

Redefining “Life” in the Mexican Abortion Debate¹

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¹ An amicus brief presented before the Supreme Court of Mexico in reference to Action of Unconstitutionality 11-09. The submitting organization was International Women’s Rights Action Watch (IWRAW).

INTRODUCTION

The state of Baja California's attempt to reform its state constitution declaring that the right to life begins at conception is a violation of regional and international human rights norms. The Attorney General for Human Rights brought the matter to the Supreme Court of Mexico in Action of Unconstitutionality 11-09 because this definition unacceptably undermines women's human rights. This brief identifies sources of human rights law relating to the right of women to choose whether to have an abortion, as well as Mexico's obligations to ensure that this right is not violated.

Chapter VI of the federal Mexican Penal Code prohibits abortion in most cases but creates an exception for pregnancies that result from rape² or when the woman is in danger of dying.³ Today, every Mexican state allows abortion in some circumstances.⁴

The right to life, the right to health, and the right to be free from cruel, inhuman or degrading treatment mandate the legal authorization of and availability of abortion. It is important for the Court to recall that the right to have an abortion was articulated over ten years ago and continues to be expanded. Mexico has ratified treaties that deal with these rights and has obligations to ensure that its citizens can access abortion services in all of its states. This brief discusses the interaction of international law with Mexican law. The second section explains the most important human rights norms that create a right to safe abortion.

² Código Penal Federal, Article 333, *published in* Instituto de Investigaciones Jurídicas de la UNAM, *available at* <http://info4.juridicas.unam.mx/ijure/tcfed/8.htm?s=>.

³ *Id.* at Article 334.

⁴ El aborto en los códigos penales de las entidades federativas 2009, Grupo de Información en Reproducción Elegida, March 2009, *available at* <http://www.gire.org.mx/contenido.php?informacion=31>.

If Baja California is allowed to define life as beginning at conception, the right to abortion under any circumstance will be at risk. If Baja California is successful in this Action of Unconstitutionality, other states may attempt to change their constitutions to define life in the same way, leaving women across Mexico without the option to obtain a safe, legal abortion.

I. INTERNATIONAL LAW

International law has been incorporated into the law of Mexico. Under Article 133 of the Constitution, treaties are considered “the Supreme Law of all of the Union.” Articles 76(I) and 89(X) grant the President the ability and obligation to deal with international treaties, and the Senate must approve treaties signed by the Executive. Mexico has ratified many treaties relating to the reproductive rights of women, including the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵ the International Covenant on Civil and Political Rights (ICCPR),⁶ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁷ the Convention on the Rights of the Child (CRC),⁸ and the American Convention on Human Rights⁹ and its Additional Protocol.

⁵ International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3.

⁶ International Covenant on Civil and Political Rights, (hereinafter ICCPR) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

⁷ Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW), G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46.

⁸ Convention on the Rights of the Child (hereinafter CRC), G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

⁹ American Convention on Human Rights (hereinafter ACHR), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123.

The doctrine of *pacta sunt servanda* states that parties bound to a treaty must comply in good faith with its terms.¹⁰ Beyond complying with the text of ratified documents, States parties must apply the interpretation of the treaties by their respective monitoring bodies, which are charged with reviewing compliance with the treaty provisions.¹¹ By ratifying treaties, States parties recognize the right of the treaty bodies to interpret the meaning and application of the text. Treaty bodies can issue comments offering legal interpretations of the treaty provisions in question and explaining the obligations of the State party. For example, Article 28 of the ICCPR requires the Human Rights Committee to study periodic reports submitted under Article 40 by States parties and to issue observations on the State parties' treaty implementation. The Committee on Economic, Social and Cultural Rights (CESCR) was established under United Nations Economic and Social Council (ECOSOC) Resolution 1985/17. The CESCR reviews reports submitted by States parties to the ICESCR, issues Concluding Observations after examining the reports, and interprets the Covenant in its General Comments.

Article 17 of CEDAW establishes the CEDAW Committee. States Parties must submit reports to the CEDAW Committee (Article 18), and the Committee reviews the reports (Article 20) and must submit reports to the General Assembly with recommendations (Article 21). Finally, Article 43 of the CRC establishes the Committee on the Rights of the Child to review reports from States Parties and to submit information to the General Assembly (Article 44).

In a February 13, 2007 case, the Supreme Court interpreted Article 133 of the Constitution as creating a hierarchy of law, with the federal Constitution at the top, treaties in the

¹⁰ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, Art. 26.

¹¹ Intervención de Terceros, Centro de Derechos Reproductivos & La Comisión Internacional de Juristas, at 10, Nov. 2007.

middle, and federal laws at the bottom.¹² This acknowledged the power of international treaties in Mexican law.¹³ However, the Court did not decide how state constitutions must deal with conflicting international treaty provisions. As constituent subdivisions of the federal State of Mexico and according to the doctrine of *pacta sunt servanda*, individual Mexican states must comply with international treaties.

In addition to this general doctrine, all treaties require their States parties to bring domestic law into compliance with treaty mandates and to take other steps to implement the rights articulated in the treaty. This means that individual state constitutions and local laws must conform to treaties, and decisions made by local congresses, governors, and other entities must comply with international law. Article 29 of the Vienna Convention on the Law of Treaties states that, “a treaty is binding on each party in respect of its entire territory.”¹⁴ The Vienna Convention also prohibits States parties from attempting to excuse deviation from a treaty based on internal law.¹⁵ Other international provisions to which Mexico is bound include Articles 2(2)¹⁶ and 50¹⁷ of the ICCPR, Article 2 of the American Convention on Human Rights¹⁸, Article 28

¹² Article 133 reads, “Esta Constitución, las leyes del Congreso de la Unión que emanen de ella y todos los tratados que estén de acuerdo con la misma, celebrados y que se celebren por el Presidente de la República con aprobación del Senado, serán Ley Suprema de toda la Unión. Los jueces de cada Estado se arreglarán a dicha Constitución, leyes y tratados a pesar de las disposiciones en contrario que pueda haber en las Constituciones o leyes de los estados.”

¹³ JERARQUÍA NORMATIVA DE LOS TRATADOS INTERNACIONALES EN MÉXICO: IMPORTANCIA EN MATERIA DE DERECHOS HUMANOS: Decisión de la Suprema Corte de Justicia de la Nación del 13 de febrero de 2007, BOLETÍN INFORMATIVO, Derechos Humanos: Agenda Internacional de México, DGDH. SRE. No. 6, 22 de mayo de 2007.

¹⁴ Vienna Convention on the Law of Treaties, Art. 27, January 27, 1980, 1155 U.N.T.S. 331.

¹⁵ *Id.* at Art. 27.

¹⁶ Article 2(2) requires states parties “to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

¹⁷ Article 50 requires the Convention to “extend to all parts of federal States without any limitations or exceptions.”

¹⁸ Article 2 reads, “Where the exercise of any of the rights or freedoms referred to... is not already ensured by legislative or other provisions, the States Parties undertake to adopt... such legislative or other measures as may be necessary.”

of the ICESCR,¹⁹ and Article 2(b),²⁰ 2(f)²¹ and 24²² of CEDAW. In other words, all pertinent international treaties to which Mexico is a party mandate that Mexico incorporate the provisions into domestic law and declare that its smaller constituents also comply. The Court should follow this fundamental principle when deciding Action of Unconstitutionality 11-09.

II. HUMAN RIGHTS NORMS AND THE RIGHT TO ABORTION

A. The right to life

The World Health Organization estimates that 20 million women have unsafe abortions every year and that 70,000 women die from them.²³ Many international treaties ratified by Mexico, and interpretations by the treaty monitoring bodies, speak to the right to life. The treaty bodies have produced over 130 Concluding Comments on the need for access to abortion services and abortion as a human right.²⁴ Upon ratifying human rights treaties, Mexico has submitted no relevant reservations, understandings, or declarations on the right to life or abortion. For this reason, the Court should respect the findings of human rights treaty bodies.

¹⁹ Article 28 mandates that, “the provisions... shall extend to all parts of federal States without any limitations or exceptions.”

²⁰ Article 2(b) requires States Parties, “To adopt appropriate legislative and other measures... prohibiting all discrimination against women.”

²¹ Article 2(f) requires States parties, “To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”

²² Article 24 requires, “States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.”

²³ Safe Abortion: Technical and Policy Guidance for Health Systems, World Health Organization, 2003; Maternal Mortality in 2000: Estimates Developed by WHO, UNICEF and UNFPA 2004.

²⁴ Janet Walsh & Marianne Mollman, “Human Rights and Access to Abortion,” *Revista Iberoamericana de Derechos Humanos*, 131 (2007).

For over a decade, international human rights treaty monitoring bodies have definitively indicated that the right to abortion exists as an element of women’s right to life. Even in the Universal Declaration of Human Rights, “the term ‘born’ was intentionally used to exclude the foetus or any other antenatal application of human rights. This is confirmed by the fact that a proposed amendment to remove the term and protect the right to life from the moment of conception, was denied.”²⁵ Since 1981, American States have never concluded as a group that life begins at conception or that abortion should be illegal.²⁶ The Court should confirm this settled principle in this case.

1. Right to Life and the International Covenant on Civil and Political Rights

Article 6.1 of the ICCPR states, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [sic] life.” The Human Rights Committee is the monitoring body for the ICCPR and is responsible for reviewing the initial and periodic reports submitted by States parties and individual complaints submitted through the Optional Protocol mechanism. The Committee has consistently expressed concern about the connection between maternal death and lack of access to legal abortion, in the health context, underscoring the limitation of “right to life” to persons already born.

Like the Universal Declaration of Human Rights, the ICCPR’s drafting history indicates that the right to life applies only to human beings after birth because “amendments that were

²⁵ Christina Zampas and Jaime M. Gher, *Abortion as a Human Right: International and Regional Standards*, *Human Rights Law Review*, 8:2 , at 263 (2008), *citing* GA OR 3rd Comm., A/PV/99 (1948) at 110-124.

²⁶ *See* part A(5) The American Convention on Human Rights, *infra*.

proposed to protect the right to life from the moment of conception were rejected.”²⁷ A proposal to state that “the right to life is inherent in the human person from the moment of conception, this right shall be protected by the law” was rejected.²⁸ Instead, the current version of Article 6 was adopted. The Supreme Court should consider the ICCPR language definitive on this issue.

The Committee most recently discussed the right to abortion (or lack thereof) in its concluding observations on Zambia and Madagascar in 2007. Of Zambia, it stated:

The Committee is concerned that despite progress made, maternal mortality remains high in Zambia. While noting the considerable efforts made by the State party in the area of family planning, the Committee is concerned that the requirement that three physicians must consent to an abortion may constitute a significant obstacle for women wishing to undergo legal and therefore safe abortion. (art. 6)

The State party is encouraged to increase its efforts in combating maternal mortality. It should amend its abortion laws to help women avoid unwanted pregnancies and not have to resort to illegal abortions that could put their lives at risk.²⁹

And regarding Madagascar, the Committee noted concern about the restrictive abortion laws, “especially in cases where the life of the mother is in danger.” To resolve this issue, the Committee requested Madagascar to “amend its legislation to help women avoid unwanted pregnancies and recourse to clandestine abortion at the risk of their lives. It should also consider

²⁷ Rebecca Cook & B. Dickens, “Human Rights Dynamics of Abortion Law Reform,” *Human Rights Quarterly*, Vol. 25, at 24 (2003).

²⁸ GA OR Annex, 12th session (1957), Agenda Item 33 at 96, ¶ 113, A/C.3/L.654.

²⁹ U.N. Human Rights Committee (hereinafter HRC) Concluding Observations, ¶ 18, Zambia, U.N. Doc. CCPR/C/ZMB/CO/3 (2007).

amending its legislation on abortion so as to bring it into line with the Covenant.”³⁰

In 2006, the Committee observed that Chile continued to have very restrictive abortion laws—which had been negatively noted in its 1999 review³¹—and stated that Chile “should amend its abortion laws to help women avoid unwanted pregnancies and not have to resort to illegal abortions that could put their lives at risk. The State party should also bring its abortion laws into line with the Covenant.”³² In 2006, reviewing the report of Paraguay, the Committee again stated its position on abortion rights:

While noting the action taken by the State party on the subject of family planning, the Committee is still concerned about high infant and maternal mortality rates, especially in rural areas. The Committee reiterates its concern about Paraguay’s restrictive abortion laws, which induce women to seek unsafe, illegal abortions, at potential risk of their life and health (articles 6 and 24 of the Covenant).

The State party should take effective action to reduce infant and maternal mortality by, inter alia, revising its legislation on abortion to bring it into line with the Covenant, and ensuring that contraceptives are available to the general public, especially in rural areas.³³

In 2005, reviewing Kenya’s periodic report, the Committee expressed

concern about the high maternal mortality rate prevalent in the country, caused,

³⁰ HRC Concluding Observations, ¶ 14, Madagascar, U.N. Doc. CCPR/C/MDG/CO/3 (May 11, 2007).

³¹ The Committee cited “[t]he legal duty imposed upon health personnel to report on cases of women who have undergone abortions may inhibit women from seeking medical treatment, thereby endangering their lives.” HRC, Concluding Observations, Chile, ¶ 15, U.N. Doc. CCPR/C/79/Add.104 (1999).

³² HRC Concluding Observations, ¶ 8, Chile, U.N. Doc. CCPR/C/CHL/CO/5 (May 18, 2007).

³³ HRC Concluding Observations, ¶ 10, Paraguay, U.N. Doc. CCPR/C/PRY/CO/2 (2006).

inter alia, by a high number of unsafe or illegal abortions (article 6 of the Covenant). The State party should adopt measures to improve access to family planning services for all women. It should review its abortion laws, with a view to bringing them into conformity with the Covenant.³⁴

In the same session, the Committee expressed similar concern with the laws of Mauritius:

The Committee notes with concern that section 235 of the Penal Code penalizes abortion even when the mother's life is in danger, and thus may encourage women to resort to unreliable and illegal abortion, with inherent risks for their life and health (Covenant, art. 6). The State party should review its legislation to ensure that women are not forced to carry pregnancies to term in violation of the rights guaranteed by the Covenant.³⁵

In 2004, the Committee was concerned with Colombian law “criminalizing all abortions” and the fact “that women who have been victims of rape or incest or whose lives are in danger as a result of their pregnancy may be prosecuted for resorting to such measures (art. 6).” The committee highlighted the need for Colombia to “ensure that the legislation applicable to abortion is revised so that no criminal offences are involved in the cases described above.”³⁶

The same concern about domestic laws prohibiting abortion appeared in Concluding Observations on Morocco in 2004. “The State party should ensure that women are not forced to carry a pregnancy to full term where that would be incompatible with its obligations under the

³⁴ HRC Concluding Observations, Kenya, ¶ 14, U.N. Doc. CCPR/CO/83/KEN (2005).

³⁵ HRC, Concluding Observations, Mauritius, ¶ 9, U.N. Doc. CCPR/CO/83/MUS (2005).

³⁶ HRC, Concluding Observations, Colombia, ¶ 13, U.N. Doc. CCPR/CO/80/COL (2004).

Covenant (arts. 6 and 7) and should relax the legislation relating to abortion.”³⁷ (In 1999, the Committee had indicated that Morocco’s “strict prohibition on abortion,” leading to high maternal mortality, was an area of concern.³⁸) Poland’s performance with respect to this issue was negatively reviewed because, even when abortion was allowed in cases of rape, there was an “unavailability of abortion in practice,” and the Committee stated that Poland “should liberalize its legislation and practice on abortion.”³⁹ (The Committee previously remarked negatively on Poland’s lack of sex education programs and its strict abortion laws.⁴⁰ There apparently was no improvement in this area five years later.)

In the 2003 review of El Salvador, the Committee noted a concern with restrictive abortion laws:

The Committee expresses its concern at the severity of the current law against abortion in the State Party, especially since illegal abortions have serious detrimental consequences for women's lives, health and well-being.

The State Party should take steps to bring its legislation into line with the Covenant as regards the protection of life (art. 6), so that women can be helped to avoid unwanted pregnancies and need not to resort to clandestine abortions that may put their lives in danger, as mentioned in the Committee's General Comment No. 28.⁴¹

The 2003 reviews of Mali and Sri Lanka focused in part on maternal and infant mortality

³⁷ HRC, Concluding Observations, Morocco, ¶ 29, U.N. Doc. CCPR/CO/82/MAR (December 1, 2004).

³⁸ HRC, Concluding Observations, Morocco, ¶ 13, U.N. Doc. CCPR/C/79/Add.113 (1999).

³⁹ HRC, Concluding Observations, Poland, ¶ 8, U.N. Doc. CCPR/CO/82/POL (December 2, 2004).

⁴⁰ HRC, Concluding Observations, Poland, ¶ 11, U.N. Doc. CCPR/C/79/Add.110 (1999).

⁴¹ HRC, Concluding Observations, El Salvador, ¶ 14, U.N. Doc. CCPR/CO/78/SLV (July 22, 2003).

and the correlating restrictions on abortion in those countries. For Mali, the Committee recommended:

So as to guarantee the right to life, the State party should strengthen its efforts in that regard, in particular in ensuring the accessibility of health services, including emergency obstetric care. The State party should ensure that its health workers receive adequate training. It should help women avoid unwanted pregnancies, including by strengthening its family planning and sex education programmes, and ensure that they are not forced to undergo clandestine abortions, which endanger their lives. In particular, attention should be given to the effect on women's health of the restrictive abortion law.⁴²

And regarding Sri Lanka, it said:

The State party should ensure that women are not compelled to continue with pregnancies, where this would be incompatible with obligations arising under the Covenant (art. 7 and General Comment 28), and repeal the provisions criminalizing abortion.⁴³

In 2001, the Committee reviewed Guatemala, noting:

The criminalization of all abortion, with the severe penalties imposed by the legislation in force except where the mother's life is in danger, gives rise to serious problems, especially in the light of unchallenged reports of the serious impact on maternal mortality of clandestine abortions and the lack of information on family planning.⁴⁴

⁴² HRC, Concluding Observations, Mali, ¶ 14, U.N. Doc. CCPR/CO/77/MLI (2003).

⁴³ HRC, Concluding Observations, Sri Lanka, ¶ 12, U.N. Doc. CCPR/CO/79/LKA (2003).

⁴⁴ HRC, Concluding Observations, Guatemala, ¶ 19, U.N. Doc. CCPR/CO/72/GTM (2001).

Regarding the situation in Venezuela, the Committee raised concerns with the wide restrictions on abortion even though many women were forced to turn to illegal and unsafe means. To remedy the problem, it urged that:

The State party must adopt the necessary measures to guarantee the right to life (article 6) for pregnant women who decide to terminate their pregnancies, including amending the law to create exceptions to the general prohibition of all non-therapeutic abortion. The State party should protect the confidential nature of medical information.⁴⁵

The Committee expressed concern about the criminalization of abortion, even in cases of rape, and high rate of maternal mortality in Peru caused by clandestine abortions. Concluding observations from the 2000 review of Peru stated that the state's criminal sanctions for abortion "are incompatible with articles 3, 6 and 7 of the Covenant and recommends that the legislation should be amended to establish exceptions to the prohibition and punishment of abortion."⁴⁶ The Committee also hoped Peru would revise its civil and penal codes "to ensure that women do not risk their life because of the existence of restrictive legal provisions on abortion."⁴⁷

Cameroon's law received similar scrutiny in 1999: "The Committee is concerned that the criminalization of abortion leads to unsafe abortions which account for a high rate of maternal mortality. The State party must take measures to protect the life of all persons, including pregnant women."⁴⁸ Costa Rica's law also needed "to be amended to introduce exceptions to the

⁴⁵ HRC, Concluding Observations, Venezuela, ¶ 19, U.N. Doc. CCPR/CO/71/VEN, (2001).

⁴⁶ HRC, Concluding Observations, Peru, ¶ 20, U.N. Doc. CCPR/CO/70/PER (2000).

⁴⁷ *Id.* at ¶ 22.

⁴⁸ HRC, Concluding Observations, Cameroon, U.N. Doc. CCPR/C/79/Add.116 (1999).

general prohibition of all abortions,” according to the Committee that year.⁴⁹ Poland’s lack of comprehensive sexual education and “strict laws on abortion” seemed to “lead to high numbers of clandestine abortions” and therefore needed adjustment.⁵⁰

As of 2000, Ireland’s law was very narrow, only allowing abortions “when the life of the mother is in danger.” The Committee said, “The State party should ensure that women are not compelled to continue with pregnancies where that is incompatible with obligations arising under the Covenant (art. 7) and General Comment No. 28.”⁵¹

Kuwait also had a very restrictive law with no exceptions, and the Committee instructed in 2000: “[t]he State party should consider amending the law and make provision for the protection of the right to life of pregnant women under article 6 of the Covenant.”⁵²

Similarly, Lesotho’s law prohibited abortion in most circumstances, even to protect the life of the woman. In response, the Committee recommended “the State party to review the law of abortion to provide for situations where the life of the woman is in danger.”⁵³

Ecuador came under review in 1998. At that time, the Committee was concerned “about the very high number of suicides of young females referred to in the [periodic] report, which appear in part to be related to the prohibition of abortion.” It noted that articles 3, 6, 7, and 24 were violated in these situations. Without referring directly to the right to abortion, the

⁴⁹ HRC, Concluding Observations, Costa Rica, ¶ 11, U.N. Doc. CCPR/C/79/Add.107 (1999).

⁵⁰ HRC, Concluding Observations, Poland, ¶ 11, U.N. Doc. CCPR/C/79/Add.110 (1999).

⁵¹ HRC, Concluding Observations, Ireland, ¶¶ 23-24, U.N. Doc. A/55/40 (July 24, 2000).

⁵² HRC, Concluding Observations, Kuwait, ¶ 16, U.N. Doc. CCPR/CO/69/KWT (2000).

⁵³ HRC, Concluding Observations, Lesotho, ¶ 11, U.N. Doc. CCPR/C/79/Add.106 (2000).

Committee went on to recommend that Ecuador “adopt all necessary legislative and other measures to assist women, and particularly adolescent girls, faced with the problem of unwanted pregnancies to obtain access to adequate health and education facilities.”⁵⁴

Zanzibar (Tanzania’s) harsh provisions for out-of-wedlock pregnancy, combined with its restrictions on abortion, were cited as areas of concern in 1998:

The Committee deplores the law in force in Zanzibar which allows for the imprisonment of both mother and father in the event of an unmarried woman becoming pregnant. In the Committee's view, this carries risks to the right to life (art. 6) (through resort to illegal abortion) and to the rights of the child (arts. 23 and 24) if born in such circumstances. It recommends the abolition of this law in Zanzibar and, noting in this connection that illegal abortion is a major cause of maternal mortality, that a national review be carried out on the restrictions on abortions (arts. 3, 6 and 26).⁵⁵

In 1997, the Committee reviewed Bolivia’s report on civil and political rights implementation. Again, the problem of maternal death relating to illegal abortion was a concern, although Bolivia did “not provide information about the effect of laws that criminalize abortion on this high level of deaths.”⁵⁶

⁵⁴ HRC, Concluding Observations, Ecuador, ¶ 11, U.N. Doc. CCPR/C/79/Add.92 (1998).

⁵⁵ HRC, Concluding Observations, Tanzania, ¶ 15, U.N. Doc. CCPR/C/79/Add.97 (1998).

⁵⁶ HRC, Concluding Observations, Bolivia, ¶ 22, U.N. Doc. CCPR/C/79/Add.74 (1997).

Senegal was criticized in 1997 for cultural attitudes that degrade women, as well as “the strict prohibition of abortion.”⁵⁷ The Committee urged the State party “to abolish practices prejudicial to women's health and to reduce maternal mortality.”⁵⁸

In short, the Human Rights Committee clearly indicates that the right to life norm must be applied to protect women’s right to life in the context of pregnancy and termination of pregnancy. The Court should use the numerous observations of the Human Rights Committee in deciding whether Baja California’s constitutional reform is legal.

2. Right to Life and the Convention on the Elimination of All Forms of Discrimination against Women

The Committee on the Elimination of All Forms of Discrimination against Women has frequently commented on the lack of abortion rights for women around the world. Mexico submitted no reservations to CEDAW and this Court should follow the Committee’s recommendations relating to the right to have an abortion. In reviewing Mexico’s implementation of CEDAW, the Committee was concerned about maternal mortality, especially with respect to indigenous women: “The Committee notes with concern that abortion remains one of the leading causes of maternal deaths and that, in spite of the legalization of abortion in specific cases, women do not have access to safe abortion services....” The State party was requested

to harmonize legislation pertaining to abortion at the federal and state levels. The

⁵⁷ HRC, Concluding Observations, Senegal, ¶ 12, U.N. Doc. CCPR/C/79/Add.82 (1997).

⁵⁸ Id.

Committee urges the State party to implement a comprehensive strategy which should include the provision of effective access to safe abortion in situations provided for under the law and a wide range of contraceptive measures, including emergency contraception, measures to raise awareness about the risks of unsafe abortions and nationwide sensitization campaigns about women's human rights, targeting in particular health personnel, as well as the general public.⁵⁹

In its 2002 review of Mexico, the Committee expressed

concern [with] the high maternal mortality rate, particularly as a result of abortions among adolescents and the inadequate education, dissemination, accessibility and supply of contraceptive devices especially to poor women in rural and urban areas and to adolescents. The Committee further notes with concern the increase in HIV/AIDS, mostly among adolescent girls.⁶⁰

A number of CEDAW's recent reviews reflect concern about the impact of abortion restrictions on women's health, frequently as a matter of life and death. Nicaragua was severely criticized for

the inadequate recognition and protection of the reproductive health and rights of women in the State party, especially among poor, rural, indigenous and Afro-descendent women.... The Committee is also concerned about the high maternal mortality rates, particularly the number of deaths resulting from illegal and unsafe abortion. It is further concerned about recent steps taken by the State party to criminalize therapeutic abortion, which may lead more women to seek unsafe, illegal abortions, with consequent risks to their life and health, and to impose severe sanctions on women who have undergone illegal abortions, as well as on

⁵⁹ U.N. Committee on the Elimination of Discrimination Against Women (hereinafter CEDAW), Concluding Observations, Mexico, ¶¶ 32-33, U.N. Doc. CEDAW/C/MEX/CO/6 (2006).

⁶⁰ CEDAW, Concluding Comments, Mexico, ¶ 445, U.N. Doc. A/57/38 (2002).

health professionals who provide medical care for the management of complications arising from unsafe abortions.⁶¹

The Committee also wrote at length regarding Chile's problems with unwanted pregnancy and inadequate health care for women. To this end, it noted:

The Committee recommends that the State party consider reviewing the laws relating to abortion with a view to removing punitive provisions imposed on women who undergo abortion and provide them with access to quality services for the management of complications arising from unsafe abortion and to reduce maternal mortality rates, in accordance with general recommendation 24, on women and health, and the Beijing Declaration and Platform for Action.⁶²

In 2006, various African countries came under the Committee's scrutiny. Of Eritrea, it noted "[particular concern] about the maternal mortality rate which is among the highest in the world — an indication of lack of obstetric care — and early pregnancies and deaths due to clandestine abortions."⁶³ Malawi lacked prenatal and post-natal health care, and "the Committee [was] alarmed at the persistent high maternal mortality rate, particularly the number of deaths resulting from unsafe abortions, high fertility rates and inadequate family planning services, especially in rural areas, low rates of contraceptive use and lack of sex education."⁶⁴

Benin's restrictive abortion laws were a matter of concern in its 2005 review relating to "the causes of morbidity and mortality in women, particularly the number of deaths due to illegal

⁶¹ CEDAW, Concluding Observations, Nicaragua, ¶ 17, U.N. Doc. CEDAW/C/NIC/CO/6 (February 2, 2007).

⁶² CEDAW, Concluding Observations, Chile, ¶ 20, U.N. Doc. CEDAW/C/CHI/CO/4 (August 25, 2006).

⁶³ CEDAW, Concluding Observations, Eritrea, ¶ 22, U.N. Doc. CEDAW/C/ERI/CO/3 (2006).

⁶⁴ CEDAW, Concluding Observations, Malawi, ¶ 31, U.N. Doc. CEDAW/C/MWI/CO/5 (2006).

abortions, and about inadequate family planning services and the low rates of contraceptive use. The Committee expressed its concern that women require the permission of their husbands to obtain contraceptives and family planning services.”⁶⁵ Its neighbor Burkina Faso gave rise to concern “about high rates of fertility, infant and maternal mortality and death due to clandestine abortions, inadequate family planning services and low rates of contraceptive use.”⁶⁶

Argentina’s maternal mortality rate, one-third of which results from illegal abortions, was a matter of grave concern in the Committee’s 2004 review. The Committee urged “the State party to adopt all necessary measures to reduce the high maternal mortality rate....”⁶⁷ In the Dominican Republic, there were “high rate[s] of female mortality and morbidity, of which unsafe abortions are among the primary causes.” The Committee recommended “that the State health services should provide an abortion when the pregnancy is a result of rape or when the mother's health is in danger.”⁶⁸ This situation had remained essentially unchanged since the 1998 review of the Dominican Republic, in which the Committee stated that “the high rate of maternal mortality, in conjunction with the fact that abortions in the Dominican Republic are absolutely and under all circumstances illegal, cause very great concern to the Committee and draws attention to the implications of the situation for women's enjoyment of the right to life.”⁶⁹

The Committee’s review of Colombia in 1999 was strongly worded: “women who seek treatment for induced abortions, women who seek an illegal abortion and the doctors who perform them are subject to prosecution. The Committee believes that legal provisions on

⁶⁵ CEDAW, Concluding Observations, Benin, ¶ 31, U.N. Doc. CEDAW/C/BEN/CO/1-3 (2005).

⁶⁶ CEDAW, Concluding Observations, Burkina Faso, ¶ 35, U.N. Doc. CEDAW/C/BFA/CO/4-5 (2005).

⁶⁷ CEDAW, Concluding Comments, Argentina, ¶¶ 380-381, U.N. Doc. A/59/38, Part II (2004).

⁶⁸ CEDAW, Concluding Comments, Dominican Republic, ¶¶ 308-309, U.N. Doc. A/59/38, Part II (2004).

⁶⁹ CEDAW, Concluding Comments, Dominican Republic, ¶ 337, U.N. Doc. A/53/38/Rev. 1, Part I (1998).

abortion constitute a violation of the rights of women to health and life and of article 12 of the Convention.”⁷⁰ Colombia’s second most common cause of maternal death was abortion, which was illegal without exception, “including where the mother’s life is in danger or to safeguard her physical or mental health or in cases where the mother has been raped.”

As a State party to CEDAW, Mexico must “adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the... Convention.”⁷¹ This includes the right of a woman to have an abortion to ensure her right to life.

3. Right to Life and the International Covenant on Economic, Social, and Cultural Rights

The ICESCR does not contain a specific provision on the right to life. However, the Committee on Economic, Social and Cultural Rights, which reviews reports on implementation of the ICESCR, has clearly stated that the right to abortion is normative because of “the relationship between high rates of maternal mortality and illegal, unsafe, clandestine abortions.”⁷² The Court should take cognizance of the Committee’s conclusions in deciding the present Action of Unconstitutionality.

The Committee reviewed Mexico’s periodic report in 1999 and commented on its restrictive abortion laws. It noted that “the fourth highest cause of death among women in

⁷⁰ CEDAW, Concluding Comments, Colombia, ¶ 393, U.N. Doc. A/54/38/Rev.1, Part I (1999).

⁷¹ CEDAW, Art. 24.

⁷² Zampas, *supra*, note 25.

Mexico is illegal abortion” and recommended that Mexico work to reduce this death toll.⁷³ The Committee spoke to the continuing problem in its 2006 review of Mexico, stating concern with “unsafe abortions, in particular as regards girls and young women.”⁷⁴ It noted with disapproval

reports on obstruction of access to legal abortion after rape, e.g. by misinformation, lack of clear guidelines, abusive behaviour directed at pregnant rape victims by public prosecutors and health personnel, and legal impediments in cases of incest, and about the lack of access to reproductive health services and education, especially in rural areas and in indigenous communities.”⁷⁵

The Committee expressed similar concerns in its 2003 review of Brazil. It noted “the high rate of maternal mortality from illegal abortions, particularly in the northern regions where women have insufficient access to health care facilities” and asked Brazil “to undertake legislative and other measures, including a review of its present legislation, to protect women from the effects of clandestine and unsafe abortion and to ensure that women do not resort to such harmful procedures.”⁷⁶

Trinidad and Tobago’s problem with clandestine abortion and high maternal mortality in 2002 resulted in the following observations:

The Committee requests the State party to provide in its next periodic report detailed information based on comparative data about the problem of abortion in Trinidad and Tobago and the measures, legislative or otherwise, including the

⁷³ U.N. Committee on Economic, Social and Cultural Rights (hereinafter CESCR), Concluding Observations, Mexico, ¶¶ 29, 43, U.N. Doc. E/C.12/1/Add.41 (August 12, 1999).

⁷⁴ CESCR, Concluding Observations, Mexico, ¶ 25, U.N. Doc. E/C.12/MEX/CO/4 (June 9, 2006).

⁷⁵ Id.

⁷⁶ CESCR, Concluding Observations, Brazil, ¶¶ 27, 51, U.N. Doc. E/C.12/1/Add.87 (June 26, 2003).

review of its present legislation, it has undertaken to protect women from clandestine and unsafe abortion.⁷⁷

Bolivia's maternal mortality problem came to the Committee's attention in 2001, when it noted the need "to bring about a reduction of deaths caused by illegal abortion...."⁷⁸ In 2001, with respect to Jamaica, the Committee observed, "clandestine abortion is the cause of a large number of deaths due to infections and complications from procedures performed under unsanitary conditions by untrained personnel and that it is one of the leading factors in the high maternal mortality rate in the State party."⁷⁹

The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health expressed concern in 2005 with Colombia's restrictive abortion laws leading to a high rate of maternal mortality. The Special Rapporteur sent a letter to Colombia in June 2005 "concerning the implementation of legislation in Colombia which makes abortion punishable as an illegal act in all circumstances." By December 2005, Colombia had made no reply, which the Rapporteur regretted.⁸⁰

The Special Rapporteur had similar concerns with Peru in 2005. He stressed the importance of ensuring access... to a wide range of sexual and reproductive health services, including family planning... and access to information. In particular, women should have access to quality services for the management of complications, whether arising from pregnancy, childbirth or abortion. Punitive

⁷⁷ CESCR, Concluding Observations, Trinidad and Tobago, ¶¶ 23, 46, U.N. Doc. E/C.12/1/Add.80 (June 5, 2002).

⁷⁸ CESCR, Concluding Observations, Bolivia, ¶ 43, U.N. Doc. E/C.12/1/Add.60 (May 21, 2001).

⁷⁹ CESCR, Concluding Observations, Jamaica, ¶ 18, U.N. Doc. E/C.12/1/Add.75 (November 30, 2001).

⁸⁰ Paul Hunt, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Addendum Summary of communications sent to and replies received from Governments and other actors, December 2004-December 2005, Economic and Social Council, Commission on Human Rights, E/CN.4/2006/48/Add.1, December 22, 2005.

legal provisions against women who undergo abortions, as well as against the relevant service providers, should be removed.⁸¹

4. Right to Life and the Convention on the Rights of the Child

Mexico has ratified without reservations the Convention on the Rights of the Child, which speaks to the right to life in Article 6: “every child has the inherent right to life.” The Committee on the Rights of the Child (CRC) reads the right to life as strongly tied to the right to health. The CRC has acknowledged the problems caused by the lack of access to abortion for teenagers around the world. Its General Comment No. 4 is a comprehensive guide for States parties to ensure that children and adolescents have access to health care without discrimination, taking into account their unique characteristics as well as vulnerabilities. Paragraph 31, for example, states, “States parties should take measures to reduce maternal morbidity and mortality in adolescent girls, particularly caused by early pregnancy and unsafe abortion practices, and to support adolescent parents.... The Committee urges States parties... to develop and implement... safe abortion services where abortion is not against the law....”⁸² The General Comment mandates that States parties make health care and facilities fully accessible to adolescents without discrimination.⁸³

In 2006, Colombia’s Constitutional Court ruled that abortion would be allowed under some circumstances, and the Committee on the Rights of the Child encouraged the state “to

⁸¹ Paul Hunt, Economic, Social and Cultural Rights: Right of Everyone to Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Addendum: Mission to Peru, Commission on Human Rights, Economic and Social Council, E/CN.4/2005/51/Add.3, ¶ 72, February 4, 2005

⁸² U.N. Committee on the Rights of the Child (hereinafter CRC), General Comment, ¶ 31, U.N. Doc. CRC/GC/2003/4 (July 1, 2003).

⁸³ *Id.* at ¶ 41(b).

ensure that safe medical facilities are available for such instances.”⁸⁴ The Committee had noted in 2000 “insufficient access by teenagers to reproductive health education and counselling services. In this connection, concern is expressed that the practice of abortion is considered the leading cause of maternal mortality.”⁸⁵ In its 2006 Concluding Observations on Peru, the Committee noted a high rate of pregnancies in teens and was “concerned about... the number of teenage girls dying as a result of abortions.”⁸⁶ That same year, the Committee noted a similar problem in Trinidad and Tobago, where “[t]he high number of unsafe and clandestine abortions undergone by teenage girls, seriously threatening their lives” drew concern.⁸⁷

The Committee recommended in 2004 that Liberia “[t]ake all necessary measures to prevent teenage pregnancies.”⁸⁸ Mozambique was reviewed in 2002, and the Committee recommended that the state “[ensure] that abortions can be conducted with all due attention to minimum standards of health safety.”⁸⁹ Of Palau in 2001, the Committee concluded that, “abortion is illegal except on medical grounds and expresses concern regarding the best interests of child victims of rape and/or incest in this regard.”⁹⁰ Regarding Chad, the Committee reported a “high rate of early pregnancy” in 2000 and suggested “that a comprehensive and multidisciplinary study be undertaken to understand the scope of adolescent health problems, including the negative impact of early pregnancy and illegal abortion.”⁹¹ And in 1999, Nicaragua’s “high and increasing rate of teenage pregnancy, the high maternal mortality rate

⁸⁴ CRC, Concluding Observations, Colombia, ¶ 71, U.N. Doc. CRC/C/COL/CO/3 (2006).

⁸⁵ CRC, Concluding Observations, Colombia, ¶ 370, U.N. Doc. CRC/C/100 (2000).

⁸⁶ CRC, Concluding Observations, Peru, ¶ 52, U.N. Doc. CRC/C/PER/CO/3 (2006).

⁸⁷ CRC, Concluding Observations, Trinidad and Tobago, ¶ 53, U.N. Doc. CRC/C/TTO/CO/2 (2006).

⁸⁸ CRC, Concluding Observations, Liberia, ¶ 49, U.N. Doc. CRC/C/15/Add.236 (2004).

⁸⁹ CRC, Concluding Observations, Mozambique, ¶ 47(b), U.N. Doc. CRC/C/15/Add.172 (2002).

⁹⁰ CRC, Concluding Observations, Palau, ¶ 46, U.N. Doc. CRC/C/15/Add.149 (February 21, 2001).

⁹¹ CRC, Concluding Observations, Chad, ¶ 30, U.N. Doc. CRC/C/15/Add.107 (1999).

related to abortion and the insufficient access by teenagers to reproductive health education and counselling services” caused concern.⁹²

5. Right to Life and the American Convention on Human Rights

The American Convention on Human Rights has a unique provision on when the right to life begins, but not all States parties recognize this definition. Article 4 states, “This right shall be protected by law and, in general, from the moment of conception.” However, the drafters did not mean to preclude the right to legal abortion by this language. Instead, “the Commission appeared to wish to emphasize that the wording of article 4(1) of the ACHR was not meant, by its drafters, to compel... the prohibition nor the legality of abortion.”⁹³ The Court must bear in mind that Mexico did not agree to create a restrictive definition of the right to life for the unborn in the ACHR.

In 1981, the Inter-American Commission on Human Rights heard a petition, known as the *Baby Boy* case,⁹⁴ on whether the United States of America had violated the American Declaration of Rights and Duties of Man of 1948⁹⁵ by acquitting a Massachusetts doctor for manslaughter after he performed an abortion on a 17-year-old with her and her mother’s consent. The complaints to the Inter-American commission argued that by acquitting the doctor at the local level and allowing the abortion provider to go unpunished, the U.S. was essentially taking away a citizen’s right to life. (The United States was not and still is not party to the Convention,

⁹² CRC, Concluding Observations, Nicaragua, ¶ 35, U.N. Doc. CRC/C/15/Add.108 (1999).

⁹³ Walsh, *supra* note 24, at 143.

⁹⁴ United States, Case No. 2141, Inter-Am. C.H.R., Res. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1980-81).

⁹⁵ O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

but was and remains a member of the Organization of American States, which the Inter-American Commission serves by providing advisory opinions.⁹⁶) The Commission looked first to the *travaux préparatoires* of the American Declaration to determine the meaning of its provision on the right to life.⁹⁷ It noted that the drafters of the Declaration, including Mexico, rejected including specific language on the right to life of the unborn and instead “adopted a simple statement of the right.”⁹⁸ The rejected provision would have been “incompatible with the laws governing the death penalty and abortion in the majority of the American States.”⁹⁹

The American Convention on Human Rights was drafted to allow states to adopt legislation allowing abortion. The final language of the right to life “from the moment of conception, in general” expresses the compromise between the various states and, as found by the Inter-American Commission, did not mean to completely prohibit abortion.¹⁰⁰ When Mexico ratified the American Convention in 1981, it included an Interpretive Declaration on Article 4, which stated:

With respect to Article 4, paragraph 1, the Government of Mexico considers that the expression "in general" does not constitute an obligation to adopt or keep in force legislation to protect life "from the moment of conception", since this matter falls within the domain reserved to the States.¹⁰¹

⁹⁶ See Organization of American States Charter Art. 112. The United States ratified the Charter in 1968.

⁹⁷ Walsh, *supra* note 24, at 142; Zampas, *supra*, note 25.

⁹⁸ United States, Case No. 2141, Inter-Am. C.H.R., Res. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 ¶¶ 14(a), 18(b) (1980-81).

⁹⁹ *Id.* at ¶ 18(b)(e).

¹⁰⁰ *Id.* at ¶ 30.

¹⁰¹ ACHR, Interpretive Declaration, Mexico (1981), available at <http://www.oas.org/juridico/English/signs/b-32.html>.

This declaration indicates that Mexico considered the language of the American Convention overly restrictive on a woman's right to have an abortion, and that laws already in place in Mexico allowing abortion in certain circumstances would be in peril if the more restrictive definition of the right to life were adopted.¹⁰²

In 2006, the Rapporteur on the Rights of Women of the Inter-American Commission issued a letter expressing concern over Nicaragua's recent law criminalizing abortion. "The Rapporteur's 2006 statement to Nicaragua represents the first time a human rights body representative has contacted a Member State on its own accord to emphasise the human rights implications of a pending state action."¹⁰³ The letter stated, "therapeutic abortion has been internationally recognized as a specialized and necessary health service for women, its ultimate purpose being to save the life of the mother when threatened during pregnancy."¹⁰⁴ The Rapporteur encouraged Nicaragua to consider its obligations under human rights treaties before implementing the abortion ban. Nonetheless, Nicaragua adopted a complete abortion ban in October 2006.¹⁰⁵

¹⁰² The Inter-American Commission noted in the *Baby Boy* case that the penal code of the Federal District and Territories of Mexico would have been undermined by the proposed narrow definition.

¹⁰³ Zampas, *supra*, note 25.

¹⁰⁴ Inter-American Commission Issues Landmark Statement Declaring Nicaragua's Abortion Ban Jeopardizes Women's Human Rights, Center for Reproductive Rights, December 1, 2006, *available at* <http://reproductiverights.org/en/press-room/inter-american-commission-issues-landmark-statement-declaring-nicaragua%E2%80%99s-abortion-ban-je>.

¹⁰⁵ Código Penal de la República de Nicaragua, Capítulo V "Del Aborto", *available at* http://www.oas.org/juridico/mla/sp/nic/sp_nic-int-text-cp.html, last accessed June 8, 2009.

B. The Right to Health

The right to life is invariably linked to the right to health but is articulated differently. The Court's decision in this matter should reflect that various international and regional treaties recognize health and health care as important human rights for all people. "[D]ata shows that the availability of safe, effective and acceptable contraception and family planning, including safe pregnancy termination services, is necessary to achieve the fundamental right to health."¹⁰⁶ As stated by the Committee on Economic, Social and Cultural Rights, "[t]he realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health."¹⁰⁷ As with respect to the right to life, international human rights bodies have held for a decade that the right to health means that women must have access to safe and legal abortion.

1. Right to Health and the International Covenant on Civil and Political Rights

Perhaps the most important case decided by a U.N. body on the right to health and abortion is *KL v. Peru*.¹⁰⁸ In that case, 17-year-old Peruvian Karen Noelia Llantoy Huamán became pregnant and learned that the fetus had anencephaly. After receiving advice from a doctor regarding risks to the woman's life and fetal deformities, Ms. Llantoy opted to abort the fetus, which was legal under Peruvian law in cases where the woman's life or health was in danger. However, the Peruvian state hospitals denied her right to have an abortion "because they

¹⁰⁶ Berta E. Hernández, *To Bear or Not to Bear: Reproductive Freedom as an International Human Rights*, 17 *Brook. J. Int'l Law* 309, 316 at 339 (1991) (footnote omitted).

¹⁰⁷ CESCR, General Comment, ¶ 21, U.N. Doc. E/C.12/2000/4 (August 11, 2000).

¹⁰⁸ *Karen Noelia Llantoy Huamán v. Peru*, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); 13 *IHRR* 355 (2006) (hereinafter *KL v. Peru*).

claimed it fell outside the health and life exceptions, as there is no explicit right to abortion in cases of severe foetal impairment.”¹⁰⁹ Ms. Llantoy gave birth. The baby lived for only four days, during which the complainant breastfed. She then became deeply depressed.

The complaint to the Human Rights Committee alleged that the State of Peru violated her rights under Articles 2, 3 6, 7, 17, 24 and 26 of the ICCPR. The Committee found that Peru had breached Articles 2, 7, 17, and 24. Regarding Article 7, the Committee held that Ms. Llantoy’s depression and “severe consequences” was foreseeable and directly caused by the State’s refusal to allow the abortion, constituting a violation of the article.¹¹⁰ The right to privacy under Article 17 was also violated because the state’s “intervention to terminate the pregnancy, interfered arbitrarily in her private life.”¹¹¹ Special rights for minors articulated in Article 24 were violated because she did not receive the required special care; in fact, the Committee “[noted] the special vulnerability of the author as a minor girl.”¹¹²

“The significance of *KL* is immense because it marks the first time a UN human rights body held a government accountable for failing to ensure access to abortion services to an individual.”¹¹³ This Court should take into account the arguments articulated in the *KL* case when deciding the constitutionality of Baja California’s constitutional reform

2. The Right to Health and the International Covenant on Economic, Social, and Cultural Rights

¹⁰⁹ Zampas at 270, *supra*, note 25.

¹¹⁰ *KL v. Peru*, ¶ 6.3.

¹¹¹ *Id.* at ¶ 6.4.

¹¹² *Id.* at ¶ 6.5.

¹¹³ Zampas at 271, *supra*, note 25.

The Committee on Economic, Social, and Cultural Rights has clearly articulated the duty of judges to ensure citizens' right to health. "Judges and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to health in the exercise of their functions."¹¹⁴ Many international treaty provisions and interpretive comments discuss the connection between poor maternal health and limitations on abortion as a health service. Article 12.1 of the ICESCR states, "[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The Committee on Economic, Social and Cultural Rights has commented over the years on the right to health and its connection with abortion services.

The Committee encouraged Mexico in 2006 "to ensure and monitor the full access of rape victims to legal abortion, to implement the Equal Start in Life Programme in all of its states, to ensure full access by everyone, especially by girls and young women, to reproductive health services and education, especially in rural areas and in indigenous communities, and to allocate sufficient resources for these purposes."¹¹⁵

In 2001 the Committee expressed its concern over the "low status of women's sexual and reproductive health rights and [the Committee was concerned] in particular about the increased incidence of illegal abortions."¹¹⁶ The Committee directed Colombia to "provide [in its next report] detailed information based on comparative data about the problem of abortion in

¹¹⁴ CESCR, General Comment No. 14, ¶ 61, U.N. Doc. E/C.12/2000/4, (August 11, 2000).

¹¹⁵ CESCR, Concluding Observations, Mexico, ¶ 44, U.N. Doc. E/C.12/MEX/CO/4 (June 9, 2006).

¹¹⁶ CESCR, Concluding Observations, Colombia, ¶ 24, U.N. Doc. E/C.12/1/Add.74 (November 30, 2001).

Colombia and the measures, legislative or otherwise, including the review of its present legislation, it has undertaken to protect women from clandestine and unsafe abortion.”¹¹⁷

In 2004, the Committee addressed this issue in Chile:

The Committee is concerned about the consequences for women's health of the legal prohibition on abortion, without exceptions, in the State party. While there are no official statistics on the number of abortions performed annually, the large number of women who are hospitalized for abortion complications every year (34,479 in 2001) gives an indication of the extent of this problem.¹¹⁸

Concerning women's access to abortion as a feature of the right to health care in Poland, the Committee noted in 2002, “[t]he Committee is concerned about the restrictive abortion laws, which have resulted in a large number of women risking their health by resorting to clandestine abortionists.”¹¹⁹ The Committee addressed similar concerns in Argentina in 2000:

On the issue of reproductive health rights, the Committee is concerned that the criminalization of abortion deters medical professionals from providing this procedure without judicial order, even when they are permitted to do so by law, *inter alia* when there are clear health risks for the mother or when pregnancy results from rape of mentally disabled women. The Committee also expresses concern over discriminatory aspects of the laws and policies in force, which result in disproportionate resort to illegal, unsafe abortions by poor and rural women.¹²⁰

¹¹⁷ *Id.* at ¶ 45.

¹¹⁸ CESCR, Concluding Observations, Chile, ¶ 26, U.N. Doc. E/C.12/1/Add.105 (2004).

¹¹⁹ CESCR, Concluding Observations, Poland, ¶ 29, U.N. Doc. E/C.12/1/Add.82 (2002).

¹²⁰ HRC, Concluding Observations, Argentina, ¶ 14, U.N. Doc. CCPR/CO/70/ARG (2000).

3. The Right to Health and the Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women, ratified by Mexico without reservations, speaks to the need for safe and legal abortion. If abortion is legal under a State party's domestic law, the state must provide services without discrimination. The Committee has encouraged many countries, including Mexico, to provide abortion services.

Over ten years ago, the Committee expressed concern with Mexico's "high rate of teenage pregnancy and the lack of access for women in all States to easy and swift abortion."¹²¹ The Committee requested "that the Government consider the advisability of revising the legislation criminalizing abortion and suggests that it weigh the possibility of authorizing the use of the RU486 contraceptive, which is cheap and easy to use, as soon as it becomes available."¹²² Today, abortion remains criminal in some circumstances under federal and state law, so the concern remains.

The CEDAW Committee has reviewed other countries on abortion access. With respect to Bosnia and Herzegovina, it was "concerned at [sic] the lack of family-planning education and the difficulty in accessing contraceptives, which result in a high rate of abortions and teenage

¹²¹ CEDAW, Concluding Observations, Mexico, ¶ 399, U.N. Doc. A/53/38 (1998).

¹²² *Id.* at ¶ 408.

pregnancies.”¹²³ The Committee expressed concern in 2006 with Mali’s “high maternal and infant mortality and morbidity, resulting from, *inter alia*... unsafe abortions.”¹²⁴

In 1999, noting that teenage pregnancy in Belize accounted for 23 percent of births, the Committee concluded that this rate, “in combination with the prevention of teenage mothers from pursuing their education, is predestined to reduce women's economic opportunities and thus increase their level of poverty.” The Committee went on to state:

in 1998, so-called "unspecified abortions" (abortions initiated outside the formal health sector) were the fifth cause of hospitalization, and hospitals discriminate against these women in the provision of services and care. In this regard, the Committee notes that the level of maternal mortality due to clandestine abortions may indicate that the Government does not fully implement its obligations to respect the right to life of its women citizens.¹²⁵

The Committee urged Belize “to revise its abortion laws, in particular since according to the information, existing legislation penalizing abortion is not strictly enforced.”¹²⁶

In 1998, the Committee received information that in Croatia some hospitals refused “to provide abortions on the basis of conscientious objection of doctors. The Committee considers this to be an infringement of women's reproductive rights.”¹²⁷ In its 1996 review of Paraguay, the Committee noted an extremely high level of “easily preventable maternal mortality - one of

¹²³ CEDAW, Concluding Observations, Bosnia and Herzegovina, ¶ 35, U.N. Doc. CEDAW/C/BIH/Co/3 (2006).

¹²⁴ CEDAW, Concluding Observations, Mali, ¶ 33, U.N. Doc. CEDAW/C/MLI/CO/5 (2006).

¹²⁵ CEDAW, Concluding Comments, Belize, ¶ 56, U.N. Doc. A/54/38, Part II (1999).

¹²⁶ *Id.* at ¶ 57.

¹²⁷ CEDAW, Concluding Comments, Croatia, ¶ 109, U.N. Doc. A/53/38, Part I (1998).

the highest in the region - and of extremely unsafe abortions, especially among very young girls” especially in rural areas.¹²⁸ And in 1995, the Committee criticized Guyana for its “lack of family planning services and the numbers of illegal abortions because of it.”¹²⁹

Mexico’s obligations under the CEDAW require that the Court declare Baja California’s reform unconstitutional as it violates women’s right to health.

CONCLUSION

Mexico has the duty to ensure that its citizens have access to safe and legal abortion. This has been the international standard for over ten years under the ICCPR, ICESCR, CEDAW, CRC, and the American Convention, to all of which Mexico is a party. Each of the respective treaty monitoring bodies has concluded that access to safe and legal abortion is a fundamental human right of all girls and women, implementing the right to life and the right to health. The Supreme Court must take into account the international human rights norms relating to the right to have an abortion. The Court should decide that Baja California’s Constitutional Reform contravenes international treaties and norms that are a part of the supreme law of Mexico.

¹²⁸ CEDAW, Concluding Comments, Paraguay, ¶ 123, U.N. Doc. A/51/38 (1996).

¹²⁹ CEDAW, Concluding Comments, Guyana, ¶ 621, U.N. Doc. A/50/38 (1995).