN Committee on Economic, Social and Cultural Rights. General comment no. 14. E/C.12/2000/4. 2000. ¶34; UN Committee on Economic, Social and Cultural Rights. General comment no. 16. E/C.12/2005/4. 2005. ¶41; UN Committee on Economic, Social and Cultural Rights. General comment no. 22. E/C.12/GC/22. 2016. ¶35; Report of the Special Rapporteur on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health. A/66/254. 2011. ¶16; UN Working Group on Discrimination against Women. Report of the working group on the issue of discrimination against women in law and in practice. A/HRC/32/44. 2016. ¶¶14.

⁵⁰ UN Committee on the Elimination of Discrimination against Women. General recommendation no. 35. CEDAW/C/GC/35. 2017. ¶18, 29.

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⁵² UN Commission on Human Rights. Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. E/CN.4/1985/4. 1984. ¶10-14; UN Commission on Human Rights. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. E/CN.4/1987/17. 1987. ¶60-61.

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