Abortion in the Americas:

Non-discrimination and Equality as Tools for Advocacy and Litigation

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Introduction

This article will explore to what extent International Human Rights Law (IHRL) can make a formal or substantive contribution to access to abortion, analyse aspects of discrimination caused by the criminalisation of abortion, and examine the benefits of using the rights to equality and non-discrimination in advocacy and litigation to secure access to safe abortion as a critical component of reproductive healthcare.[2]

Jurisdictions within the Americas provide varying levels of access to abortion, although laws are generally very restrictive in Latin America. Four jurisdictions currently criminalise abortion in all circumstances – even where its purpose is to save the life of a pregnant woman.[3] Chile repealed its law permitting therapeutic abortion in 1989; El Salvador and Nicaragua introduced laws in 1998 and 2006, respectively, which removed previous exceptions for emergency and therapeutic abortion; the Constitution of the Dominican Republic of 2010 established the inviolable right to life from conception, creating a constitutional ban on abortion.[4] However, in 2006, the Colombian Constitutional Court repealed such a no-exceptions ban on abortions, ruling that it conflicted with its obligations under the Convention on the Elimination of Discrimination against Women (CEDAW) to deliver reproductive health services without discrimination.[5] In the United States, abortion is permitted but, since 2010, a series of laws which restrict access in practice have been passed in several states.[6] In contrast, legislative developments in Mexico City,[7] and juridical decisions in Argentina[8] and Brazil[9] have recently extended the circumstances in which abortion is permitted.

This article will analyse whether a no-exception ban on abortion is legitimate under IHRL, and evaluate aspects of direct, indirect and multiple and systemic discrimination caused by such legislation. It will look at how IHRL supports therapeutic abortion in certain situations – through claims of rights to non-discrimination, health, reproductive autonomy and freedom from inhuman treatment – and explore how the principles of non-discrimination and equality can strengthen this argument, examining the interpretation and clarification of these rights by the treaty bodies which monitor them. It will then look at the lived experience of the no-exceptions abortions bans in Nicaragua and El Salvador, where abortion is criminalised under any circumstances. In doing so it will demon-

strate how such legislation violates the principle of non-discrimination in relation to the rights to health and equality before the law, and will examine the multiple discrimination which marginalised and vulnerable groups of women experience in relation to these laws. Finally, it will examine the use of the principles of equality and non-discrimination in litigation, including an analysis of the Colombian Supreme Court's decision in a constitutional challenge to a no-exceptions abortion ban. It will offer a comparison of subsequent claims for protection, contrasting these with the recent restrictive legislative moves in the United States. In doing so, it will evaluate the benefits of applying the principles of equality and non-discrimination within advocacy and litigation, and the impact of the mandatory and immediate obligations which are put upon the state as a result.

1. International Legal Framework

On one level, there appears to be a particular silence on abortion within human rights treaties. The sole exception where abortion is explicitly declared as a right in a legally binding international instrument is in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.[10] However, other international and regional IHRL instruments contain provisions which are applicable to abortion, including the rights to life, health, reproductive autonomy, freedom from cruel or inhuman treatment and the right to non-discrimination. Interpretations of these legal instruments by treaty bodies and courts have further clarified how the treaty provisions should be implemented in relation to abortion.

1.1 The Right to Life

The right to life is a fundamental provision within international and regional treaties:[11] it is a right from which there can be no derogation, even in times of emergency.[12] In the abortion debate, those against abortion have used IHRL to claim a foetal right to life[13] whereas others have claimed that there is no legal basis for such a claim and that any absolute foetal right could violate the rights of the mother – and especially her own right to life.[14] If there is a foetal right to life, the extent of the right's application must be established in order to analyse to what extent a pregnant woman's rights can be limited by the state's interest in protecting any foetal rights.

Legal Instruments

The terminology within the primary legal documents does not explicitly extend the right to life to the unborn, although neither does it preclude this. In the Universal Declaration on Human Rights (UDHR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) the right to life belongs to "everyone" (Article 3 UDHR; Article 2(1) ECHR); in the International Covenant on Civil and Political Rights (ICCPR) it belongs to "every human being" (Article 6(1) ICCPR); in the United Nations Convention on the Rights of the Child (CRC) it belongs to "every child" (Article 6(1) CRC). The American Convention on Human Rights (ACHR) contains the most specific definition of the point at which the right to life could begin at Article 4(1): "Every person has the right to have his life respected. This right shall be protected by law, and, in general from the moment of conception." Much debate has been generated about the point at which the right to life begins and, although most treaties are silent on this matter, it is "generally recognised that international human rights conventions are not applicable before the birth of a human being".[15] Indeed, the drafters of the ICCPR rejected, by majority vote,

the term "from the moment of conception" and analysis of the *travaux préparatoires*[16] shows that the drafters of both the ICCPR and the CRC discussed this very matter, and purposefully chose language that would not extend the right to life to the unborn.[17]

International Judicial Decisions

In 1981 the Inter-American Commission on Human Rights (IACHR) confirmed in the *"Baby Boy" Case* that abortion was compatible with the ACHR and clarified the substantive meaning of the terminology.[18] The judgment referred to the fact that the drafters had consciously changed the language of the treaty for the specific purpose of accommodating the domestic laws of those states which permitted therapeutic abortion, clarifying that the prenatal right to life is not absolute within the ACHR and that abortion is permitted under the treaty. The European Court of Human Rights (ECtHR)[19] and the European Commission of Human Rights (ECommHR)[20] have allowed for a wide margin of appreciation where abortion is concerned, meaning that European states have a very broad range of abortion laws, ranging from Ireland's restrictive laws to the UK's extremely liberal laws. The ECtHR's ruling in *A, B and C v Ireland* stressed that "[w]hile the State was entitled to a margin of appreciation to protect pre-natal life, it was not an absolute one",[21] and that:

> "[The] prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature."[22]

Therefore, whilst the ECtHR avoided ruling on whether there is a foetal right to life, it did state that any prenatal right to life is not absolute and that European human rights law requires states to provide emergency abortion.[23] Thus, even if there is a foetal right to life under the ECHR, it appears to have a lesser status to that of the mother's right to life: the state's duty to protect the woman's right to life has primacy over any foetal right to life. This reasoning has led to the general acceptance of emergency abortion as an essential medical procedure, which protects women's fundamental human rights under IHRL.

Expansive Interpretation of the Right to Life

The inviolable duty to uphold women's right to life requires the state to adopt both negative measures, such as the obligation not to kill, and positive measures, such as protection from unintentional death. Whilst this certainly supports emergency abortion to save a woman's life from imminent risk, both the United Nations and Inter-American systems have stressed that the right to life must be interpreted in an expansive manner. The Human Rights Committee (HRC) in General Comment 6 stresses that:

> "[T]he right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures."[24]

In the Americas, the Inter-American Court of Human Rights (IACtHR) has further aligned the right to life with the right to a dignified life (*vida digna*) free of inhuman treatment and supported by access to life's essentials – food, water and healthcare,[25] reflecting the interrelatedness, interdependency and indivisibility of human rights. This expansive interpretation of the right to life suggests states should provide access to reproduc-

tive healthcare and therapeutic abortion in a broader range of circumstances. When applied together with the right to non-discrimination – which is compelling to all and of a non-derogable nature – this argument is significantly strengthened.

The Balancing of Rights

The concept of the balancing of rights is crucial to judicial decisions on both discrimination and abortion. Such decisions "seek to balance competing human rights so that they are not interpreted absolutely and undermine one another"[26] and are core to the concept of proportionality. This balancing of rights has also been used by the majority of constitutional tribunals which have been asked to examine laws governing abortion, and which have recognised the need to balance the life of the foetus with the various rights of the pregnant woman.

"Even though the various tribunals have differed on which of those interests must prevail in particular cases, they have shared common ground in affirming that a total prohibition on abortion is unconstitutional because under certain circumstances it imposes an intolerable burden on the pregnant woman which infringes upon her constitutional rights."[27]

When such judicial decisions are made with an expansive interpretation of the rights to life and with full consideration of women's other rights and the right to non-discrimination, they can generate a powerful affirmation of women's right to abortion in certain circumstances.

1.2 Women's Rights to Health, Reproductive Autonomy and Non-Discrimination

In addition to the right to life, women hold several other rights which are relevant to abortion, *inter alia,* the rights to health, reproductive autonomy and non-discrimination, as well as the rights to dignity, liberty of the person and respect for privacy and family life. Several commentators have comprehensively evaluated the meaning of these rights in relation to abortion,[28] and this article will now examine how the right to non-discrimination – specifically in relation to the rights to health, reproductive autonomy and freedom from inhuman treatment – relates to the debate on abortion. In doing so, it will draw on interpretations and rulings by treaty bodies, which have been particularly clear about access to abortion in the Concluding Observations issued to individual states.

The Right to Health without Discrimination

The Preamble to the Constitution of the World Health Organisation (WHO) defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" and states that:

"[T]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."[29]

This right to health is granted in Article 12(1) of ICESCR, which must be implemented with the principle of non-discrimination accorded by Article 3, requiring:

"[A]t a minimum, the removal of legal and other obstacles that prevent men and women from accessing and benefiting from healthcare on a basis of equality. This includes, *inter alia*, (…) the removal of legal restrictions on reproductive health provisions."[30]

States can violate this right by "the denial of access to health facilities, goods and ser-

vices to particular individuals or groups as a result of *de jure* or *de facto* discrimination",[31] and, in order to respect this right, states must abstain "from imposing discriminatory practices relating to women's health status and needs".[32]

The right to health – along with other economic, social and cultural rights – must be progressively realised according to available resources. By contrast, the right to non-discrimination is not subject to such progressive realisation but rather is of immediate effect and cannot be restricted.[33] States have:

> "[V]arious obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2)."[34]

Ensuring "the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups"[35] is a non-derogable part of the core obligations under the treaty. States must not only grant these rights, but also the means to fulfil them: "[t]he right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*".[36] Furthermore, "guarantees of non-discrimination and equality in international human rights treaties mandate both *de facto* and *de jure* equality".[37]

Emergency and therapeutic abortions are medical services which are only required by women. When these are withheld to the point where they violate any right, *inter alia,* the rights to life and health, they must be read together with common Articles 2(2) and 3 of the ICESCR and ICCPR, which protect against discrimination.[38] In regard to ICESCR:

> "By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health (…) which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health."[39]

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has further stated that "it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women".[40] Thus, arbitrarily restricting access to emergency and therapeutic abortion at minimum – and possibly also to broader elective abortion – violates the principle of non-discrimination on the ground of sex.

The Guttmacher Institute[41] and WHO report that criminalising abortion does not decrease the number of abortions performed in countries, but merely limits women's abortion options to illegal and potentially unsafe options.[42] Unsafe abortion is the single highest cause of maternal death in countries with total bans, such as Nicaragua, with up to 16% of maternal deaths linked to complications arising from illegal abortions.[43] The HRC has requested that "[w]hen reporting on the right to life protected by Article 6, States parties should (…) ensure that [women] do not have to undertake life-threatening clandestine abortions".[44] The criminalisation of abortion therefore also discriminates against women by exposing them to unsafe procedures, jeopardising their right to life as well as their access to health – risks which are borne only by women and to which men are not exposed.

The criminalisation of abortion also causes a chilling effect on women who experience obstetric complications, miscarriage,

stillbirth or premature labour, who may be reluctant to seek medical help in case they are accused of procuring an abortion.[45] Furthermore, women face punitive criminal penalties for accessing healthcare which only they require, whereas men do not. In jurisdictions with no-exceptions abortion bans, these penalties can also extend to non-obstetric as well as obstetric healthcare, with medical professionals facing similar penalties for carrying out their professional duties. In such jurisdictions, the fear of criminal sanctions has a chilling effect on medical professionals' willingness to deliver specialised care to pregnant women or to attend to women who present in obstetric emergency or women who have undergone a clandestine abortion, causing further discrimination in the delivery of healthcare.[46]

The Right to Reproductive Autonomy

The right to reproductive autonomy is granted in CEDAW Article 16(e), which states that women must be able "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights". The CEDAW Committee has specified that women should not be criminalised for seeking healthcare,[47] and that states must "remove punitive provisions imposed on women who undergo abortion" in order to comply with CEDAW.[48] A state's failure to uphold these rights places a disproportionate burden on women, violating the principles of non-discrimination and equality enshrined in CEDAW. The right to reproductive autonomy relates to abortion in a wider range of circumstances than the rights to health and life (unless an expansive reading of these is taken) creating a strong argument for elective as well as therapeutic abortion.

The Right to Freedom from Cruel and Inhuman Treatment

In the case of a pregnancy which results from rape or incest, the impact on the girl or woman of carrying a pregnancy to term must be considered. By its very nature, such a pregnancy would be forced, thus violating the right to reproductive autonomy of the girl or woman. The HRC has informed states that in order to assess their compliance with Article 7 of the ICCPR – the right to be free from cruel and inhuman treatment – it "needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape".[49] The HRC required this specifically for adherence with Articles 6 and 7 of the ICCPR: the right to life and the right to be free from torture and inhuman treatment, demonstrating that it considers the mental and physical suffering caused by a forced pregnancy to contravene Article 7. Further to this, the United Nations Committee Against Torture has expressed "deep concern" about absolute bans on abortion in its Concluding Observations on several countries.[50] The HRC was asked to consider the case[51] of *K.N.L.H. v Peru,*[52] which concerned a 17 year old pregnant girl who, after an ultrasound scan found that the foetus was anencephalic, was denied abortion, even though it was allowed under Peruvian law.[53] The 2006 HRC ruling evaluated the girl's "serious mental suffering" and the fact that medical staff had foreseen this suffering, concluding that the continued pregnancy was cruel or inhuman treatment,[54] violating Article 7 of the ICCPR.

The Right to Equality before the Law

The criminalisation of health services which only women require is a direct violation of the rights to health and non-discrimination: "it is discriminatory for a State party to re-

fuse to legally provide for the performance of certain reproductive health services for women".[55] This criminalisation further impacts on women's rights to equality before the law and equal protection of the law,[56] liberty of the person and due process.

The criminalisation of abortion generally imposes an obligation on medical professionals to report abortions, as they have to report other crimes. The HRC requires states to provide information on any laws and practices that:

> "[M]ay interfere with women's right to enjoy privacy and other rights protected by article 17 on the basis of equality with men, [for example] where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion".[57]

The Committee emphasised that this could also impact on the right to life and the right to be free from cruel or inhuman treatment, and that states should report on any laws or practices that interfere with the equal enjoyment of the right to privacy by women, and on the measures taken to eliminate such laws or practices.[58] The obligation on medical professionals to make reports to the police breaches patient confidentiality, and, dependent on the reporting procedure, can violate the rights to privacy, freedom from reputational attacks[59] and the presumption of innocence.[60] This also has a chilling effect on women, who may be reluctant to seek medical help during or after such an obstetric emergency or illicit abortion,[61] resulting in poor health outcomes and increasing possibility of maternal mortality.

The criminalisation of women who are suspected of having undergone an abortion can also lead to the failure to uphold guarantees of judicial process or to violations of the rights to a fair trial and equal protection of the law.[62] Article 8 of the ACHR prescribes the right to a hearing "by a competent, independent and impartial tribunal" and outlines the specific minimum judicial guarantees – *inter alia*, the right to a hearing, the inalienable right to counsel, prior notification of charges and time to prepare defence, the right to examine witnesses, the right not to be compelled to self-incriminate and the right to appeal to a higher court. The pre-trial detention, judicial process and trials for abortion-related crimes in some jurisdictions have been found to systematically fail to meet these standards.[63] For instance, women may be presumed guilty before evidence has been gathered, denied access to legal counsel before their trial, prevented from testifying in their defence and subjected to trials which are based on conjecture rather than proof. Beyond this, women of low socio-economic status, in particular, lack the financial recourse to access legal support or expert opinion resources and often also lack knowledge about their rights, which can further impair their enjoyment of these rights.

Violence against Women

Violence against women "is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".[64] States have both negative and positive obligations in relation to violence against women, including "to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control",[65] and "to provide appropriate specialized services for women who have been subjected to violence".[66] The Committee Against Torture has also condemned the criminalisation of abortion in all circumstances. It has stated that

the ban has a serious effect on the mental health of:

> "[W]omen victims of violence [who] were subjected to continuing violations, placing them under serious traumatic stress with the risk of incurring long-term psychological problems".[67]

Women who are victims of rape and who are unable to access safe abortion experience compound discrimination on the grounds of sex with regard to their rights to life, health, reproductive autonomy and to freedom from cruel and inhuman treatment.

Furthermore, the Inter-American Convention on the Elimination of Violence Against Women (Convention of Belém do Pará) holds that a state commits an act of violence against women not only by failing to refrain from it, but also by perpetuating or condoning an act of violence.[68] Forcing the continuation of a pregnancy that has resulted from rape perpetuates the violence. Insomuch, prohibiting access to abortion in cases of rape can, in itself, be interpreted as an act of violence against women.

Intersectional Discrimination

Some groups of women experience discrimination due to the intersection of two or more prohibited grounds in relation to abortion, and "such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying".[69] Typically, groups of women which are statistically more likely to require emergency or therapeutic abortion include: women who are less able to access contraception and healthcare information and services, groups who have poorer overall standards of health, groups where girls become sexually active at a young age and groups which are disproportionately affected by gender-based violence and rape. These may include, for example, indigenous women, ethnic minorities and internally-displaced women.[70] Low income and rural women and adolescent girls are disproportionately affected by the abortion bans in Central America,[71] experiencing multiple discrimination on the grounds of sex, social origin, age and economic or other status, prohibited under ICESCR Article 2(2).[72] In addition, "economic status" is a protected ground in the Inter-American system[73] and the right to health obliges states to satisfy "the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable".[74]

Adolescent pregnancies are 50% more likely than average to incur complications which require emergency intervention, such as therapeutic abortion,[75] and adolescent girls are disproportionately affected by maternal mortality.[76] In order to guarantee the right to health for adolescents, states must develop "youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services".[77] The Committee on the Rights of the Child has issued Concluding Observations on several countries, calling on them to ensure that adolescent girls have access to contraception and safe abortion.[78] Furthermore, adolescents in Central America are disproportionately affected by rape and incest and are, therefore, more likely to require specialist services, including termination of pregnancy.[79] This group is therefore disproportionately affected by the lack of access to safe abortion, suffering further indirect and multiple discrimination, on grounds of sex and age in enjoyment of the rights to life and health.

Typically rural women are poorer, have high levels of malnutrition and restricted

access to drinking water, become sexually active younger and have a higher number of pregnancies.[80] In general, they also have low levels of education, restricted access to health information and sex education, and limited access to high quality health services and reproductive healthcare, as well as low levels of power, autonomy and decision-making ability, due to cultural factors.[81] These factors lead to higher risk of obstetric complications and maternal mortality, making rural women statistically more likely to require reproductive healthcare services, such as emergency and therapeutic abortion.[82]

Poor women do not have the economic resources to attend a private clinic where they may be able to receive discrete treatment, nor to travel to another jurisdiction to obtain an abortion. Their lack of economic resources means that if they do access clandestine abortion, they are exposed to the highest risk and lowest sanitary conditions, which represents discrimination and social injustice.[83] There also is evidence that they are disproportionately affected as a result of the healthcare they are able to access within the country, with only public hospitals reporting suspected abortions to the police. Further to this, where women face criminal penalties for abortion, poor women rarely have the resources to access legal assistance, constituting further discrimination on grounds of their economic status.

Consequential Impact on Equality

Lack of substantive access to reproductive healthcare, including safe and legal abortion can have a compound discriminatory effect on women's ability to participate in all areas of public life, and has a profound effect on women's "exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".[84] In addition to the significant financial and personal impact which bearing and raising a child has on a woman, lack of access to reproductive healthcare has a consequential impact on other rights, *inter alia* the rights to education and work, perpetuating socio-economic and educational disadvantage, as well as gender inequalities.[85] By contrast:

> "[I]ncreasing access for all women to reproductive health care services enables women to seek educational and employment opportunities and contributes to the elimination of social and economic discrimination against women."[86]

Restrictive access to reproductive healthcare serves to perpetuate gender stereotypes, poverty and social iniquities. The criminalisation of abortion "directly contributes to the feminization of poverty in [El Salvador] and further exacerbates the inequality that women face",[87] thus perpetuating disadvantage and discrimination. Furthermore, the inability of women to make decisions regarding their reproductive capacities further accentuates this situation. By contrast:

> "[E]mpowering women by allowing them meaningful involvement in decision-making processes that affect them has been found to be instrumental in ensuring the success of programmes aimed at reducing poverty and increasing equality between men and women."[88]

Thus any prohibition on abortion can have an ongoing impact on the right to equality in the enjoyment of an expansive range of rights, impairing women's ability to participate on an equal basis with men in all areas of public life.

Systemic Discrimination

Systemic discrimination is "pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination," typified by "legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups".[89] Inasmuch, the impact on women outlined above represents systemic discrimination. Additionally, in Central America, for instance, there are high levels of violence against women, including the phenomenon of "feminicide",[90] which is an extremely grave and widespread pattern of discrimination against women. When the context of these broad and pervasive patterns of discrimination against women is taken into consideration, a no-exceptions ban on abortion represents one element of systemic discrimination against women.

2. Discrimination: the Lived Experience under No-Exceptions Bans on Abortion

In Latin America, there has been a noticeable trend towards no-exceptions bans on abortion. Nicaragua, El Salvador, Chile and the Dominican Republic have introduced laws which permit no recourse, even when the woman's life is at immediate risk.[91] Article 37 of the Dominican Republic's new constitution grants the inviolable right to life from conception and outlaws abortion in all circumstances. Mia So has stated that "there is no reading of Article 37 that would make it compatible with the Dominican Republic's current standards of international law and fundamental principles of human dignity".[92] Further to the prohibition of emergency abortion – a prohibition which violates fundamental human rights, such bans can have a discriminatory impact on all aspects of women's lives. This article will now analyse the substantive impact of such legislation from a perspective of non-discrimination and equality, highlighting aspects of discrimination in two case studies and demonstrating the systematic violation of fundamental human rights.

2.1 Nicaragua: Discrimination and the Right to Health

In 2006, Nicaragua repealed the law allowing therapeutic abortion in limited circumstances, removing the rights to seek an abortion to save the mother's life or health, to terminate a pregnancy that resulted from rape or incest, or to abort a foetus with fatal defects. Nicaragua's new Penal Code (Law 641) was introduced in 2008 and criminalised abortion in all circumstances, placing extremely harsh sanctions on medical personnel who perform an abortion or provide any aftercare, and on any woman or girl who seeks or has an abortion. Furthermore, administering any medical treatment which results in the death of a foetus or spontaneous abortion – even unintentionally – is also criminalised.[93] This has led to the discriminatory denial of both obstetric and non-obstetric healthcare.

When the law allowing therapeutic abortion was repealed, Victor Abramovich, the IACHR's Special Rapporteur on Women's Rights, wrote to the Nicaraguan Foreign Minister stating that:

> "Therapeutic abortion is recognised internationally as a specialised and necessary health service for women. The denial of this health service constitutes a violation of women's life and physical and psychological integrity. Equally [the prohibition on therapeutic abortion] would be an obstacle to the work of health professionals, whose obligation is to protect life and deliver adequate treatment to their patients."[94]

There are many documented examples where medical professionals have denied essential obstetric care to pregnant women. For instance, women with obstetric emergencies such as an ectopic pregnancy – a non-viable pregnancy, which has lethal consequences for the woman if left untreated – have been denied treatment.[95]

Furthermore, there are cases where women have been refused life-saving treatment for non-obstetric conditions such as breast cancer because medical staff were concerned that it may cause foetal damage and spontaneous abortion.[96] CESCR has stated that:

"[T]he realisation of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health".[97]

Therefore, we can see that this absolute ban on abortion clearly violates a woman's right to access to healthcare – not only by not removing barriers, but by actually creating them – and, therefore, also violates the principle of non-discrimination in the delivery of healthcare.[98]

Healthcare staff face harsh criminal sanctions for performing emergency abortions or medical treatment that unintentionally results in spontaneous abortion, violating their rights to deliver care. The president of the IACtHR has stated that:

"In certain cases, such as when continuing the pregnancy would endanger the life of the woman, or when the pregnancy is as a result of rape, the criminalization of abortion would cause a violation of the obligation of the state to protect the life of the woman."[99]

In *de la Cruz-Flores v Peru,*[100] Judge Garcia Ramirez stated of medical professionals that if the state:

"[P]revented them from complying with their ethical and juridical duty, and even imposed penalties for such compliance (…) the State would be harming the right to life and health of the individual, both directly and by intimidation or restrictions imposed on those who, due to their profession, are regularly obliged to intervene in the protection of those rights".[101]

Thus it can be seen that the criminalisation of abortion further violates the rights of women both by subjecting them to criminal sanctions for pursuing their right to healthcare and also by impeding the medical professionals responsible for the frontline delivery of those rights. It also violates the rights of medical professionals by attracting criminal sanctions for carrying out their professional duty. The HRC has specifically stated that:

"The State party should bring its legislation on abortion into line with the provisions of the Covenant (…) and avoid penalising medical professionals in the conduct of their professional duties."[102]

In February 2010, the IACHR granted Precautionary Measures for "Amalia",[103] a Nicaraguan woman with cancer who was being denied treatment because she was pregnant, and the treatment could cause spontaneous abortion or stillbirth. The request for Precautionary Measures required that Nicaragua treat "Amalia" according to her wishes and medical needs, and that the State respond within five days. These Precautionary Measures set precedent in recognising the need to deliver indicated medical treatment in pregnancy, and for the termination of pregnancy to acknowledge non-obstetric as well

as obstetric threat to life during pregnancy. This demonstrates "that the Commission understands and condemns the effects that the abortion negation can have in the rights to life, health, and to the integrity of women in the region".[104]

In its General Comment 14, CESCR presumes that retrogressive measures in relation to the right to health are not permissible, and are in themselves a violation of the right to health:

"If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant."[105]

Emergency and therapeutic abortions were available in Nicaragua for over a hundred years until this recent ban, and medical care was also available to pregnant women. In this respect, Nicaragua's abortion ban violates the principle of non-retrogression. CESCR illustrates the impact that this has on the state's duty to uphold women's rights noting with concern:

"[T]he general ban on abortion, even in cases of rape, incest and, apparently, pregnancies threatening the life of the mother, (…) and various documented cases in which the death of a pregnant woman has been associated with a lack of timely medical intervention to save her life such as would have taken place under the legislation in force before the law was revised".[106]

2.2 El Salvador: Discrimination and the Right to Equal Protection of the Law

The law in El Salvador outlaws abortion in all circumstances, including abortion to save the life of a woman. Previous access to therapeutic and emergency abortion was repealed in 1998, and Chapter II of the Penal Code now prohibits Crimes Against the Life of Human Beings in the First Stages of Development, with strict criminal penalties prescribed by Section 133 for anyone who procures an abortion or allows one to be procured. Medical professionals face even harsher penalties for any involvement, and are obliged to report a suspected abortion to the police.[107] Poor women suffer disproportionately from El Salvador's absolute ban on abortion, as they do in other jurisdictions with such laws.[108]

Healthcare professionals in El Salvador are obliged to maintain patient confidentiality, but also to report any crimes to the police, including that of abortion. A note from the Attorney General's Office is displayed in the maternity department of public hospitals, reminding staff of this duty and putting them under pressure to make reports.[109] The manner and speed with which reports are made – prior to any investigation or gathering of evidence – violates the right to the presumption of innocence. Women of low socio-economic status who are suspected of having undergone an abortion are regularly reported to the police. Poor women are disproportionately more likely to suffer from obstetric complications, but they are frequently reported to the police following a miscarriage (spontaneous abortion), stillbirth or premature labour. Significantly, not one such report has been made to the police by a private clinic or hospital.[110] In this manner, poor women are disproportionately affected by these violations of their right to presumption of innocence, privacy and patient confidentiality. Following a report to the police, they are often shackled to their hospital bed and then transported straight from the hospital to prison, often in a grave medical situation.

Article 133 of the Penal Code establishes that anyone who causes an abortion or knowingly allows an abortion to take place can be punished with two to eight years in prison. In addition to imposing criminal sanctions for accessing an essential component of reproductive healthcare, this has also led to the arbitrary imprisonment of women who have suffered a miscarriage or an obstetric complication.[111] Furthermore, if the foetus is deemed to have been viable, the Prosecutor habitually converts this into the crime of aggravated homicide, which is punishable by 30 to 50 years in prison.[112] As of June 2012, the Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico (ACDATEE, Citizens for the Decriminalisation of Therapeutic, Ethical and Eugenic Abortion) has met 128 women who have been imprisoned for abortion, and 25 who have been prosecuted for aggravated homicide, after an abortion, miscarriage or stillbirth. The majority of the women who have been imprisoned share a similar profile, according to Morena Herrera, president of the ACDATEE:

"They are women who live in a situation of poverty, young women who have low levels of education, know little of the law, and have little help to prepare a defence for their case. Therefore the Attorney General (Fiscalía General de la Republica) easily obtains prosecutions and the women remain incarcerated."[113]

Further, the ensuing trials[114] fall short of the international standards for a fair trial and equal protection of the law.[115] There are documented cases of women who have been charged with abortion-related crimes in El Salvador who have been unable to meet with legal counsel prior to their trial and have not been permitted to testify in their own defence.[116] Expert evidence is provided by the prosecution only and is often insufficient to support the charges and in particular the charge of aggravated homicide. For instance, the autopsy may list the gender and approximate gestational age of a foetus, but not the cause of death, nor whether it was a live birth. It is thus apparent that women's right to equality before the law and judicial guarantees is disproportionately and unjustifiably affected by this process.

The case of Sonia Esther Tábora[117] is emblematic of the lived experience of El Salvador's abortion law. In 2005, Tábora was sentenced to 30 years in prison for aggravated homicide after she suffered a miscarriage. All aspects of her detention and trial reflect intersectional discrimination on grounds of sex and socio-economic status. Her patient confidentiality was violated, she was presumed guilty rather than innocent, and transferred from hospital to remand as though she were a dangerous criminal. Her trial did not meet the standards of a fair trial under international standards. No autopsy was carried out and no direct or scientific evidence was presented by the prosecution during the trial, which relied on the conjecture of the judge rather than proof. Tábora spent seven and a half years in prison before being released on 14 August 2012, following a review of her sentence. Although she was released, she was not exonerated of the crime for which she had been prosecuted.[118]

In previous similar cases, the result of judicial reviews has been for the sentence to be commuted or annulled on the basis that evidence was insufficient to support prosecution or that the sentence was excessively severe and disproportionate.[119] However, women have generally served a substantial time in prison before such a review is granted, and are not exonerated of the crimes. The refusal to exonerate these women means that they

cannot receive reparations for the time they have spent in prison. Furthermore, it has an ongoing impact on all aspects of their lives, and in particular on their right to work: their papers still contain their "criminal record" and they are unable to secure work as a result, thus suffering further discrimination.[120]

The situation in El Salvador demonstrates that a no-exceptions ban on abortion causes direct sex discrimination in relation to the rights to life and health, as well multiple discrimination, on grounds of sex, age and economic status, in relation to the rights to equality before the law, privacy and judicial guarantees. Poor, young, rural women are statistically more likely to require these services, and – because of the nature of health and legal services which they have the resources to access – they are also disproportionately more likely to have their rights violated by the state bodies involved. This illustrates that the violations of rights are disproportionately borne by this group of women, constituting intersectional and systemic discrimination, and perpetuating iniquities.

3. Litigation: Abortion, Equality and Non-Discrimination in Litigation and Advocacy

The discrimination caused by restrictive abortion laws demonstrated above can be addressed through strategic litigation and advocacy. By using an analysis based on equality and discrimination, an argument can be developed which is grounded in compelling obligations under IHRL, and which can result in the development of legislation which places immediate and mandatory obligations on the state to ensure substantive access to reproductive health services, including therapeutic abortion. This article will now examine how judicial bodies have interpreted the principles of equality and non-discrimination and how the principles can be used in advocacy and litigation in order to ensure abortion laws which comply with obligations under IHRL. These decisions can serve as useful advocacy tools, both for ensuring substantive and non-discriminatory enjoyment in the specific countries concerned, and also to support broader national and international advocacy work to repeal restrictive and discriminatory abortion laws.

At the international level, there appears to have been a general reluctance to rule on discrimination in relation to abortion.[121] Legal reasoning tends to have focussed on the rights to health or on civil and political rights, such as privacy, freedom of information, freedom from inhuman treatment, rather than examining any issues of equality or discrimination. However, strategic litigation at a national level has successfully used the principle of equality to overturn a no-exceptions ban on abortion. For example, the Colombian Constitutional Court made a landmark decision in 2006, which gave an expansive interpretation of equality and non-discrimination, and ruled that access to abortion was a key component of equality. The Court's jurisprudence will be analysed, looking particularly at the expansiveness of legal protection which comes from the positive rights paradigm, in comparison to a negative rights approach.

3.1 Colombia: Equality and Non-Discrimination in Litigation

In 2006, the Colombian Constitutional Court overturned a no-exceptions ban on abortions in the case C-355-2006.[122] The constitutional challenge was brought by Monica Roa, a Colombian attorney, on behalf of Women's Link Worldwide as part of their strategic litigation programme. The Court relied on international human rights law and its interpretation by treaty bodies,

and in particular the International Bill of Rights, CEDAW, the Convention of Belém do Pará, and the Convention on the CRC.

The Court ruled that abortion must be allowed in three situations: when the pregnancy presents a serious threat to the life or health of the women, when the pregnancy is the result of rape, incest or other non-consensual fertilisation or when the foetus has malformations incompatible with life outside the womb. As such, abortion is recognised as a component of the right to reproductive autonomy, but only women whose circumstances fall within the three stated criteria have the right to freely decide on and access this option.

Discrimination and Equality

The decision specifically recognised the connection between equality and abortion. The Court interpreted the notions of equality and discrimination in an expansive manner, drawing on the state's obligations under regional and international human rights treaties.[123] Despite the restrictions in scope, the decision is firmly grounded in the rights to equality and non-discrimination, and offers a broad interpretation of discrimination with regard to lack of access to abortion. The Court's interpretation of the scope of discrimination analysed the range of rights which were restricted by the abortion ban, as well as the consequential impact on rights in the future. The Court ruled that sexual and reproductive rights:

"[E]merge from the recognition that equality in general, gender equality in particular, and the emancipation of women and girls are essential to society. Protecting sexual and reproductive rights is a direct path to promoting the dignity of all human beings and a step forward in humanity's advancement towards social justice."[124]

The Court further ruled that:

"[I]llegal abortion is a violation of the right to equal access to health, according to the equality test (…) and the denial of an abortion is a clear example of discrimination against women, violating their right to health and life".[125]

The Court reasoned that the ban had discriminated against women as a group, that men were not similarly treated in regard to required medical procedures, and that the justification of protecting foetal life at all costs was subjective and unreasonable. The Court also ruled that imposing gender roles based on stereotypes was an act of discrimination which violated the right to equality, and that the criminalisation of abortion embodied the stereotype of a woman as a reproductive machine, without taking into account that she may want to decide on other things for her life or that her life may be sacrificed for a life-plan imposed upon her.[126]

The Court also analysed the intersectional and multidimensional nature of discrimination, highlighting groups who were especially vulnerable to be affected and evaluating the ongoing impact of the ban on equality. The Court reasoned that:

"[T]he criminalisation of a medical procedure that is only required by women violates the right to equality, and ignores the particular impact that an unwanted pregnancy has on the lives of young women, and women from low income and/or ethnic backgrounds".[127]

It also ruled that the criminalisation of abortion is:

"[A] violation of the equality of women with less power and resources (…)

and violates the right to freedom from discrimination in relation to economic and/or marital status when the only choice on abortion, compromises the ability of women to support their children".[128]

The state has obligations of an immediate nature regarding the right to non-discrimination, in that it cannot be subject to progressive realisation. Additionally, the state must take positive measures to ensure substantive enjoyment of rights and to overcome systemic discrimination. In this manner, the Court's reasoning on intersectionality obliges the state to take positive measures to ensure that marginalised women from vulnerable groups or of limited financial means are able to access reproductive healthcare on an equal basis with others, and to remove all obstacles, in law or in practice, which prevent *de facto* access to reproductive health services.

Positive Rights Paradigm Versus a Negative Rights Approach in Litigation

Emilia Ordolis has assessed the immediate benefits of using a positive rights paradigm in this Constitutional challenge.[129] Specifically, she has compared the strength and meaning of the Court's decision with decisions on abortion by the courts in the United States and Canada. Ordolis notes that:

> "[W]hile the equality-based reasoning of the Colombian Constitutional Court led to positive rights remedies, the liberty, security of the person, and privacy-based approaches to abortion articulated by the North American courts have led to more negative rights remedies".[130]

Negative Rights Paradigm

Abortion legislation deriving from litigation or judicial review in the negative rights paradigm created from a privacy or liberty of the person perspective (such as *Roe v Wade*), obliges the state to refrain from violating these rights by decriminalising abortion but does not oblige the state to guarantee access to it. Whilst this should guarantee a minimum standard of access, the state is obliged only to uphold a minimum formal standard, and not to take positive measures to guarantee substantive access to abortion or to eliminate systemic discrimination by addressing the specific needs of marginalised groups of women. Thus, states cannot create barriers to abortion in law, but they can create barriers in practice, for instance by creating legislation which makes it more difficult to access abortion services.

The negative rights approach is vulnerable to regressive laws and actions to restrict *de facto* access. Examples of this vulnerability can be seen in the recent adoption of legislation in several US states which restricts access in practice.[131] Examples of laws and policies which restrict access to abortion in practice include: imposing restrictions on access to abortion drugs;[132] creating targeted regulations of abortion clinics;[133] restricting state funding for abortions;[134] banning abortions after 20 weeks;[135] and imposing conditions on women seeking an abortion, such as requiring them to listen to a foetal heartbeat,[136] to undergo an ultrasound – which may need to be performed using a vaginal probe,[137] to listen to a detailed verbal description of the foetus,[138] or to wait a certain period of time before receiving the procedure.[139] The obligation to provide only formal access to abortion can create a two-fold barrier to substantive access: firstly it does not require the states to remove any obstacles; and secondly, it does not oblige the state to refrain from creating further obstacles. In this manner, legislation is vulnerable to regressive developments.

Neither does such an approach result in legislation which obliges the state to take positive measures to ensure substantive access nor to overcome systemic disadvantage. There is no obligation to remove barriers which "primarily affect marginalised women," an omission which often results in the "failure of the state to become engaged in ensuring women's access to abortion".[140] In this manner, only formal rather than substantive access is ensured, and systemic discrimination and iniquities can persist.

Positive Rights Paradigm

This is in contrast to the positive rights paradigm created by the use of an approach based on equality and non-discrimination, which places an obligation on the state to remove any barriers to substantive access and to take positive measures to eliminate any systemic discrimination. In contrast, the positive rights paradigm seen in Colombia can allow for expansive and progressive developments. Although the original ruling of C-355-2006 was limited in scope in terms of the situation in which abortion is permissible, subsequent claims for *tutela* (judicial protection) have resulted in further clarification from the Colombian Constitutional Court. The Court's judgments demonstrate a reinforcement, strengthening and expansion of rights and of obligations, as well as a clarification of processes and state obligations in order to achieve substantive access.

In subsequent cases, the Court has established that access to abortion in the situations defined in C-355-2006 is a critical component of reproductive healthcare and reproductive rights and is a matter of fundamental human rights and a component of *vida digna* (a dignified life) and of equality, which the state and all involved in the health and social services must take all necessary steps to protect, respect and fulfil.[141] The Court has further ordered that health professionals must respect patient confidentiality, that women must have adequate information to be able to exercise their sexual and reproductive rights freely and without discrimination, that abortion services must be available throughout the jurisdiction and offered without delay, and that sex education must include information about when abortion is legally permitted.[142] The Court has expounded on the specifics of the state obligation to remove all obstacles and take positive measures to ensure substantive enjoyment and *de facto* access.[143] These include obliging local authorities to ensure that there is sufficient availability within the public health service, and prohibiting health professionals from diluting or disregarding any evaluation of a pregnancy's risk, requesting a judicial authorisation for an abortion and refusing an abortion when a woman is in one of the permitted situations or to a minor under 14 years who is in a serious situation and whose parents or legal guardians do not give permission.[144] The Court has also clarified that conscientious objection cannot be collective or institutional, but is only valid in relation to an individual's beliefs,[145] and has mandated that a request for abortion must be responded to within five days.[146] Importantly, the Court has also established that a risk to mental health is a sufficient reason to seek an abortion and that a mental health evaluation must be conducted on a woman seeking an abortion, thus expanding the provision and protecting the right to voluntarily terminate a pregnancy.[147]

This demonstrates that the use of the rights to non-discrimination and equality can produce legislation which is less vulnerable to regressive actions and restriction, and where the State has clear and non-derogable obligations to protect, respect and fulfil. Further to

this, it can be progressively expanded in order to secure a broader access to abortion in line with the principle of equality. Although both the Guttmacher Institute and Women's Link Worldwide have reported that substantive access to abortion in Colombia has not yet met the standards required and that many women are still denied their right to a legal abortion,[148] it is clear that the legislative framework supports this right, that it cannot be restricted, and that claims of *tutela* have been instrumental in clarifying state responsibility and process in order to progress towards universal access. This framework enables advocates to work towards securing the substantial enjoyment of this right by the women of Colombia.

3.2 International Jurisprudence on Abortion, Discrimination and Equality

United Nations

In *K.H.L.M. v Peru*, the HRC declared complaints under Articles 3 (non-discrimination) and 26 (equality before the law) of the ICCPR to be inadmissible, stating that they had not been properly substantiated, because the petitioner had not provided any evidence relating to the events which demonstrated discrimination under the articles.[149] In *V.D.A. v Argentina*,[150] which concerned a young, mentally-impaired girl who had been raped and subsequently refused an abortion, the HRC ruled that there had been a violation of Article 3 in relation to Articles 7, 17 and 2(3) of the ICCPR, confirming that "the State's failure to exercise due diligence in safeguarding the legal right to a procedure required solely by women resulted in discriminatory treatment".[151]

The CEDAW Committee examined the case of *L.C. v Peru*,[152] which concerned the case of a young rape victim who was denied a therapeutic abortion and suffered a delay in non-obstetric medical treatment, which resulted in her suffering permanent disability. The Committee found that the petitioner had suffered multiple discrimination in accessing medical care and judicial protection, and held that the denial of access to therapeutic abortion and the delay in non-obstetric treatment was discrimination and gender stereotyping. Finding a violation of CEDAW Article 12, which obliges states to eliminate discrimination against women in access to healthcare, the Committee declared that:

> "[O]wing to her condition as a pregnant woman, L. C. did not have access to an effective and accessible procedure allowing her to establish her entitlement to the medical services that her physical and mental condition required."[153]

The Committee ruled that the denial of an abortion and the delay in medical treatment violated Article 5 of CEDAW, which obliges States to take measures *inter alia* to eliminate gender stereotypes, and were "influenced by the stereotype that protection of the foetus should prevail over the health of the mother".[154] The Committee also ruled that "the State party is obliged to take all appropriate measures, including legislation, to modify or abolish existing laws which constitute discrimination against women".[155]

The case of *Alyne da Silva Pimentel v Brazil*,[156] also before the CEDAW Committee, did not involve abortion but was the first case regarding a maternal death to be decided by an international human rights body. The decision is significant as it established the obligation of states to guarantee that all women in their jurisdiction have substantive access to timely, non-discriminatory, and appropriate maternal health services, finding that the state "did not provide timely emergency

obstetric care, hence infringing the right to non-discrimination based on gender, race and socio economic background"[157] and that the treatment of the victim constituted multiple discrimination.[158]

These cases show that the UN treaty bodies are concerned about the direct and multiple discrimination which women experience in accessing abortion and reproductive healthcare.

Europe[159]

The ECtHR and ECommHR have avoided ruling specifically on the point at which the right to life begins, but have ruled on other aspects in relation to abortion, such as the right to privacy and to access and disseminate information.[160] Similarly, the ECtHR has found it "unnecessary" to rule on the right to non-discrimination (Article 14 ECHR) in relation to abortion in *A, B and C v Ireland* and in *Tysiąc v Poland.*[161] This reflects a general reluctance of the Court both to rule on Article 14 and to address reproductive rights from the perspective of equality and discrimination. As outlined previously, the ECtHR allows states a wide margin of appreciation in the scope of their abortion laws. Were it to rule on discrimination and equality in relation to abortion and reproductive rights, the immediate nature of these rights could make this margin much narrower, and states may be obliged to take positive measures to ensure access and may be liable to have to restrictive laws challenged on these grounds.

The Inter-American American System

The IACHR[162] has decided on some cases involving abortion, but these have not evaluated equality and discrimination, although a clear statement on this has been issued. In 2010, the IACHR issued Precautionary Measures for "Amalia", which asked Nicaragua to ensure that she could access essential non-obstetric health-care whilst pregnant.[163] In a friendly settlement issued in 2007, the IACHR held that Mexico had violated the rights of an adolescent rape victim, who was denied a legal abortion by means of coercion by medical professionals.[164] Mexico was ordered to pay reparations to the victim, an order which acknowledged the real costs of raising a child and also included psychological care, reflecting the mental health costs of being forced to continue with a pregnancy as a result of rape.

Following the hearing on the Reproductive Rights of Women at its 141st Regular Session, on 1 April 2011, the IACHR issued its boldest statement on abortion yet, requiring all member states to review all laws which could have a *de jure* or *de facto:*

> "[D]iscriminatory impact on women in terms of their access to reproductive health services, and [...] to prevent any negative consequences that such measures could have on the exercise of women's human rights in general".[165]

It went on:

> "This implies the obligation to analyze in detail all laws, regulations, practices, and public policies that, in words or in practice, could have a discriminatory impact on women in terms of their access to reproductive health services, and the obligation to prevent any negative consequences that such measures could have on the exercise of women's human rights in general. The States are likewise obligated to eliminate all barriers of fact or of law that keep women from obtaining access to maternal health services they need, including criminal sanctions for seeking such services."[166]

The statement requires that states remove all barriers – including criminal sanctions – that limit women's access to maternal healthcare and:

"[R]eminds the States that therapeutic abortion is recognised internationally as a specialised, necessary health services for women intended to save the mother's life when it is at risk due to pregnancy, and that denying this service constitutes an attack on the life and physical and psychological integrity of women".[167]

This recent development is extremely significant, as it firmly positions therapeutic abortion as an established medical-indicated procedure, which can be accessed through human rights. It also underpins the conclusion that an absolute ban on abortion does not comply with international human rights law and violates the fundamental principle of non-discrimination. Whilst the most recent statements from the IACHR align abortion and discrimination, these have yet to be integrated into a judicial decision.

In March 2012, a petition was submitted to the IACHR by the Center for Reproductive Rights and local Salvadoran organizations ACDATEE and the Colectiva de Mujeres para el Desarrollo Local (Women's Collective for Local Development).[168] The case regards "Manuela", a woman who was sentenced to 30 years in prison after suffering an obstetric emergency. Medical professionals believed she had attempted an abortion and informed the police, who accused her of murder and shackled her to the bed. Following this, she was sentenced to 30 years in prison. The trial did not meet international standards as "Manuela" was not able to meet with her legal counsel, speak in her own defence, nor was she presumed innocent until proven guilty. In prison, she was diagnosed with cancer but denied the medical treatment which could have saved her, and she died in prison in 2010.

This will be the first time an international judicial body will hear the case of a woman who has been imprisoned as a result of seeking emergency obstetric healthcare in a jurisdiction with a no-exceptions abortion ban. The petitioners argue that El Salvador's no-exceptions ban on abortion violates the right to life, the right to personal integrity and liberty, the right to humane treatment, and the right to a fair trial and judicial protection, as well as the principles of equality and non-discrimination as cross-cutting themes which intersect all these rights.[169] This case is vitally important in order to obtain a judicial decision about abortion in the Americas – and specifically about no-exception bans.

If this case proceeds to the IACtHR, this will open the opportunity for a legally binding decision on access to abortion in the Americas. Furthermore, the IACtHR has been less reluctant than its European counterpart to apply the principles of equality and non-discrimination as cross-cutting rights in its judgments. Taking into account the IACHR's statement on discriminatory abortions laws and the Colombian Constitutional Court's interpretation of IHRL and the principles of equality and discrimination in relation to abortion, it is hard to imagine that the IACtHR would not adopt the same reasoning. In this respect, this case represents a critical stage in the development of jurisprudence on abortion and an opportunity for the links between abortion, equality and non-discrimination to be formally made by an international judicial body.

Conclusion

The principles of equality and non-discrimination have the potential to make a signifi-

cant contribution to formal and substantive access to abortion. It is clear that no-exceptions bans on abortion conflict with states' inviolable obligation under IHRL to uphold women's rights – and in particular their rights to life and non-discrimination. As the most recent opinions and jurisprudence of the UN and OAS bodies indicate, restricting therapeutic abortion is also in contravention of IHRL, violating *inter alia* a woman's rights to health, non-discrimination and freedom from inhuman treatment. The argument for therapeutic abortion as a human right is significantly strengthened when the rights to equality and non-discrimination are applied as cross-cutting themes, and when evidence of systemic direct and intersectional discrimination is used to support it. Arguments for equality and non-discrimination should continue to be used to advocate for *de facto* as well as *de jure* access to abortion – a critical element of reproductive healthcare – as well as to seek remedy when these rights are not upheld.

Moreover, the rights to equality and discrimination are of a mandatory and immediate nature, requiring states to ensure substantive enjoyment of rights on an equal basis. Using these in litigation and advocacy against legislation, practices or policies that have the purpose or effect of discrimination and which create and perpetrate inequalities can create a foundation for the subsequent development of legislation which is expansive and less vulnerable to regressive action. The positive rights approach enables a multidimensional approach, which obliges the state to ensure substantive access and to address compound inequities, and which has the potential to identify and address the systemic and multiple discrimination faced by the most marginalised and vulnerable women.

1 Vickie Knox completed a Masters in Understanding and Securing Human Rights at the University of London, and a year-long internship in advocacy and information at the Equal Rights Trust. She is currently conducting fieldwork and campaign support for the Central American Women's Network in London.

2 In this article, the term "emergency abortion" will be used to denote termination of pregnancy where the woman's life is at immediate risk; the term "therapeutic abortion" will be used to denote abortion where there is a risk to the woman's health or life, where the foetus has a terminal defect or where the pregnancy was a result of rape or incest; the term "elective abortion" will denote abortion available on demand; the term "spontaneous abortion" will denote miscarriage. A no-exceptions ban on abortion is a ban on all abortions, including emergency abortion.

3 In Europe, Malta and Vatican City also have no-exceptions bans on abortion.

4 Constitución de la República Dominicana, proclamada el 26 de enero. Publicada en la Gaceta Oficial No. 10561, del 26 de enero de 2010, Article 37, available at: http://www.suprema.gov.do/PDF_2/constitucion/Constitucion.pdf.

5 Sentencia C-355 de 2006 Corte Constitucional [C-355/2006], available at: http://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm.

6 See Guttmacher Institute, "Legislation Enacted: Monthly State Update: Major Developments in 2012", available at: http://www.guttmacher.org/statecenter/updates/index.html#FOCA.

7 Legislation allowing elective abortion in the first trimester was passed in April 2007. Despite a legal challenge to this law, in August 2008 Mexico's Supreme Court upheld this decision.

8 The Argentine Supreme Court handed down a decision in March 2012 which clarified Section 2, Article 86 of the Argentine Penal Code, decriminalising abortion in all cases of rape, and ruling that women would not have to obtain judicial permission to access this, but could rely on a doctor's *affidavit*.

9 In April 2012, the Supreme Court of Brazil expanded the circumstances under which abortion is not a criminal offence to include cases of anencephaly, a fatal foetal defect. The ruling, holding that criminalisation of abortion in such cases would violate a woman's constitutional rights, concluded eight years of reason on this matter.

10 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Article 14(2)(c), reads: "State parties shall take all appropriate measures to (…) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."

11 Defined within the following instruments: Universal Declaration on Human Rights, International Covenant on Civil and Political Rights (ICCPR), United Nations Convention on the Rights of the Child, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), American Convention on Human Rights (ACHR).

12 No derogation from the right to life is stipulated in: Article 4(2) ICCPR, Article 15(2) ECHR, and Article 27(2) ACHR.

13 For this argument, see: Flood, P.J., "Does International Law Protect the Unborn Child?", *The National Catholic Bioethics Quarterly*, 7(2), 2007, pp. 73-96; Freeman, K., "The Unborn Child And The European Convention On Human Rights: To Whom Does 'Everyone's Right To Life' Belong?", *Emory International Law Review*, 8, 1994, pp. 615-665; Joseph, R., *Human Rights and the Unborn Child,* Martinus Nijhoff Publishers/Brill Academic, 2009. Note that although Joseph's work appears thorough, it lacks an accurate and analytic approach, bending IHRL to support her moral argument, rather than providing an objective and analytical approach to the provisions of the law, resulting in arguments which contain several inaccuracies, omissions and unsubstantiated claims.

14 See Michel, A.E., "Abortion and International Law: the Status and Possible Extension of Women's Right to Privacy", *Journal of Family Law*, 20(2), 1981, pp. 241-261; Zampas, C. and Gher, J.M., "Abortion as a Human Right – International and Regional Standards", *Human Rights Law Review*, 8(2), 2008, pp. 249-294; Alston, P., "The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child", *Human Rights Quarterly*, 12(1), 1990, pp. 156-178.

15 Cook, R.J. and Dickens, B.M., "Human Rights Dynamics of Abortion Law Reform", *Human Rights Quarterly*, 25(1), 2003, p. 24.

16 Article 32 of the Vienna Convention on the Law of Treaties stipulates that the *travaux préparatoires* provide one of a number of "supplementary means of interpretation" which can be used when the meaning of the treaty is ambiguous or obscure.

17 Cook and Dickens, above note 15; Zampas and Gher, above note 14.

18 *"Baby Boy" Case (White and Potter v USA)*, IACtHR Resolution No. 23/81, Case 2141 (6 March 1981). In 1973 the US Supreme Court ruled in *Roe v Wade* (410 U.S. 113, 1973) that women had the constitutional right to terminate their pregnancy before the foetus was viable, thus legalising abortion in the USA. In the *"Baby Boy" Case,* the petitioners asked the Inter-American Commission on Human Rights (IACHR) to interpret the compatibility of the *Roe v Wade* decision, reading the American Declaration of the Rights and Duties of Man (ADRDM) with ACHR Art. 4(1). The IACHR's interpretation of Art. 4(1) refers extensively to the *travaux préparatoires*, using them to guide the judicial decision.

19 The European Court of Human Rights (ECtHR) is established and mandated by Section II of the ECHR.

20 The European Commission on Human Rights assisted the ECtHR with admissibility of cases and examination of merits until it was abolished in 1998 by the 11th Protocol to the ECHR.

21 *A, B and C v Ireland*, 25579/05 [2010] ECHR 2032 (16 December 2010), Para 172.

22 Ibid., Para 238.

23 In *A, B and C v Ireland* the Court ruled that this must be both *de jure* and *de facto* access to abortion. Whilst

emergency abortion is legal in Ireland, C was not able to access this due to *de facto* barriers, such as the lack of access to information. The court ordered that these barriers be removed.

24 Human Rights Committee, *General Comment 6: The Right to Life (Art. 6)*, U.N. Doc. HRI/GEN/1/Rev.7, 1982, Para 5.

25 *The "Street Children" Case (Villagrán-Morales et al v Guatemala)*, IACtHR Series C No. 63 (19 November 1999); *Yakye Axa Indigenous Community v Paraguay*, IACtHR Series C No. 142 (6 February 2006); *Sawhoyamaxa Indigenous Community v Paraguay*, IACtHR Series C No. 146 (29 March 2006).

26 Goonesekere, S., "A Rights-Based Approach to Realizing Gender Equality", Para 61, available at: http://www.un.org/womenwatch/daw/news/rights.htm.

27 Women's Link Worldwide, "C-355/2006: Excerpts from the Constitutional Court's Ruling that Liberalized Abortion in Colombia", 2007, p. 48, available at: http://www.womenslinkworldwide.org/wlw/bajarFS.php?tl=3&per=18.

28 See, for example, Michel and Zampas & Gher, above note 14.

29 World Health Organisation Constitution, Preamble, Para 1.

30 Committee on Economic, Social and Cultural Rights, *General Comment 16, "The equal right of men and women to the enjoyment of all economic, social and cultural Rights" (Art. 3 of the Covenant)*, U.N. Doc. E/C.12/2005/4, 2005, para.29

31 Ibid., Para 50.

32 Committee on Economic, Social and Cultural Rights, *General Comment 14, "The right to the highest attainable standard of health"*, U.N. Doc. E/C.12/2000/4, 2000, Para 34.

33 Committee on Economic, Social and Cultural Rights, *General Comment 3, "The nature of State Parties' obligations" (Art. 2, Para 1 of the Covenant)*, U.N. Doc. E/1991/23, 1990, Para 9.

34 See above, note 32, Para 30.

35 Ibid., Para 43(a).

36 Ibid., Para 33.

37 See above, note 30, Para 7.

38 Common Article 3 of the ICESR and ICCPR is not a stand-alone provision; it cannot be read on its own, but must be read in conjunction with another article.

39 See above, note 32, **P**ara 18.

40 Committee on the Elimination of Discrimination against Women, *General Recommendation 24, "Women and Health"*, U.N. Doc. A/54/38/Rev.1, 1999, Para 11.

41 The Guttmacher Institute is a non-profit organisation based in the US, which aims to advance sexual and reproductive health worldwide.

42 Guttmacher Institute and the World Health Organisation, "Facts on Induced Abortion Worldwide," 2012, available at: http://www.guttmacher.org/pubs/fb_IAW.html.

43 Shaw, D., "Abortion and human rights," *Best Practice & Research Clinical Obstetrics and Gynaecology,* 24(5), 2010, pp. 633-646.

44 Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (article 3)*, CCPR/C/21/Rev.1/Add.10, 2000, Para 10.

45 Amnesty International, *The Total Abortion Ban in Nicaragua: Women's Lives and Health Endangered, Medical Professionals Criminalised*, 2009, available at: http://www.amnesty.org/en/library/asset/AMR43/001/2009/en/ea2f24b4-648c-4389-91e0-fc584839a527/amr430012009en.pdf.

46 Ibid.

47 See above, note 40, Para 14.

48 Ibid. See also the *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Colombia*, 02/05/1999, A/54/38. Commenting on Colombia's (now repealed) absolute ban on abortion, the CEDAW Committee stated: "the Committee believes that legal provisions on abortion constitute a violation of the

rights of women to health and life and of Article 12 of the Convention" (Para 393).

49 See above, note 44, Para 11.

50 Committee against Torture, *Concluding Observations on Nicaragua*, U.N.Doc. CAT/C/NIC/CO/1, 2009; see also Concluding Observations on Chile, El Salvador and Nepal.

51 The HRC can receive petitions about alleged rights violations from individuals in states who have adopted the (First) Optional Protocol to the ICCPR, recognising the Committee's jurisdiction.

52 *K.N.L.H. v Peru,* HRC Communication No. 1153/2003 (14 August 2006).

53 Anencephaly is a fatal foetal defect, which always results in stillbirth or death within days of birth. Peru allows abortion *inter alia* when a foetus has a fatal defect.

54 See above, note 52.

55 See above, note 40, Para 11.

56 Article 26 ICCPR and Articles 8(2) and 24 ACHR.

57 See above, note 44, Para 20.

58 Ibid.

59 Article 17 ICCPR and Article 11 ACHR.

60 Article 14(2) ICCPR and Article 8(2) ACHR.

61 See above, note 32. Para 12(d) states that: "While lack of respect for the confidentiality of patients will affect both men and women, it may deter women from seeking advice and treatment and thereby adversely affect their health and well-being. Women will be less willing, for that reason, to seek medical care for diseases of the genital tract, for contraception or for incomplete abortion and in cases where they have suffered sexual or physical violence."

62 The rights to a fair trial and the due process of law within the Organisation of American States (OAS) are prescribed in Articles 7, 8, 9 and 25 of the ACHR and in Articles XVIII and XXVI of the American Declaration on Human Rights. The ACHR further states the minimum guarantees required in providing these rights, thus outlining the accepted standards of a trial. These standards are reflected in other international documents, such as in Articles 9, 10, 14 and 15 of the ICCPR, and further detailed in the Human Rights Committee. (See Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, CCPR/C/GC/32, 2007.

63 For example, in El Salvador; see case study at 2.2 below.

64 Committee on the Elimination of Discrimination against Women, *General Recommendation 19, "Violence against women"*, 1992, Para 1.

65 Ibid., Para 24(m).

66 Inter-American Convention on the Elimination of Violence against Women (Convention of Belém do Pará), Article 8(d).

67 See above, note 50.

68 See above, note 66, Articles 2(c) and 7.

69 Committee on Economic, Social and Cultural Rights, *General comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2 Para 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, 2009, Paras 17 and 27.

70 IPAS, *La Muerte Materna en Nicaragua: La Vida de Cada Mujer Cuenta,* 2008, p.12, available at: http://www.ipas.org/en/Resources/Ipas%20Publications/La-muerte-materna-en-Nicaragua-La-vida-de-cada-mujer-cuenta.aspx.

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73 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), Article 4.

74 Ibid., Article 10.

75 See above, notes 42 and 70.

76 Ibid.

77 See above, note 32, Para 23.

78 Committee on the Rights of the Child, *Concluding Observations on Nicaragua*, U.N. Doc. CRC/C/NIC/CO/4, 2010.

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80 Ibid.

81 Ibid.

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83 Inter-American Commission on Human Rights, "Audienca Témática Regional: Derechos Reproductivos de las Mujeres en América Latina y el Caribe", 2011.

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85 See, for instance, Crane, B.B. and Hord Smith, C.E., "Access to Safe Abortion: An Essential Strategy for Achieving the Millennium Development Goals to Improve Maternal Health, Promote Gender Equality, and Reduce Poverty", 2006, available at: www.unmillenniumproject.org/documents/Crane_and_Hord-Smith-final.pdf.

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87 Centre for Reproductive Rights, "Persecuted: Political Process and Abortion Legislation in El Salvador: A Human Rights Analysis", 2001, available at: http://reproductiverights.org/sites/crr.civicactions.net/files/documents/persecuted1.pdf.

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89 See above, note 69, Para 12.

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91 See Zampas, C. and Gher, J.M., above note 14; and Human Rights Watch, *International Human Rights Law and Abortion in Latin America*, 2005.

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93 Penal Code of the Republic of Nicaragua (Law 641), Articles 143-149.

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101 Ibid., the Separate Opinion of Judge Sergio Garcia Ramírez, Para 7.

102 Human Rights Committee, *Concluding Observations of Third Periodic Report on Nicaragua*, U.N. Doc. CCPR/C/NIC/CO/3, 2008, Para 13.

103 IACHR, PM 43-10 – "Amalia", Nicaragua, listed in "Precautionary Measures Granted by the Commission during 2010", available at: http://www.cidh.org/medidas/2010.eng.htm.

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110 Ibid.

111 According to the Fundación Iberoamericana para el Desarrollo (Latin American Foundation for Development), around 6,000 women have been imprisoned in El Salvador, having attended hospital following either a spontaneous abortion (miscarriage) or a clandestine induced abortion. See "Especial IV: Encarceladas por abortar (El Salvador)", available at: http://www.fundacionfide.org/comunicacion/noticias/archivo/81694.html. Note that the Spanish term "abortar" can refer to both spontaneous abortion (miscarriage) and induced abortion.

112 See above, note 109.

113 See above, note 108.

114 See *inter alia* the cases of Sonia Esther Tábora Contreras, Isabel Cristina Quintanilla, María Edis Hernández Méndez de Castro, Karina del Carmen Herrera Climaco, available at: http://www.jurisprudencia.gob.sv.

115 See above, note 62.

116 See *inter alia* the case of Isabel Cristina Quintanilla, above note 114.

117 See above, note 114.

118 ACDATEE, "Nota de prensa, Tribunal de Sentencia Reconoce Error Judicial al Condenar a 30 Años a Sonia Tabora", 16 August 2012, available at: http://www.colectivafeminista.com/vista_contenido.php?tipo=208&conten=1.

119 See *inter alia* the cases of Isabel Cristina Quintanilla and Karina del Carmen Herrera Climaco, above note 114.

120 Author's interview with Isabel Cristina Quintanilla, 20 August 2012.

121 See section 3.2 below.

122 See above, notes 5 and 27.

123 See above, note 5.

124 See above, note 27, Para 32.

125 See above, note 5, at "Igualdad".

126 Ibid.

127 Ibid.

128 Ibid.

129 Ordolis, E., "Lessons from Colombia: Abortion, Equality and Constitutional Choices", *Canadian Journal of Women and Law,* Vol. 20, 2008, pp. 263-288.

130 Ibid., p. 280.

131 See above, note 6.

132 For instance, see Oklahoma's HB 1970 (Medical Abortion Law) and HB 2381, which require a doctor to be physically present when prescribing RU-486 to a patient.

133 For instance, Mississippi's HB 1390, which requires anyone performing abortions in a clinic to be certified in obstetrics and gynaecology and to obtain "official admitting privileges" at a local hospital. Alabama, Arizona, Indiana, Kansas, Missouri, Oklahoma, South Carolina and Utah also have laws which require doctors who perform abortions to have admitting privileges in local hospitals.

134 For instance, South Dakota only funds abortions to save the life of the woman, having removed the provision for cases of rape or incest in 2006. Several states introduced legislation restricting abortion funding in Health Plans during 2012. For more details, see http://www.guttmacher.org/statecenter/updates/index.html#funding.

135 For instance, Arizona's HB 2036, Ohio's SB 76, New Hampshire's HB 1660 and Alabama's HB 18, ban all abortions after 20 weeks except in absolute medical emergencies – i.e. to save the woman's life.

136 For instance, Virginia's HB462 of 2012 and Texas' HB15 of 2011 require the medical professional to make the heart auscultation, where present, audible to the woman and provide a simultaneous verbal description thereof.

137 For instance, Virginia's HB462 of 2012 and Texas' HB15 of 2011.

138 For instance, Texas' HB15 of 2011 requires the medical professional to provide "a simultaneous verbal explanation of the results of the live, real-time sonogram images".

139 For instance, South Dakota's HB1217 of 2011 requires a three-day wait for an abortion and North Carolina's "Women's Right to Know Act" HB 854 of 2011 and Texas' HB15 both require a 24-hour wait.

140 See above, note 129, p.281.

141 Colombian Constitutional Court, Sentencia T-585 de 2010, available at: http://www.corteconstitucional.gov.co/relatoria/2010/t-585-10.htm.

142 Colombian Constitutional Court Sentencia T-388 de 2009, available at: http://www.corteconstitucional.gov.co/relatoria/2009/t-388-09.htm.

143 Ibid.

144 Ibid.

145 Ibid.

146 See Colombian Constitutional Court, Sentencia T-841 de 2011, available at: http://www.corteconstitucional.gov.co/relatoria/2011/t-841-11.htm.

147 Ibid.

148 Womens Link Worldwide, "Progress and obstacles of implementing the C355/06 Decision", 2012, available at: http://www.womenslinkworldwide.org/wlw/new.php?modo=detalle_prensa&dc=356.

149 See above, note 52.

150 *V.D.A. v Argentina*, HRC Communication No. 1608/2007 (25 May 2007).

151 Ibid., Para 8.5.

152 *L.C. v Peru*, CEDAW/C/50/D/22/2009 (4 November 2011).

153 Ibid., Para 8.15.

154 Ibid.

155 Ibid., Para 8.16.

156 *Alyne da Silva Pimentel v Brazil* CEDAW/C/49/D/17/2008 (10 August 2011).

157 Ibid., Para 7.2.

158 Ibid., Para 7.7.

159 Whilst this article focuses on the Americas, jurisprudence from Europe is included, as the IACtHR has authority to interpret other treaties under Articles 29 and 64 of the ACHR. See "Other Treaties Subject to the Consultative Jurisdiction of the Court" (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, 24 September 1982, Inter-Am. Ct. H.R. (Ser. A) No. 1 (1982).

160 For example, *A, B and C v Ireland*, 25579/05 [2010] ECHR 2032 (16 December 2010); *Paton v United Kingdom*,

8416/79 [1980] 3 EHRR 408 EComHR (13 May 1980); and *Vo v France*, 53924/00 [2004] ECHR 326 (8 July 2004).

161 *Tysiąc v Poland*, 5410/03 [2007] (20 March 2007).

162 The IACHR is an advisory body, which – as well as receiving petitions and making referrals to the Court – acts in a similar way to treaty monitoring bodies, compiling thematic and country reports and issuing clarifications and comments on specific points of law and their substantive implementation.

163 See above, Section 2.1.

164 *Ramírez Jacinto v Mexico*, IACHR Report No. 21/07 Petition 161-02 (9 March 2007).

165 Inter-American Commission on Human Rights, "Situation on the Rights of Women", Annex to Press Release 28/11 on the 141st Regular Session of the IACHR, 2011, available at: http://www.oas.org/en/iachr/media_center/PReleases/2011/028A.asp. See also Inter-American Commission on Human Rights, "Access To Maternal Health Services From a Human Rights Perspective", OEA/Ser.L/V/II. Doc. 69, 2010, available at: http://cidh.org/women/SaludMaterna10Eng/MaternalHealthTOCeng.htm.

166 Ibid.

167 Ibid.

168 See Center for Reproductive Rights, "Center for Reproductive Rights Files Case Revealing the Horrifying Reality of El Salvador's Ban on Abortion", 21 March 2012, available at: http://reproductiverights.org/en/press-room/center-for-reproductive-rights-files-case-revealing-the-horrifying-reality-of-el-salvador.

169 Ibid.