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AMICUS CURIAE BRIEF

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Introduction

1. This Amicus Curiae brief is aimed a contribution to aid this renowned Constitutional Court to reach the best possible decision in the important case *Acción pública de inconstitucionalidad contra el artículo 122 de la Ley 599 de 2000 (Código Penal)* submitted by fourteen Colombian citizens challenging the constitutionality of article 122 of the Criminal Code, which makes abortion a crime in Colombia save for three exceptions established by this Constitutional Court in decision *C-355 of 2006*.

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2. This brief will focus on providing this Court with detailed information and analysis on two main areas that we find of relevance and on which we feel that, as an institute dedicated to research on transnational law, we can contribute to the decision of this Court. These areas are: (i) comparative national law and (ii) international law relevant to the case before this Court. Our focus is on legislation and decisions from national and international bodies.

3. As the brief shows, there is a relevant trend in both domestic and international law towards the liberalisation of the laws that regulate abortion and, *most importantly for the case presently before the Colombian Constitutional Court, the decriminalisation of abortion in general*, that is, decriminalisation that is not restricted to the exceptions currently recognised in Colombia.

4. It is important to note from the outset, that decriminalisation is not necessarily linked to a moral approval of abortion "on request". On the contrary, it is perfectly reasonable to object to abortion "on request" (or even to abortion in general) on moral grounds and still be in favour of decriminalisation for a set of reasons related to the overwhelming negative consequences that criminalisation entails, including the violation of several fundamental human rights.

5. This brief focuses precisely on this latter argument, and not on moral or legal arguments for or against abortion.[1] It shows that the global trend towards liberalisation and decriminalisation is in great part motivated by the gradual recognition that *criminal law is neither an effective nor a just and proportionate response to the issue of abortion*. Rather, it is a blunt instrument that fails to achieve its purported aim of protecting fetal life at an inordinate cost to the rights and well-being of women, in particular the poorest.

6. This brief is organised as follows. In Part One, we focus on the arguments for decriminalisation, starting with the inadequacy of criminal law as an instrument to address abortion in general (section I) and then discussing more specific reasons that apply to the

[1] For an excellent discussion on these, see R Dworkin, Life's Dominion: An Argument about Abortion and Euthanasia (HarperCollins 1993).

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Colombian situation, in particular on how criminalisation represents a disproportionate infringement on the right to legal abortion recognised in the landmark decision C-355/2006 (section II). In Part Two, we offer an overview of comparative domestic law (section III) and international law (section IV) on the liberalisation and decriminalisation of abortion. Section V concludes and summarises the brief.

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Part One
The Arguments for Decriminalisation

I - Criminal Law as an Inadequate Instrument

7. The use criminal law as an appropriate response to any societal problem should always be questioned and employed very carefully. As it "involves the most onerous and draconian of state powers, [it] should be invoked only where it provides a necessary and proportionate response."[2] This is what the well-established idea of criminal law as a last resort (*ultima ratio)* requires.[3] According to Emeritus Oxford Professor Andrew Ashworth:

> *"[E]ven if it appears to be justifiable in theory to criminalize certain conduct, the decision should not be taken without an assessment of the probable impact of criminalization, its efficacy, its side-effects, and the possibility of tackling the problem by other forms of regulation and control." (in Principles of Criminal Law, Oxfor4d University Press, 1999, pages 67-68, our emphasis).*

8. As the claimants in the present case have shown and is a common experience across the world, the criminalization of abortion fails all these assessments. The impact of criminalisation on the rights and well-being of women is extremely deleterious. The most obvious and important negative impact of criminalization is that it creates and fuels a demand for and

[2] Sheldon S. "The Decriminalisation of Abortion: An Argument for Modernisation". *Oxford Journal of Legal Studies* 2015:1-32, at 3.
[3] For a good discussion see N Jareborg, 'Criminalization as Last Resort' (2005) 2 Ohio St J Crim L 512; A Ashworth,'Conceptions of Overcriminalization' (2008) 5 Ohio St J Crim L 407; D Husak, Overcriminalisation: The Limits of the Criminal Law (OUP 2008); and H Packer, The Limits of the Criminal Sanction (Stanford University Press 1968).

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offer of *clandestine and unsafe abortions*[4], one of the leading causes of *maternal morbidity and deaths* in countries that still criminalize abortion, either fully or partially.

9. According to the World Health Organization's estimates, 45% of all abortions performed annually are unsafe, leading 7 million women to be admitted to hospitals every year in developing countries. Approximately 68,000 women die as a result of unsafe abortions annually, making it one of the main causes of maternal mortality (13%). According to the WHO, a woman dies every 8 minutes in a developing country of complications arising from an unsafe abortion.[5]

10. Of the women who survive unsafe abortion, 5 million suffer long-term health complications, such as haemorrhage (heavy bleeding); infection; uterine perforation (caused when the uterus is pierced by a sharp object); damage to the genital tract and internal organs.

11. Research shows that women and adolescents resort to unsafe abortion for a series of interrelated reasons, including restrictive laws; poor availability of services; high cost; stigma; conscientious objection of health-care providers and unnecessary requirements, such as mandatory waiting periods, mandatory counselling, provision of misleading information, third-party authorization, and medically unnecessary tests that delay care.[6]

12. To this significant loss of life and well-being we must add an exorbitant economic cost. According to the WHO, the annual cost of treating major complications from unsafe abortion is estimated at USD 553 million.[7]

13. Given this extremely high human cost of unsafe abortions fuelled in great part by criminalization and other interrelated causes, the principal of criminal law as ultima ratio

[4] An *unsafe abortion* is defined as "a procedure for terminating an unintended pregnancy carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both."
[5] WHO 2020, Preventing unsafe abortion, available at https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion and Haddad, Lisa B, and Nawal M Nour. "Unsafe abortion: unnecessary maternal mortality." *Reviews in obstetrics & gynecology* vol. 2,2 (2009): 122-6.
[6] WHO 2020 Ibid.
[7] Ibid.

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would require the "positive side" of the equation, that is, the number of abortions prevented (and potential lives saved) by restrictive criminal laws to be at least equally high, if not higher. Yet, as research has shown time and again, there is not even a correlation (let alone causation) between more restrictive criminal laws and lower number of abortions.

14. On the contrary, countries with more liberal laws have often experienced a decrease in the number of abortions in the past decades, whereas those with more restrictive laws have not. In Eastern Europe, for instance, where abortion laws are very liberal (see Appendix to this brief), abortion rates fell from 88 per 1000 women in the 1990s to 42. In Western Europe, where abortion laws are also rather liberal, these rates are much lower, at 21 per 1000 women, and even lower in the US, at 17 per 1000. In Canada and parts of Australia, where abortion has been recently decriminalised, abortion rates have not risen either.[8]

15. In countries with restrictive laws the average rate is 37 abortions per 1000 women, whereas in those where abortion is available "on request" is it 34 on average.[9]

16. It is clear, thus, that restrictive laws are not effective in achieving their professed aim of reducing abortion and protecting potential life. Under such circumstances, there seems to be no moral or legal justification for using criminal law to address the issue of abortion. It is a disproportionate and ineffective means, a blunt instrument that causes death and disability, violating some of the most fundamental rights of women (the rights to life, health and non-discrimination) without any compelling countervailing positive effect.

17. It is therefore not necessary to be morally in favour of abortion "on request" to reach the conclusion that abortion in general should not be criminalised. There is simply no reasonable justification to do so, and plenty of strong reasons to do the opposite. This is in great part why, as we shall see below, a significant number of courts and international bodies

[8] Royal College of Midwives (2016) *RCM support for the 'We Trust Women' campaign: the facts*.
[9] Sedgh G et al., Abortion incidence between 1990 and 2014: global, regional, and subregional levels and trends, *Lancet,* 2016, 388(10041): 258–267.

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increasingly support and implement the total decriminalization of abortion (see sections III and IV below).

18. Before that, we will explore other more specific reasons that apply to the Colombian case in particular.

II - The Ineffectiveness of C-355/2006: *disproportionate infringement*

19. Fundamental rights are not worth much if they cannot be exercised by right holders. The history of international and constitutional human rights is sadly cluttered with such "ropes of sand", to use the metaphor of Indian Supreme Court justice Bhagwati.[10]Too often the rights that are recognised in grandiloquent declarations, international treaties, constitutions and judicial decisions end up being useless to the large majority people. Obstacles to the effectiveness of human rights include lack of rights' awareness and-or psychological preparedness, difficulties to access legal representation and courts and lack of economic resources to afford the costs usually associated with the effective exercise of rights.[11]

20. Obstacles to exercise the rights recognised in decision C-355/2006 seem to be a real problem for a significant number of women in Colombia. As persuasively argued by the claimants in the present case, it is not only the women who seek abortion currently regarded as illegal in Colombia who continue to die and suffer due to criminalization, as discussed in section 1 supra. It is also those who have been *in theory* benefited by decision C-355 yet, *in practice*, still have no access to safe abortions due to the very same problems they faced before that landmark decision.

[10] People's Union for Democratic Rights v. India, [1983] 1 S.C.R. 456, at 487.
[11] There is a growing literature on the topic. For a discussion in the field of the right to health, see Ferraz, O.L.M., *Health as a Human Right. The Politics and Judicialisation of Health in Brazil* (Cambridge University Press, 2020).

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21. Criminalization, they argue, is "the greatest obstacle keeping women and girls, particularly those in situations of vulnerability, from receiving safe abortion services under the three exceptions" established in C-355. The data seems to support their claim. According to the most updated figures available, there are around 400,412 illegal procedures performed per year, leading to 130.000 complications and 70 deaths (8% of all maternal deaths in Colombia). Safe and legal abortions obtained under the three exceptions account for only between 1% to 9% of that figure.[12]

22. There seems to be strong indication, thus, that the partial decriminalization brought about by C-355-2006 is not translating, as it should, into the effective fruition of rights by a large number of women in Colombia. What percentage of those 400.000 abortions are cases that fall under the three exceptions yet the women involved are incapable of or unwilling to exercise their right to legal abortion is difficult to know for sure. But it seems plausible to assume that the number is high, due to *stigma*, *lack of knowledge and clarity about what constitutes a legal abortion, fear of being falsely accused of breaching the law*, all of which are fuelled by the continuing existence of the crime of abortion in the Penal Code, irrespective of the exceptions.

23. Uncertainty, stigma and fear of prosecution provoked by criminalisation have a well-known negative effect on the safety of abortions.[13] It deters many doctors from carrying out abortions legally, pushing women to clandestine clinics and delaying the performance of abortion, making it even less safe and prone to complications.[14] As shown in an international comparative studies, 'criminalising abortion does not prevent it [abortion] but, rather, drives

[12] Ver anexo 3: Mesa por la vida y la salud de las mujeres. Causa Justa: argumentos para el debate sobre la despenalización total del aborto en Colombia. Editado por Ana Cristina González Vélez y Carolina Melo. Pág. 86. Disponible en versión digital.
[13] R Cook, 'Stigmatized Meanings of Criminal Abortion Law' in R Cook, JN Erdman and BM Dickens (eds), Abortion Law in Transnational Perspective: Cases and Controversies (University of Pennsylvania Press 2014).
[14] British Medical Association (2017) Decriminalisation of abortion: a discussion paper from the BMA

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women to seek illegal services or methods' and prevent them from undergoing abortion at an earlier and safer stage.[15]

24. The continuing criminalization of abortion in Colombia and elsewhere imposes on the claimants what many courts across the world consider a *disproportionate interference* with the rights to access legal abortion, i.e. in the three cases recognised in Colombia, as we shall see in more detail below (sections III and IV).

25. The jurisprudential concept of proportionality seems rather helpful to the analysis required from the Colombian Constitutional Court in the present case. It aids courts in the difficult determination of whether a restriction by the state on fundamental rights (such as life, health and non-discrimination in the present case) is lawful or not. The premises of the analysis are these: (i) fundamental rights, with few exceptions, are not absolute, but rather strong claims that should not be interfered with lightly[16]; (ii) any interference with fundamental rights has to be justified by a pressing social need and should not go beyond what is strictly necessary to achieve that aim.[17]

26. The proportionality test singles out interferences that are not justified as they *impose an unnecessary or disproportionate burden on the exercise of a fundamental right*.[18] The criminalization of abortion seems to fail the proportionality test on both counts. As we have seen in this and the previous section, without effectively advancing its professed aim of

[15] Greene Foster D. Comment: Unmet need for abortion and woman-centered contraceptive care. *The Lancet* 2016; 388 (10041): 216-217; Petersen KA. Early medical abortion: legal and medical developments in Australia. *MJA* 2010; 193(1): 26-29.

[16] For a classic development of rights as strong claims see Ronald Dworkin, Taking Rights Seriously (Duckworth, London 1977): "In most cases, when we say that someone has a ''right'' to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed to justify any interference.", at 188.

[17] See Robert Alexy, 'Balancing, constitutional review, and proportionality' (2005) 3 International Journal of Constitutional Law 572–581.

[18] In the US, rather than proportionality the US Supreme Court has used the related concepts of "strict scrutiny" and "undue burden". See Michael C. Dorf, Incidental Burdens on Fundamental Rights, Harvard Law Review, Apr., 1996, Vol. 109, No. 6 (Apr., 1996), pp. 1175-1251; Valerie J. Pacer, Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis, 73 WASH. U. L. Q. 295 (1995) and *Fourteenth Amendment — Due Process Clause — Undue Burden* — Whole Woman's Health v. Hellerstedt, *HARVARD LAW REVIEW THE SUPREME COURT — LEADING CASES.* Vol. 130:397 2016.

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reducing illegal and unsafe abortions, criminalization causes inordinate harm to the lives and well-being of women in general, as well as prevents legal abortions from being performed under safe conditions.

27. To finish, it is important to reemphasise a point already made in the previous section. Decriminalisation does not necessarily mean unfettered access to abortion "on request". Restrictions can remain yet not through criminal law, but rather via specific civil legislation, or regulation, professional practice codes etc. What decriminalisation does is eliminate the inevitable negative consequences of criminalisation and open the door for a more rational and balanced discussion and implementation of parameters by regulatory and professional authorities, ensuring that services are fit for purpose, equitable and primarily developed by those who deliver and those who access abortion services.[19]

[19] Sheldon S. "The Decriminalisation of Abortion: An Argument for Modernisation". *Oxford Journal of Legal Studies* 2015:1-32, p.26 and p.30.

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Part Two
The Decriminalisation of Abortion in Domestic and International Law

28. Part I focused on the arguments for decriminalisation, claiming that criminal law is an inadequate and disproportionate response to abortion in general (section I, …-…) and represents a disproportionate infringement on the fundamental rights of women in Colombia to life, health and non-discrimination by placing an undue obstacle on their access to legal and safe abortions recognised in C-355/2006 (section II). This part offers a survey of comparative domestic (section III) and international (section IV) law and jurisprudence that shows how decriminalisation is a transnational phenomenon in great part fuelled by a growing consensus around the arguments discussed in Part I.

29. The decision in C-355/2006 is part of this transnational judicial dialogue yet, as argued above, should not be the end of the conversation in Colombia. To fulfil its aims of protecting the fundamental rights of women in Colombia it needs to go further, fully decriminalising abortion, as requested by the claimants in the present case before this Constitutional Court. The developments occurred in other countries and at the international level surveyed below can provide, we hope, a good source of information and inspiration for this Court.

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III

Abortion in Comparative Domestic Law

A. Legislation liberalising and decriminalising abortion

30. The worldwide trend in the domestic laws that regulate abortion across the world is towards liberalisation and decriminalisation. Since the year 2.000, 32 countries have moved in that direction. Out of those, 18 have moved from a total prohibition to either abortion "on request" (Nepal and Sao Tome and Principe) or to allowing abortion under certain circumstances (e.g. to save the woman's life, to preserve health or on social and economic grounds). A striking example from South America is Chile, which in 2017, after an 80-year very restrictive policy, started to allow abortion under certain exceptions (risk to the mother's life, fetal anomalies, and rape).[20]Another 14 have expanded the legal grounds on which women can access abortion services. Only one country, Nicaragua, moved in the other direction, prohibiting abortion under any circumstances.[21] (for a full list and more detailed data see appendix A)

31. As a result of this liberalisation of abortion laws, a majority of countries worldwide (home to 59% of women of reproductive age), have currently in place what might be called liberal abortion laws, i.e. abortion is available either "on request" (most liberal countries) or under certain conditions (semi liberal countries), to follow the terminology adopted by the Center

[20] Gloria Maira, Lidia Casas, Lieta Vivaldi, 'Abortion in Chile: The Long Road to Legalization and its Slow Implementation', *Health Human Rights,* Vol 21:2 (2019), pp. 121-131.

[21] And now a decision of the Poland Supreme Court has also further restricted access to abortion. The ruling effectively imposes a near-total ban on legal abortions, finding that abortions for foetal defects violate the Polish constitution. Once the decision comes into effect, abortion will only be allowed in cases of incest and rape or if the mother's life it at risk. See, for example, "Poland abortion: Top court bans almost all terminations" *BBC* (23 October 2020), < https:/bbc.co.uk/news/world-europe-54642108>; Eszter Zalan, 'Polish court effectively bans legal abortions' *EU Observer* (23 October 2020), < https://euobserver.com/social/149848> . The decision repealed Article 4a, sec. 1 point 2 and Article 4a sec. 2, first sentence of the Act on Family Planning, Human Embryo Protection, and Conditions of Legal Pregnancy Termination.

of Reproductive Rights.[22] Countries that allow abortion "on request" generally allow it for up to 12 weeks of gestation and, once that limit has expired, abortion is often allowed on additional grounds. There are currently 66 countries that fall under this most liberal category (home to 36% of the women of reproductive age in the world.)[23]

32. Yet despite this liberalisation, many countries (especially but not exclusively those that allow abortion only in certain cases, like Colombia) still retain abortion as a crime in their penal legislation. As we saw in Part One, this is extremely problematic from a rule of law and fundamental rights perspective given the incompatibility of such attitude with the principle of *criminal law as ultima ratio* (section I) and the disproportionate burden it imposes, through stigma, lack of clarity and information and fear of prosecution, on the legal right to abortion of women in Colombia (section II).

33. But many countries have been gradually recognising these arguments and taking action to address this important problem, either via legislation or jurisprudence. To cite only the most recent examples, in **Australia**, for instance, the state of **Queensland** has recently passed legislation not only permitting abortion on request up until 22 weeks of pregnancy but also *removing abortion from the Penal Code* (Termination of Pregnancy Act 2018). As expressly provided in s. 10 of the Act:

> *"Despite any other Act, a woman who consents to, assists in, or performs a termination on herself **does not commit an offence**."*

[22] https://beta.reproductiverights.org
[23] Center for Reproductive Rights https://beta.reproductiverights.org

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34. Moreover, on the webpage of the Department of Health, it is clearly stated that the Act's aim is to ensure that "termination of pregnancy is treated as a ***health issue rather than a criminal issue*.**"[24]

35. In 2019, **Ireland**, one of the countries where opposition to abortion has been historically very strong, legalized abortion "on request" up to 12 weeks of pregnancy after a national referendum. The resulting legislation, made possible by an amendment to the Constitution of 1937, provides that ***no women shall be criminally liable "in respect of her own pregnancy."*** [25]

36. Most recently, **Northern Ireland** also liberalized its abortion laws following several years of public demands for access to abortion.[26] The case of Sarah Ewart – a woman who was denied an abortion in Northern Ireland in 2013, despite severe foetal impairments – triggered a consultation of the Department of Justice into the possible decriminalization of abortion. In 2015, the Belfast High Court declared Northern Ireland's abortion law incompatible with the right to respect for one's "private and family life" under Article 8 of the European Convention on Human Rights (ECHR). These and other events, ultimately led to the passing of new abortion laws in 2020 allowing unrestricted abortions up to 12 weeks of gestation, up to 24 weeks in exceptional circumstances (risk of mental or physical injury to the woman) and prescribing no time limit if there is a substantial fetal impairment or fatal fetal abnormality or if the woman's life is at risk.[27]

[24] Queensland Government, Queensland Health, Termination of pregnancy legislation, https://www.health.qld.gov.au/system-governance/legislation/specific/termination-of-pregancy-legislation accessed 28.10.2020.
[25] Health (Regulation of Termination of Pregnancy) Act 2018, s. 23 (3); Irish Constitution (1937), Article 40.3.3 as amended in 2018.
[26] The Abortion (Northern Ireland) Regulations 2020 No 345, available on https://www.legislation.gov.uk/uksi/2020/345/.
[27] Amnesty International UK, 'Abortion in Ireland and Northern Ireland: Abortion decriminalised in Northern Ireland', accessible via ≤www.amnesty.org.uk/abortion-rights-northern-ireland-timeline≥.

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37. Importantly, section 11 of the Act **expressly decriminalises abortion in respect of the woman** and virtually decriminalises it in respect of doctors and other persons, allowing a broad defence of "good faith" and limiting the maximum sanction to a fine of £5.000.

38. But it has not been only through legislation that decriminalisation has been achieved. Courts have also stepped in to decriminalise abortion. The next section provides a survey of the jurisprudence of national courts.

B. Selected Domestic Jurisprudence on Decriminalisation

39. The most recent example of judicial decriminalisation of abortion is that of ***South Korea***, where the Constitutional Court **declared unconstitutional the criminalisation of abortion**, in place since 1953 through articles 269 and 270 of the Criminal Code, suspending their application and giving Parliament until the end of 2020 to adjust the legislation accordingly.[28] It is interesting to note that the Korean case is similar to the one currently before the Colombian Constitutional Court as the 1953 law already exempted from criminal sanctions cases of rape, incest, severe genetic disorders, specific diseases, and threats to a woman's health. The following passages of the judgement are particularly relevant as they rely precisely on the arguments discussed in Part One of this brief:

> *"… the threat of criminal punishment has only a limited effect on a pregnant woman's decision whether to terminate her pregnancy. In addition, there have been very few cases in which a woman has been punished criminally for procuring an abortion. In*

[28] A summary in English of the decision can be found in the Constitutional Court's webpage here https://search.ccourt.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=영문판례&eventNum=49475&eventNo=2017헌바127&pubFlag=0&cId=010400

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> *light of these circumstances, we find that the Self-Abortion Provision **does not effectively protect the life of a fetus** …."(our emphasis)*[29]
>
> *"The Self-Abortion Provision also **places a substantial burden on a woman** who seeks or has undergone an abortion by limiting her access to counseling, education, and information regarding abortions. Also, it forces her to seek out expensive procedures to procure an abortion, making it difficult for her to seek relief in the event of medical malpractice during an abortion, and rendering her vulnerable to retaliatory harassment …." (our emphasis)*

40. South Korea is just the latest example of courts recognising that criminalisation is not an appropriate response to abortion. In many other countries, courts have reached similar conclusions.

41. In **Portugal**, the Constitutional Court (Tribunal Constitucional), stated in 2010 that it was **wrong to assume *that criminalisation "automatically translates into a decrease in the number of these [abortion] acts*** *and, therefore, a lower possibility of occurrence of the risks associated with them… It is rather that this regime [criminalisation] would have the effect, as it has had in the past, of **increasing the number of abortions performed in completely inadequate conditions and of much more serious risks for women's health – a risk often realized, as hospital practice documents***".[30]

[29] South Korean Constitutional Court, Case on the Crime of Abortion (2017Hun-Ba127, April 11, 2019), First Draft of the English Summary, p. 2.

[30] Tribunal Constitucional Acórdão n.º 75/2010 11.6: *O erro da arguição é o de pressupor que o impedimento ou dificultação de realizar a interrupção voluntária da gravidez em condições de impunibilidade se traduz automaticamente no decréscimo do número desses actos e, logo, numa menor possibilidade de concretização do risco a eles associado. Ora, já vimos que não é assim. Certo é antes que esse regime teria o efeito, como teve no passado, de potenciar o número de abortos praticados em condições completamente inadequadas e, esses, de risco muito mais grave para a saúde da mulher – risco frequentemente concretizado, como a prática hospitalar documenta.* https://dre.pt/pesquisa/-/search/2670436/details/maximized

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42. In **Chile**, the Supreme Constitutional Court concluded, in a decision of 2017, that the criminal prosecution and punishment of abortion **is not the most appropriate mechanism to protect the unborn**, since the total number of women convicted of this practice is derisory compared to the total number of abortions performed in the country.

> *"That in terms of appropriateness, the central question is whether the criminal measure is the most effective in protecting the unborn. … criminal prosecution and punishment **has not been the ideal mechanism for protecting the unborn**. It should also be noted that this figure of 30,000 does not include clandestine abortions. From a mere reading of these figures, **it is clear that criminal law protection is not the most appropriate.**"(our emphasis)*[31]

43. In **Mexico**, The Supreme Court of Justice of the Nation (Suprema Corte e Justicia de la Nation) took a similar standing in 2009 when deciding the Unconstitutionality Actions 146/2007 and 147/2007. The Court held that **the criminalisation *"of the termination of the primary stage of pregnancy is not suitable to safeguard the continuation of the gestation***, *since the legislator took into account that it is a social reality that women who do not want to be mothers resort to the practice of clandestine pregnancy terminations with the consequent detriment to their health and even the possibility of losing their lives".* [32]

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[31] Supreme Constitutional Court of Chile Role N° 3729(3751)-17 CPT (August 28, 2017), p.120: Original: *"Que en cuanto a la idoneidad, la pregunta central es si la medida penal es la más eficaz para proteger al no nacido. En los anexos acompañados por el Ejecutivo en su contestación, viene una serie de estadísticas no controvertidas por los requirentes. En ellas se señala que durante el año 2014 hubo 30.799 egresos hospitalarios por aborto. No obstante, entre el año 2005 y 2016, el número de mujeres formalizadas por delito de aborto y por aborto sin consentimiento, corresponden a 378 mujeres. Las mujeres condenadas sólo ascienden a 148. Ello demuestra inmediatamente que la persecución y sanción penal no ha sido el mecanismo idóneo para proteger al no nacido. Hay que señalar, además, que en esa cifra de 30.000 no se incluyen los abortos clandestinos. De la sola lectura de estas cifras, se demuestra que la protección penal no es la más idónea."*

[32] Mexican Supreme Court of Justice sentence nº 21469 "Unconstitutionality Action 146/2007 and its accumulated 147/2007" of March 2009, p.28:*"(…)**In addition to the fact that the decriminalisation of a legal good does not imply its lack of protection and, specifically, the decriminalisation of the termination of pregnancy refers to the case in which the pregnant woman decides on such a termination, but the criminal sanction for the person who attempts to harm the product of conception without her consent is maintained.***

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44. Other passages of that decision emphasise the inadequacy of criminalisation as a response to abortion.

> *"In addition to the fact that the **decriminalisation of a legal good does not imply its lack of protection** and, specifically, the decriminalisation of the termination of pregnancy refers to the case in which the pregnant woman decides on such a termination, but the criminal sanction for the person who attempts to harm the product of conception without her consent is maintained. (…)"*

*"In fact, the philosophy that guides penal regulation requires acting in extreme situations, but not penalising all real or potentially illicit behaviour, especially **the deprivation of liberty should be the ultimate ratio**. **The system of constitutional guarantees tends to ensure that criminal sanctions do not proliferate and that the punitive power of the State is manifested in the most limited way possible**. (...)*

45. In **Brazil**, there is a case pending where a declaration of unconstitutionality of articles 124 and 126 of the Penal Code, which criminalise abortion, is sought. (ADPF 442) In 2012, the Supreme

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*(…) The contested rules are not conducive to the termination of pregnancy, since the removal of a disincentive is not equated with the establishment of an incentive." In fact, the philosophy that guides penal regulation requires acting in extreme situations, but not penalising all real or potentially illicit behaviour, especially the deprivation of liberty should be the ultimate ratio. The system of constitutional guarantees tends to ensure that criminal sanctions do not proliferate and that the punitive power of the State is manifested in the most limited way possible. (...) On the other hand, **the penalization of the termination of this primary stage of pregnancy is not suitable to safeguard the continuation of the gestation process**, since the legislator took into account that it is a social reality that women who do not want to be mothers resort to the practice of clandestine pregnancy terminations with the consequent detriment to their health and even the possibility of losing their lives. (...) This court considers that the measure used by the legislator is thus ideal for **safeguarding women's rights, since the non-criminalisation of the termination of pregnancy has as its counterpart the freedom of women to decide about their bodies, their physical and mental health and even their lives,** since we cannot ignore the fact that even today, as the legislator of the Federal District clearly refers in his explanatory statement, there is maternal mortality".*

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Court had added to the grounds of permissible abortions those carried out when the fetus has serious brain injuries (anencephaly) that make life unviable outside the womb. The most relevant case for our purposes, however, is Habeas Corpus 124.306, of November 2016, in which two justices of the STF, Luis Roberto Barroso and Marco Aurelio Mello recognised that criminalisation is disproportionate and, therefore, unconstitutional:

> *"Criminalization, (...) violates several fundamental rights of women, as well as the principle of proportionality"*[33].

46. Furthermore, according to the Court, the impact of the criminalization on poor women made it particularly objectionable, as it *"prevents these women, who do not have access to private doctors and clinics, from resorting to the public health system to undergo the appropriate procedures. As a consequence, cases of self-mutilation, serious injuries and deaths are multiplying"*[34].

47. Moreover, the Brazilian Supreme Federal Court also concluded that the criminalization of abortion violates the principle of proportionality because:

> *"(i) it constitutes a measure of* ***doubtful adequacy to protect the legal good that it is intended to protect*** *(life of the unborn child), because it does not have a relevant impact on the number of abortions performed in the country, only preventing them from being performed safely;*

[33] Federal Supreme Court of Brazil, "HABEAS CORPUS 124.306" (Nov. 2016), p.1: *"3. Secondly, it is necessary to interpret Articles 124 to 126 of the Penal Code - which define the crime of abortion - in accordance with the Constitution in order to exclude from its scope the voluntary interruption of pregnancy carried out in the first trimester.* ***Criminalisation in*** this case violates several fundamental rights of women, as well as the principle of proportionality."

[34] Ibid p.2 "***To all this is added the impact of criminalization on poor women. Treatment as a crime, given by Brazilian criminal law, prevents these women, who do not have access to private doctors and clinics, from resorting to the public health system to undergo the appropriate procedures.*** *As a consequence, cases of self-mutilation, serious injuries and deaths multiply."*

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> *(ii)* ***it is possible for the State to prevent the occurrence of abortions by more effective and less harmful means than criminalisation****, such as sex education, distribution of contraceptives and support for the woman who wishes to have the child but is in adverse conditions;*
>
> ***(iii) the measure is disproportionate in the strict sense, as it generates social costs (public health problems and deaths) which outweigh its benefits"***[35]*.*

48. The current wave of transnational jurisprudence on decriminalisation of abortion was preceded by an earlier one that took place mostly in the US and Western Europe in the 1970s and 1980s. The most well-known decisions here are, of course, those of the US Supreme Court such as *Roe v. Wade* and *Planned Parenthood v. Casey* (1992). The latter is particularly relevant as it develops the standard of "undue burden" which is closely related to the principle of proportionality discussed in Part One. The Court defined "undue burden" as "a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus", which is not acceptable under the Constitution.[36]

49. If even regulations can be regarded as illegal for imposing an "undue burden" on the fundamental rights, criminalisation seems completely disproportionate a response. This was precisely what the Spanish Constitutional Court concluded in its ruling 53 of 11 April 1995, declaring that taking into account the reasonable enforceability of the conduct and the proportionality of the penalty, **the criminal sanction of abortion may place an "unbearable**

[35] Ibid p.2 "*6. The criminal classification also violates the principle of proportionality for cumulative reasons:* ***(i) it is a measure of doubtful adequacy to protect the legal good it is intended to protect*** *(life of the unborn child), because it does not have a relevant impact on the number of abortions performed in the country, but only prevents them from being performed safely;* ***(ii) it is possible for the State to prevent the occurrence of abortions by more effective and less harmful means than criminalisation,*** *such as sex education, distribution of contraceptives and support for the woman who wishes to have the child but is in adverse conditions;* ***(iii) the measure is disproportionate in the strict sense, as it generates social costs*** *(public health problems and deaths) which outweigh its benefits."*

[36] Ibid, p 877.

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burden" on the mother in certain circumstances, and therefore the imposition of criminal sanctions would be totally inappropriate in these cases.[37]

50. Less well-known but highly relevant to our discussion are the cases of Germany and Canada. In **Germany**[38], the first abortion decision of the Federal Constitutional Court was actually to order the National Congress to ***recriminalize*** abortion, after striking down legislation that had liberalised abortion, the Abortion Reform Act of 1974.[39]According to the majority, the removal of criminal restrictions against abortion was incompatible with article 1 of the Constitution of 1949 that famously states: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[40] Two justices dissented, including the only woman on the court. Far from justifying continued punitive measures, they argued, the lessons of history counselled "restraint in employing criminal punishment, the improper use of which in the history of mankind has caused endless suffering."[41] In 1976, Parliament reformed paragraph 218 to provide immunity from prosecution for abortion in the case of

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[37] Sentence 53/1985, of 11 April, of the plenary session of the Constitutional Court, in the appeal of unconstitutionality number 800/1983, p.29 *"(9)Furthermore, the legislature, which must always bear in mind the reasonable enforceability of conduct and the proportionality of the penalty in the event of failure to comply, may also waive the criminal penalty for conduct which objectively could represent an unbearable burden, without prejudice to the State's duty to protect the legal good in other areas, where appropriate. Human laws contain patterns of conduct in which normal cases generally fit, but there are unique or exceptional situations in which criminal punishment for non-compliance with the law would be totally inappropriate; the legislator cannot use the maximum constraint - criminal sanction - to impose in these cases the conduct that would normally be required, but which is not in certain specific cases."*
Original: *" (9)Por otra parte, el legislador, que ha de tener siempre presente la razonable exigibilidad de una conducta y la proporcionalidad de la pena en caso de incumplimiento, puede también renunciar a la sanción penal de una conducta que objetivamente pudiera representar una carga insoportable, sin perjuicio de que, en su caso, siga subsistiendo el deber de protección del Estado respecto del bien jurídico en otros ámbitos. Las leyes humanas contienen patrones de conducta en los que, en general, encajan los casos normales, pero existen situaciones singulares o excepcionales en las que castigar penalmente el incumplimiento de la Ley resultaría totalmente inadecuado; el legislador no puede emplear la máxima constricción -la sanción penal- para imponer en estos casos la conducta que normalmente sería exigible, pero que no lo es en ciertos supuestos concretos."*

[38] See Reva B. Siegel, *Dignity and sexuality: Claims on dignity in transnational debates over abortion and same-sex marriage I•CON (2012), Vol. 10 N. 2, 355–379*

[39] Five German states challenged the law: Baden-Württemberg, Bavaria, Rhineland-Palatinate, Saarland and Schleswig- Holstein. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 .

[40] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW], May 23, 1949, Bundesgesetzblatt [BGBl] 1, art. 1.

[41] *Id*. at 670.

specific "indications" including the life and health of the mother, fetal deformity, rape and incest, or "social need/emergency." Upon reunification, the German Federal legislature enacted the Pregnant Women's and Family Assistance Act, which decriminalized abortion in the early weeks of pregnancy.

51. But the Federal Constitutional Court intervened again, in 1993, reaffirming its 1975 decision requiring the recriminalisation of abortion, yet this time allowing the government to offer immunity from prosecution for abortion to women who submitted to counselling designed to persuade them to continue the pregnancy.[42]

52. Despite still accepting criminal law as part of the answer to abortion, something we reject for reasons developed in Part One, some passages of the German Constitutional Court's decision of 1993 clearly indicate that criminalisation has undeniable negative aspects and should therefore be significantly restricted:

> *"...**effective protection of life could not be achieved through the threat of criminal punishment alone*** [136]"[43]
>
> *"a woman, who discovers an unwanted pregnancy, will often find her very existence at threat...**a threat of criminal punishment is of little effect at this point*** [184]"[44].

[42] See Siegel, 2012, ibid.
[43] *ibid* [136] *"Der Gesetzgeber - so tragen die Landesregierungen ergänzend vor - gehe davon aus, daß der Staat bedrohtes Leben nicht in allen Fällen schützen könne, und ziele deshalb darauf, daß er es in möglichst vielen Fällen schütze. Damit werde die Aufgabe, das einzelne Leben zu schützen, nicht in Frage gestellt."*
[44] *ibid* [184] *Nach dem Dargelegten ist es dem Gesetzgeber verfassungsrechtlich grundsätzlich nicht verwehrt, für den Schutz des ungeborenen Lebens zu einem Schutzkonzept überzugehen, das in der Frühphase der Schwangerschaft in Schwangerschaftskonflikten den Schwerpunkt auf die Beratung der schwangeren Frau legt, um sie für das Austragen des Kindes zu gewinnen, und dabei im Blick auf die notwendige Offenheit und Wirkung der Beratung auf eine indikationsbestimmte Strafdrohung und die Feststellung von Indikationstatbeständen durch einen Dritten verzichtet.*

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> *"in order for a physician to make a responsible decision...he must know that the regulation **excludes the threat of criminal punishment**" [242]*[45]

53. The **Canadian Supreme Court** is probably the one that went further in rejecting criminalisation, In *R v Morgentaler* (1988), the court found that a woman's right to make reproductive choices is protected under the Canadian Charter of Rights and Freedoms and it is enshrined in her right to "life, liberty and security"[46]. As a consequence, the criminalisation of abortion by the Canadian Penal Code was also unconstitutional.

> *"if an act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one hand, **the commission of a crime** to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, **her right to security of the person has been violated**."*[47]

54. The Court also noted the "state-imposed psychological stress"[48] that the criminalisation of abortion inflicts on a woman and the psychological harm that could result from late term abortions as women try to fulfil the procedural requirements for "therapeutic abortions" in order to avoid criminal sanctions.[49]

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[45] *ibid* [242] *Die Beratungsstellen trifft im Rahmen des Beratungskonzepts eine besondere Verantwortlichkeit. Der Staat muß daher - auf gesetzlicher Grundlage - die Anerkennung dieser Stellen regelmäßig und in nicht zu langen Zeitabständen überprüfen und sich dabei vergewissern, ob die Anforderungen an die Beratung beachtet werden; nur unter diesen Voraussetzungen darf die Anerkennung weiter fortbestehen oder neu bestätigt werden*

[46] R v Morgentaler, [1988] 1 SCR 30 p. 30

[47] Ibid. p. 32-33

[48] Ibid p. 32

[49] Ibid p.33 and p. 75

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IV – The Decriminalisation of Abortion in International Law

55. Reproductive rights are grounded on a number of fundamental human rights recognised in international law and jurisprudence, including the rights to life, health, equality, information, education and privacy, as well as freedom from discrimination. We survey below the most relevant instruments, statements and decisions of international human rights bodies relevant to the present case before the Colombian Constitutional Court.

The UN System

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

56. Whilst the Convention on the Elimination of All Forms of Discrimination against Women CEDAW makes no express mention of abortion, there are several provisions, which Colombia is under a duty to comply with through ratification on 19 January 1982, that are relevant to the matter of abortion and decriminalization. The CEDAW Committee, a body of 23 independent experts that monitors the implementation of the Convention, has expressed concern about the violation of such rights by restrictive abortion laws, **having called for the full decriminalization of abortion**.[50]

57. Right from the Preamble, CEDAW affirms that **"the role of women in procreation should not be a basis for discrimination"**, a point that is further reemphasised in several of its articles, such as article 4 (2), where special measures for maternity protection are recommended and "shall not be considered discriminatory".

[50] See, among many others, CEDAW's Committee concluding observations on Chile, UN Doc. CEDAW/C/CHL/CO/7 (2018); Fiji, UN Doc. CEDAW/C/FJI/CO/5 (2018); Marshall Islands, UN Doc. CEDAW/C/MHL/CO/1-3 (2018); Republic of Korea, UN Doc. CEDAW/C/KOR/CO/8 (2018).

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58. Particular relevant are some provisions of Part III of CEDAW, which focuses on the social and economic rights of women such as education (article 10), employment (article 11) and health (article 12). Restrictive abortion laws and, in particular, criminalization, affects significantly the right to non-discrimination in education and access to health care:

> ***Article 10 (h)*** *Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.*
>
> ***Article 12***
>
> *1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services,* ***including those related to family planning****.*
>
> *2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women* ***appropriate services in connection with pregnancy****, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*

59. Equality before the law (art. 15) can also be affected by restrictive abortion laws, and article 16 expressly provides that States parties shall ensure, on a basis of equality of men and women: *The same rights to* ***decide freely and responsibly on the number and spacing of their children*** *and to have access to the information, education and means to enable them to exercise these rights; (1(e))*

60. In its role of interpreting these rights and monitoring their implementation, CEDAW's Committee has issued a host of General Comments and Recommendations related to abortion that are relevant to the case currently pending before the Colombian Constitutional Court. In General Recommendation n. 24, for instance, it expressly states that

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> *"barriers to women's access to appropriate health care include **laws that criminalize medical procedures only needed by women** and that punish women who undergo those procedures."* [51]
>
> and
>
> "(*c) Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, **legislation criminalizing abortion should be amended**, in order to withdraw punitive measures imposed on women who undergo abortion;"*
>
> [52]

61. In a 2014 statement, it reiterated this understanding in unequivocal terms:

*"Unsafe abortion is a leading cause of maternal mortality and morbidity. As such, States parties should legalize abortion at least in cases of rape, incest, threats to the life and/or health of the mother, or severe fetal impairment, as well as provide women with access to quality post-abortion care, especially in cases of complications resulting from unsafe abortions. **States parties should also remove punitive measures for women who undergo abortion**."*[53]

62. More recently, in its General recommendation No. 35 on gender-based violence against women, the CEDAW Committee has described criminalization of abortion and denial or delay of access to legal abortion as constituting "forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment" and that State parties repeal all legal provisions that are discriminatory against women and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence,

[51] CEDAW Committee, General Recommendation No. 24 on women and health, UN Doc. A/54/38/Rev.1 (1999), para. 14.
[52] CEDAW Committee, General Recommendation No. 24 on women and health, UN Doc. A/54/38/Rev.1 (1999), para. 31(C).
[53] See CEDAW Committee, "Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review," 57th Session (2014), para 7.

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including in customary, religious and indigenous laws. **Provisions that criminalize abortion are explicitly listed amongst those to be repealed**.[54]

63. In its 2018 review of South Korea, the Committee expressly recommended that

> *"the State party to legalize abortion in cases of rape, incest, threats to the life and/or health of the pregnant woman, or severe foetal impairment, **and to decriminalize it in all other cases, remove punitive measures for women who undergo abortion**, and provide women with access to quality post-abortion care, especially in cases of complications resulting from unsafe abortions."*

64. As we saw (see … above), South Korea's Constitutional Court has followed that recommendation, and we respectfully urge that the Colombian Constitutional Court does the same in the present case.[55]

International Covenant on Civil and Political Rights (ICCPR)

65. Colombia ratified the ICCPR on 29 Oct 1969. There is no explicit reference to abortion in the ICCPR, and the travaux préparatoires show that a proposed amendment to refer to it was rejected, as at the time of drafting most states still held abortion as illegal.[56] However, human rights bodies such as the Human Rights Committee and the Human Rights Council have increasingly interpreted the rights contained in the ICCPR as being incompatible with restrictive abortion laws, in particular with the criminalisation of abortion.

[54] CEDAW Committee, General Recommendation 35 on gender-based violence against women (2017), para. 18 and 29(c)(i).
[55] CEDAW Committee concluding observation on the Republic of Korea, UN Doc. CEDAW/C/KOR/CO/8 (2018), paras. 42 and 43.
[56] U.N. Doc. E/CN.4/SR.35.

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66. In General Comment 28, the Human Rights Committee stated that in order to be able to assess a state's compliance with Article 7 (the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment), states must report on whether they provide safe access to abortion for women who become pregnant as a result of rape, demonstrating a clear link between safe access to abortion and states' obligations regarding Article 7 rights. [57] Furthermore, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment found that the `denial to safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amounts to torture or ill- treatment.'[58] This is because when women are denied access, be that de jure or de facto access, they are forced to turn to clandestine abortions which pose a much greater risk of maternal mortality.[59] What should be a simple medical procedure, is turned into one which risks the life of the pregnant mother, as a direct consequence of a criminalised, restrictive abortion law.[60]

67. General Comment 36 is stronger in its condemnation of criminalised abortion laws, by strongly supporting the link between lesser restrictions and greater protection of the right to life and other rights under the Covenant, such as the prohibition of inhuman and degrading treatment and the right to privacy, and expressly condemning criminalisation:

> *"Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates*

[57] CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), Adopted at the Sixty-eighth session of the Human Rights Committee, on 29 March 2000, CCPR/C/21/Rev.1/Add.10, at [10-11].
[58] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57, 5 January 2016 [44].
[59] HRC (2016), "Report of the Working Group on the issue of discrimination against women in law and in practice", A/HRC/32/448, April 2016 at [80].
[60] Ibid.

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> *article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy… For example,* ***they should not take measures such as*** *criminalizing pregnancy of unmarried women or* ***applying criminal sanctions to women and girls who undergo abortion or to medical service providers who assist them in doing so, since taking such measures compels women and girls to resort to unsafe abortion****. States parties should remove existing barriers to effective access by women and girls to safe and legal abortion'*[61]

68. The Committee has also expressly recognised the progress represented by the Constitutional Court Decision No. C-355 of 2006 yet urged Colombia not only to continue, but to ***"step up its efforts to ensure that women have effective, prompt access to legal abortion services."*** [62] As we argue in Part One of this brief, decriminalisation is a necessary and crucial step in that direction. This is because states obligation is not merely to provide minimal exceptions to restrictive abortion laws; they must also not regulate abortion in a way *'that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions, and they should revise their abortion laws accordingly.'*[63] This view has been reinforced in the HRC's concluding observation reports on various states, including Peru,[64] El Salvador,[65] Poland,[66] Chile,[67] and indeed Colombia, where the HRC expressed particular concern for the continued lack of effective access to abortion, and advised that Colombia reviewed the 'repercussions of the existing legal framework' to ensure that women 'do not have to resort to clandestine abortions that endanger their life and health.'[68]

[61] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018 at [8].
[62] 17 November 2016, CCPR/C/COL/CO/7 at [20] and [21].
[63] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018 at [8].
[64] 15 November 2000, CCPR/CO/70/PER at [20].
[65] 22 August 2003, CCPR/CO/78/SLV at [14].
[66] 2 December 2004, CCPR/CO/82/POL at [8].
[67] 18 May 2007, CCPR/C/CHL/CO/5 at [8].
[68] 17 November 2016, CCPR/C/COL/CO/7 at [20].

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69. One such repercussion of the existing legal framework is the requirement that in order to terminate a pregnancy which occurred as a result of rape, the woman must have reported the incident to the appropriate authorities. The Committee has previously recognised the `excessive' nature of such a requirement and emphasised how it can prevent effective access to abortion services.[69] By requiring that women comply with such requirements, Colombia's laws make an already traumatic experience even worse.[70] This is another illustration of how the progress made by C-355/2006, though important, does not go far enough in securing effective access to safe abortions.

70. In several of its Concluding Observations, the Committee has made it clear that states have an obligation to `ensure that women are not denied medical services and are not prompted by legal obstacles, including criminal provisions, to resort to unsafe abortions that put their lives and health at risk.'[71] The continued criminalisation of abortion is in itself an important obstacle, as we saw in Part One, generating stigma, lack of clarity and fear of prosecution, creating significant obstacles to access to safe abortion services, even when the criteria under C-355/2006 is met.[72] As the HRC stated in its Concluding Observations on Colombia, there are concerns over the `obstacles that some women have faced when attempting to gain access to legal abortion services, including conscientious objection on the part of health-care personnel without appropriate referrals and a lack of proper training on the part of such personnel.'[73]

71. To reemphasise, the exceptions granted under C-355/2006 do not go far enough in ensuring safe access to abortion in line with the rights guaranteed under the ICCPR, and ultimately the

[69] UN Doc. CCPR/C/MAR/CO/6 (2016) at [21-22].
[70] See Cameroon UN Doc. CCPR/C/CMR/CO/5 (2017) at [21].
[71] Bangladesh UN Doc. CCPR/C/BGD/CO/1 (2017); See also Lebanon - UN Doc. CCPR/C/LBN/CO/3 (2018) at [26]; Cameroon UN Doc. CCPR/C/CMR/CO/5 (2017) at [22]; DRC CCPR/C/COD/CO/4 (2017) at [22]; Dominican Republic UN Doc. CCPR/C/DOM/CO/6 (2017) at [16] and Jordan UN Doc. CCPR/C/JOR/CO/5 (2017) at [21].
[72] See Pakistan UN Doc. CCPR/C/PAK/CO/1 (2017) at [16].
[73] 17 November 2016, CCPR/C/COL/CO/7 at [21].

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continued criminalisation `does grave harm to women's health and human rights by stigmatizing a safe and needed medical procedure.'[74]

72. The Human Rights Committee has also had the opportunity to reinforce its views on criminalisation in its capacity as adjudicative body of individual complaints in Mellet v Ireland (2014) and Whelan v. Ireland (2014):
"The Committee notes that, like in *Mellet v. Ireland*, **preventing the author from terminating her pregnancy in Ireland caused her mental anguish and constituted an intrusive interference in her decision as to how best to cope with her pregnancy, notwithstanding the non-viability of the fetus**. On this basis, the Committee considers that the State party's interference in the author's decision is **unreasonable …**." [75]

The International Covenant on Economic, Social and Cultural Rights (ICESCR)

73. Colombia ratified the International Covenant on Economic, Social and Cultural Rights () in 1969. Although the ICESCR, like other international instruments, also makes no mention of abortion, article 12 ensures the "of everyone to the enjoyment of the highest standard of physical and mental health" and article 2(2) guarantees the rights of the Covenant to all persons, without discrimination of sex.

74. The ICESCR Committee General Comment 14 on Article 12 similarly makes no mention of abortion, but several of its statements are clearly and directly relevant to the issue of abortion. When clarifying the normative content of the right to health, for instance, it states that

[74] Ibid.
[75] Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2425/2014 available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/CCPR_C_119_D_2425_2014_25970_E.pdf

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> *"The right to health contains both freedoms and entitlements. The freedoms **include the right to control one's health and body, including sexual and reproductive freedom**, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health."*[76]

> *"The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, **and access to health-related education and information, including on sexual and reproductive health**."*[77]

> *"The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child" (art. 12.2 (a)) may be understood as requiring measures **to improve child and maternal health, sexual and reproductive health services, including access to family planning**, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information."*[78]

75. General Comment 14 also includes a paragraph with the title Women and the Right to Health where the following strong statement on reproductive rights is made:
*"The 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***

[76] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 Women and the Right to Health para 8.
[77] Ibid. para 11.
[78] Ibid. para 14.

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and reproductive health. *It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and* ***norms that deny them their full reproductive rights***."[79]

76. A major goal [of states bound by the Covenant] should be reducing women's health risks, particularly lowering rates of maternal mortality".[80] The Word Health Organisation Reproductive Programme 2017 Report found that maternal mortality or disability was in most cases the direct result of not having access to safe abortion where the minimal medical standard was not met.[81] The Committee on Economic, Social and Cultural Rights (CESCR) therefore advocate access to safe abortion on these grounds. General Comment 14 states that there should be no interference with access to health services "including in the area of sexual and reproductive health".[82] Criminalising abortion would therefore be an interference with access to reproductive health services by denying women the option of safe abortion.

77. In General Comment 22, exclusively dedicated to the right to sexually and reproductive health, the Committee states that "denial of abortion often leads to maternal mortality and morbidity, which in turn constitutes a violation of the right to life or security, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment".[83] Paragraph 28 is directly relevant to decriminalisation, making clear that protection of the rights of women "requires repealing or reforming discriminatory laws, policies and practices in the area of sexual and reproductive health" and, later on in paragraph 34:
"States parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual and reproductive health. This requires

[79] Ibid. para 21.
[80] (Contained in Document E/C.12/2000/4)
[81] The Word Health Organisation Reproductive Programme annual 2017 Report p10
[82] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 Women and the Right to Health paragraph 21
(Contained in Document E/C.12/2000/4)
[83] General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) paragraph 10

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States to repeal or reform laws and policies that nullify or impair the ability of certain individuals and groups to realize their right to sexual and reproductive health. There exists a wide range of laws, policies and practices that undermine autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health, ***for example criminalization of abortion or restrictive abortion laws****. States parties should also ensure that all individuals and groups have equal access to the full range of sexual and reproductive health information, goods and services, including by removing all barriers that particular groups may face."*[84]

Convention on the Rights of the Child (CRC)

78. Colombia ratified the Convention on the Rights of the Child (CRC) in 1991. Article 1 defines a child as "every human being below the age of eighteen years". As it is well-known and supported by the available empirical evidence, a significant proportion of abortions across the world involves girls below the age of 18. According to the WHO's latest statistics, around 5.9 million abortions occur each year in girls aged between 15-19, 3.9 million of which are unsafe, contributing to maternal mortality, morbidity and lasting health problems. A significant number of abortions are carried out in girls under 15 and some even under the age of 10.[85]

79. Article 24 of the CRC obligates states to ensure that "no child is deprived of his or her right of access to such health care services", which the Committee on the Rights of the Child (CRC) has interpreted as meaning that States should consider allowing children access to safe abortion without the consent of their parents.[86] The Committee also recommends that

[84] General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) para 57
[85] WHO 2020, Adolescent Pregnancy. https://www.who.int/news-room/fact-sheets/detail/adolescent-pregnancy referencing Darroch J, Woog V, Bankole A, Ashford LS. Adding it up: Costs and benefits of meeting the contraceptive needs of adolescents. New York: Guttmacher Institute; 2016
[86] Committee on the Rights of the Child (CRC Committee), General Comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health (art. 24), (62nd Sess., 2013), in

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"States ensure access to safe abortion and post-abortion care services, irrespective of whether abortion itself is legal. irrespective of whether abortion itself is legal."[87], based on the obligation of article 24, paragraph 2 (d) that obligates States "to ensure appropriate pre-natal and post-natal health care for mothers".

80. The CRC Committee has also emphasised that "the risk of death and disease during the adolescent years is real, including from preventable causes such as … unsafe abortions".[88] A 2011 UN report found that unsafe abortion can lead a variety of injuries including uterine and cervical injury, incomplete abortion and a number of mental health risks.[89] With these risks in mind, therefore, the Committee notes that "States should ensure that health systems and services are able to meet the specific sexual and reproductive health needs of adolescents, including family planning and safe abortion services".[90]

Regional Bodies

Organization of American States and the American Convention on Human Rights

81. The American Convention on Human Rights is the only international human rights instrument that contemplates the right to life from the moment of conception. Under article 4, "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. No one shall be arbitrarily deprived of his life." However, this provision has been interpreted by the Inter-American Commission on Human Rights (IACHR), which monitors the human rights provisions in the American regional system,

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, para.31., U.N. Doc. CRC/C/GC/15 (2013)
[87] Ibid., para. 70., U.N. Doc. CRC/C/GC/15 (2013)
[88] Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence, UN Doc. CRC/C/GC/20 (2016), paras. 13 and 60.
[89] Report of the UN Special Rapporteur on the Right to Health, UN Doc. A/66/254, August 3, 2011, para. 36.
[90] Ibid. General Comment No. 15, para.56.

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as not recognising an absolute right to life before birth.[91] The same interpretation was adopted by the Inter-American Court of Human Rights (IACtHR), which concluded that embryos cannot be understood to be a person for the purposes of article 4(1) of the Convention. The Court noted that "it can be concluded from the words 'in general' that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails understanding that exceptions to the general rule are admissible."[92]

82. More recently, the IACHR has reemphasized its position by welcoming the liberalization of abortion laws in Chile[93], urging El Salvador to follow the same path[94], and urging all states all states to adopt comprehensive, immediate measures to respect and protect women's sexual and reproductive rights.[95]

Council of Europe and the European Convention on Human Rights

83. The Council encourages reformation of laws that restrict or deny women's access to sexual and reproductive health care, specifically including 'removing laws criminalising abortion and restrictive abortion laws.'[96] By specifying that restrictive abortion laws engage the right to life, the right to freedom from torture and ill treatment and the right to privacy, the Council calls upon states to reform restrictive abortion laws and remove associated criminal penalties in order to 'respect and ensure women's human rights.'[97]

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[91] Inter-American Commission on Human Rights, White and Potter ("Baby Boy Case"), Resolution No. 23/81, Case No. 2141, U.S., March 6, 1981, OAS/Ser.L/V/II.54, Doc. 9 Rev. 1, October 16, 1981, para. 14(a).
[92] Inter-American Court, Artavia Murillo and others v. Costa Rica, Judgment of November 28, 2012, Inter-Am Ct.H.R., Series C. No. 257, para. 264.
https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_257_ing.pdf
[93] http://www.oas.org/en/iachr/media_center/preleases/2017/133.asp
[94] http://www.oas.org/en/iachr/media_center/preleases/2017/133.asp
[95] http://www.oas.org/en/iachr/media_center/preleases/2017/165.asp
[96] Issue paper published by the Council of Europe Commissioner for Human Rights - Women's sexual and reproductive health and rights in Europe, December 2017 at s2.
[97] Ibid at s3.3.

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84. Such recommendation was officialised through Parliamentary Resolution 1607,[98] which has called for Member States to decriminalise abortion, remove restrictions which hinder legal and actual access to abortion and ensure women can effectively exercise their right to safe and legal abortion. This is because, as the Council emphasises, restrictive abortion laws do not reduce the number of abortions, instead, the consequence is a greater frequency of unsafe abortions and maternal mortality.[99] Besides the real risk to their own health that clandestine abortions bring, there are other effects caused by the nature of criminalisation. These laws can `produce feelings of isolation, fear, humiliation and stigmatisation,' as well as a `broad range of physical, psychological, financial and social impacts on women, with implications for their health and well-being.'[100]

85. The European Convention on Human Rights (ECHR) of 1950 is interpreted and implemented by the European Court of Human Rights (ECtHR). For a long time, its record on access to abortion has been largely one of avoidance. More recently, however, ECtHR's jurisprudence, especially on Article 3 (prohibition of torture and inhuman and degrading treatment), is incrementally developing in favour of broader access to abortion.[101] The recent cases of *RR v Poland* and *P and S v Poland* and illustrations of this trend, as the Court offered " a much deeper analysis of the applicants' circumstances than in the earlier decisions of *A, B and C v Ireland* and *Tysiąc v Poland*, elucidating what is necessary to establish a violation of Article 3 where there is ineffective access to abortion."[102] In both *RR v Poland* and *P and S v Poland*, the ECtHR the court referred to "the relevance of physical and mental effects; the sex, age and state of health of the victim; the length of suffering; and feelings of fear, anguish and

[98] Council of Europe Parliamentary Assembly, Resolution 1607 on access to safe and legal abortion in Europe, 15th sitting, 16 April 2008.
[99] WHO, "Unsafe abortion incidence and mortality: global and regional levels in 2008 and trends during 1990-2008" (2012) at page 6; See also Issue paper published by the Council of Europe Commissioner for Human Rights - Women's sexual and reproductive health and rights in Europe, December 2017 at s1.6.
[100] Issue paper published by the Council of Europe Commissioner for Human Rights - Women's sexual and reproductive health and rights in Europe, December 2017 at s1.6.1.
[101] Bríd Ní Ghráinne, Aisling McMahon, Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights?, *Human Rights Law Review*, Volume 19, Issue 3, November 2019, Pages 561–584, https://doi.org/10.1093/hrlr/ngz020
[102] Ibid.

inferiority capable of humiliating or debasing the victim" and "expressly confirmed that acts and omissions in the field of healthcare policy could in certain circumstances engage State responsibility under Article3 'by reason of their failure to provide appropriate medical treatment'."[103]

86. Rather relevant to the present case are the following passages of the decision of the ECtHR in *P and S v Poland*:

> *"The procedures in place should therefore ensure that such decisions are taken in good time. The uncertainty which arose in the present case despite a background of circumstances in which under Article 4 (a) 1.5 of the 1993 Family Planning Act there was* ***a right to lawful abortion resulted in a striking discordance between the theoretical right to such an abortion on the grounds referred to in that provision and the reality of its practical implementation*** *…"* (para 111)
>
> *"the Court is of the opinion that if the authorities were concerned that an abortion would be carried out against the first applicant's will,* ***less drastic measures than locking up a 14-year old girl in a situation of considerable vulnerability should have at least been considered by the courts****. It has not been shown that this was indeed the case.*
>
> *Accordingly, the Court concludes that the first applicant's detention between 4 and 14 June 2008, when the order of 3 June 2008 was lifted, was not compatible with Article 5 § 1 of the Convention." (paras 148-149)*

African Charter on Human and People's Rights

[103] Ibid.

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87. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) which explicitly recognized that "states must ensure women's right to abortion, at a minimum, in instances 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."[104] In a recent general comment, the African Commission on Human and Peoples' Rights further recognized that, "inadequate access to safe abortion and post-abortion care can result in violations of the rights to privacy, confidentiality, and freedom from discrimination and cruel, inhuman, or degrading treatment."[105]

88. Although, many African States parties to the Protocol continue to criminalize abortion or excessively restrict women and girls' right to access safe and legal abortion services under the conditions provided by the Maputo Protocol[106], the "ACHPR through the mechanism of the Special Rapporteur on Women's Rights' continues to urge Member States to ratify and remove barriers to access such as restrictive abortion laws, criminalisation as well as administrative barriers including third party notification or authorisation."[107]

[104]Protocol to the African Charter on Human and Peoples 'Rights on the Rights of Women in Africa, OAU Doc. 5 CAB/LEG/66.6 (2003), art. 14(2)(c).
[105]African Commission on Human and Peoples 'Rights, General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples 'Rights on the Rights of Women in Africa (2003).
[106]Statement by the Special Rapporteur on the Rights of Women in Africa on the Occasion of the "Global Day of Action for Access to Safe and Legal Abortion" 28 September, 2018. Available at:https://www.achpr.org/pressrelease/detail?id=22
[107]Ibid.

Conclusion

89. The survey on national and international law and jurisprudence offered in Part Two of this brief reveals a clear tendency across the globe towards the liberalization of abortion laws and decriminalization of abortion. This reflects, we submit, a growing transnational consensus on the inadequacies of restrictive laws and criminalization as an appropriate tool to address abortion given its significant negative effects on women's sexual and reproductive rights and little to no positive effect on its professed aims of protecting fetal life, as we have defended in Part One.[108]

90. Progress is slow but steady and seems to follow a similar pattern across the globe, with few notorious exceptions. From support to total prohibition and criminalization reflected in very restrictive laws, opinion shifts slowly to the acceptance of specific grounds under which abortion should be permitted as the appropriate balance between women's rights and the legitimate aim of protecting fetal life. Gradually, however, it becomes clear that this balance is an illusory one, as restrictive laws, and criminalization in particular, not only fail to protect fetal life but cause inordinate harm to women's lives and well-being, making the problem worse, not better.

91. Criminalisation entails, therefore, the worst of possible worlds, achieving nothing that it aims to achieve, yet causing a lot of harm in the process. And this is true, as is becoming

[108]In 2019, the International Conference on Population and Development in Nairobi, Kenya, known as ICPD25, more than 9,500 delegates from 170 countries, representing a variety of viewpoints and perspectives, announced more than 1,200 commitments to further global sexual and reproductive health and rights. The Governments of Kenya and Denmark together with UNFPA, the United Nations sexual and reproductive health agency, co-convened the Nairobi Summit on ICPD25 in Nairobi, Kenya, on 12-14 November 2019. The Summit took place at the Kenyatta International Convention Centre and marked the 25th anniversary of the 1994 International Conference on Population and Development (ICPD) in Cairo. Nairobi Summit on ICPD25 Report. Available at: ://www.unfpa.org/publications/nairobi-summit-icpd25-report. **Nairobi Summit on ICPD25 Commitments** https://www.nairobisummiticpd.org/commitments

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increasingly clear, not only of total criminalization (which is gladly becoming rarer) but also of partial criminalization, as in the case of Colombia. This is because retaining abortion as a crime in the Penal Code, even when exceptions are in place, creates stigma, lack of clarity, fear of prosecution and abuse from those against abortion. The result is that the scourge of total criminalization, i.e. unsafe abortions, maternal morbidity and mortality, physical and psychological damage, experiences little improvement with so-called semi-liberal laws.

92. As long as abortion remains as a crime in the codes, with or without exceptions, the harsh reality will not improve much. For these reasons, which we hope this Amicus Curiae brief has helped to clarify, we urge this renowned Constitutional Court of Colombia to grant the Acción pública de inconstitucionalidad contra el artículo 122 de la Ley 599 de 2000 (Código Penal).

From London to Bogotá, 29 October 2020

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Appendix A. The Global Trend Towards Abortion Liberalization

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As we mentioned in Part One, section 1 of this brief, there is a global trend towards liberalisation in abortion legislation and also, though weaker, in decriminalisation of abortion. This annex provides a more detailed treatment with the aid of further data and figures.

93. As a result of this liberalisation of abortion legislation, a majority of countries worldwide, home to 95% of women of reproductive age, currently allow abortion in at least one specific case, e.g. to save the life of the mother, or in the case of rape. Around 59% live in countries that have a liberal abortion system in place, i.e. abortion is available either "on request" (most liberal countries) or under a set of certain conditions (semi liberal countries). Countries that adopt a system of abortion "on request" generally allow it for up to 12 weeks of gestation and, once that limit has expired, abortion is often allowed on additional grounds. There are currently 66 countries that fall under this most liberal category, home to 36% of the women of reproductive age in the world.[109] See Figures 1 and 2 below.

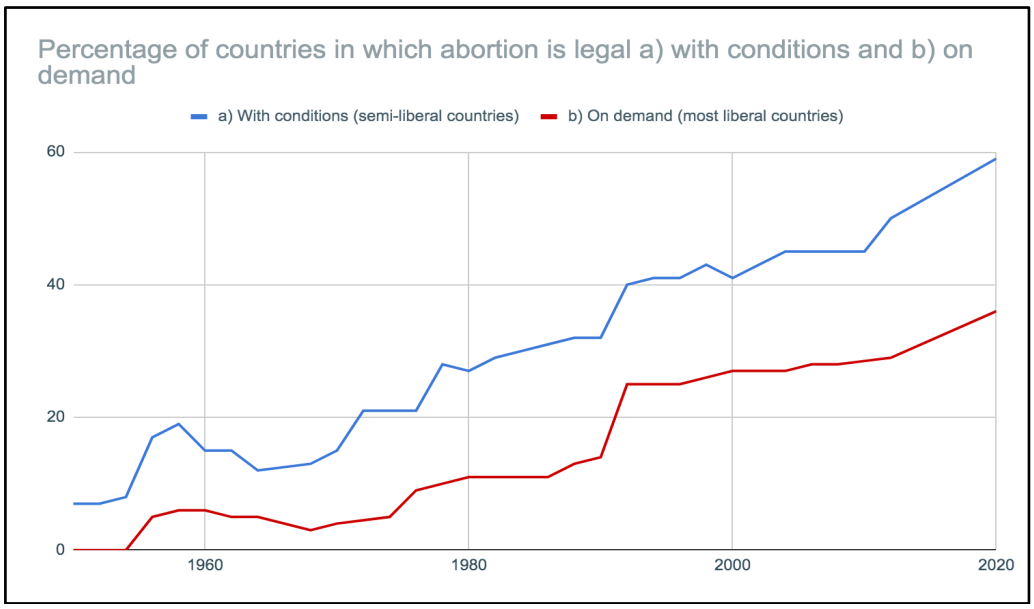

***Figure 1**: Percentage of countries in which abortion is legal a) with conditions and b) on demand.*
Source: Own compilation using various sources[110]

[109] (Center for Reproductive Rights)

[110] Boyle et al, 'Abortion liberalization in world society, 1960–2009' (2015) 121 American Journal of Sociology 3; Centre for Reproductive Rights, 'World Abortion Map by the Numbers' (2017); Vogelstein and Turkington, 'Abortion Law: Global Comparison' (Council on Foreign Relations, 2019), https://www.womenonwaves.org.

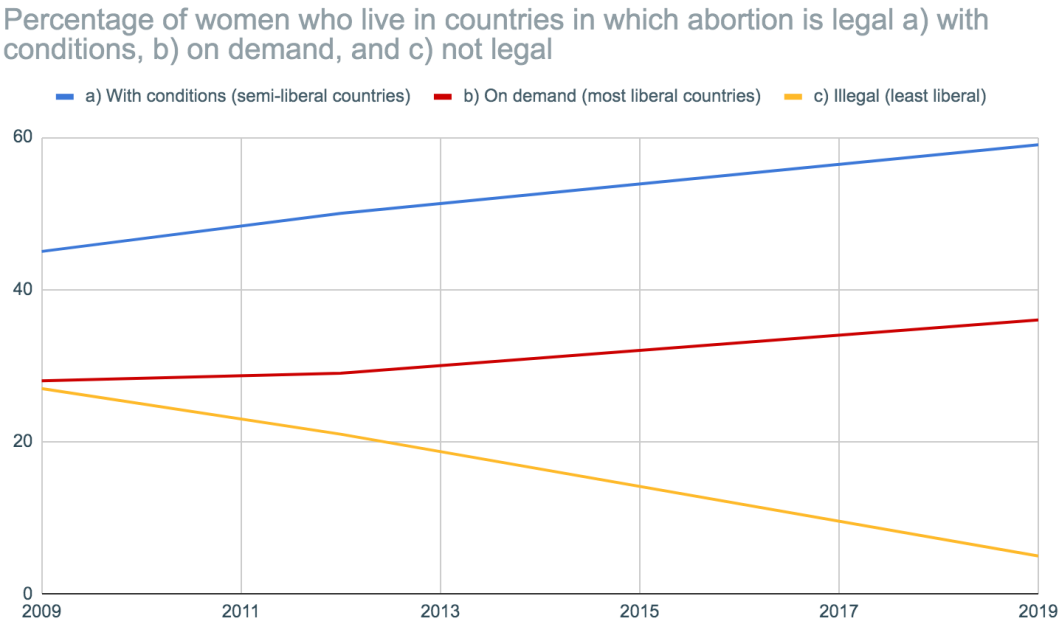

Figura 2: *Porcentaje de mujeres que viven en países en los que el aborto es legal a) con condiciones, b) a demanda; y c) es ilegal*[111]

Europe

94. Europe is the region with a highest percentage of countries with most liberal abortion laws. Among the 45 countries in Europe, 36 currently allow abortion at the women's request.[112]The majority of European countries revised their legislation in the 1970s and 1980s, but there have been noteworthy variations.
95. Under the Soviet Union, for instance, various Eastern European countries legalized abortion already in the 1950s. Among them, Belarus adopted additional reforms through the 'On Health Care Law' in 1987 and remains one of the most liberal abortion laws in Europe, to date: abortion is available upon request up to 12 weeks or up to 22 weeks of pregnancy in case of certain social reasons.[113]

[111] Para datos de 2009-2017: Centre for Reproductive Rights, 'World Abortion Map by the Numbers' (2017); Para datos de 2017-2019: 'Abortion Law: Global Comparison' (Council on Foreign Relations, 2019)

[112] These numbers correspond to the data used making the graphs. Please see the table of countries (appendix ..).

[113]

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96. More legal restrictions have been eased since the 1990s in Europe: Albania, Estonia, Luxembourg, Portugal, Spain, and Switzerland have all allowed abortion on request.[114]
97. Most recently, both Ireland and Northern Ireland, traditionally very rrestrictive countries, liberalized its abortion laws following several years of public demands for access to abortion.[115] [116]
98. In a 2008 resolution of the Council of Europe, member states are invited to 'decriminalize abortion within reasonable gestational limits, if they have not already done so', 'guarantee women's effective exercise of their right of access to a safe and legal abortion', and 'lift restriction which inder, *de jure* or *de facto,* access to safe abortion'.[117] Even though the resolution is not legally binding, it indicates a trend towards liberalization of abortion laws in Europe.[118]

Asia

99. In Asia, 16 countries out of 45 have laws under the most liberal category. Vietnam was the pioneer, legalizing abortion in 1945, after which China followed in 1957. In the last 20 years, various Asian countries have lifted legal restrictions on abortion. Cambodia has permitted abortion at the woman's request up to 12 weeks of gestation since 1997. Similarly, Central Asian countries have adopted liberal abortion laws since the 1990s, expanding liberalization with amendments throughout the early 2000s. Nepal, for instance, radically changed its laws in 2002 and now allows abortion upon request up to 12 weeks of gestation and up to 18 weeks in case of rape, and at any time if the woman's life or health is in danger.

Africa

100. In Africa's 4 countries out of 53 have laws under the most liberal category: Tunisia, Guinea-Bissau, Mozambique and South Africa. In South Africa, abortion was legalised in 1996, during the nation's transition from apartheid to independence and democracy, under the Choice on Termination of Pregnancy Act (CTOPA). It has been available without restriction since then, for the first trimester and on additional

[114] Agnes Guillaume, Clementine Rossier, 'Abortion around the world. An overview of legislation, measures, trends, and consequences' *Population,* Vol 72:2 (2018).
[115] The Abortion (Northern Ireland) Regulations 2020 No 345, available on https://www.legislation.gov.uk/uksi/2020/345/.
[116] Amnesty International UK, 'Abortion in Ireland and Northern Ireland: Abortion decriminalised in Northern Ireland', accessible via ≤www.amnesty.org.uk/abortion-rights-northern-ireland-timeline≥.
[117] Council of Europe, Resolution 1607 on Access to safe and legal abortion in Europe (Adopted by the Parliamentary Assembly of the Council of Europe during the 15th sitting on the 16 April 2008).
[118] Puppinkc, G., 'Abortion and the European Convention on Human Rights', *Irish Journal of Legal Studies* Vol. 3(2), 2013.

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grounds after the 20th week. In early 2008, the South African Parliament voted to ease abortion restrictions even further, establishing 24-hour abortion facilities and allowing nurses - not just midwives and doctors - to carry out the procedure.[119]

America

101. In the Americas 8 countries out of 31 have laws under the most liberal category. Abortion is currently permitted on request in Guyana, French Giuana, Uruguay, Cuba, Greenland, Puerto Rico, Canada and the United States. In the latter country, abortion has been a constitutional right since the 1973 Supreme Court ruling in the case of *Roe v. Wade,* but regulations differ across federal states. In Canada, the 2017 Termination of Pregnancy Policy allows for legal abortion upon request up to a gestational period of 21 weeks.

Oceania

102. In Oceania, 3 out of 10 countries have laws under the most liberal category. Abortions can be performed legally at the women's request in Australia, New Caledonia and New Zealand. The latter state has recently adopted the Abortion Legislation Act (2020) under which abortion is legal upon request up to a gestational period of 20 weeks.

[119] Pew Research Center, 'Abortion Laws Around the World', *Polling and Analysis* (30 September 2008), accessible on ≤www.pewforum.org/2008/09/30/abortion-laws-around-the-world>.

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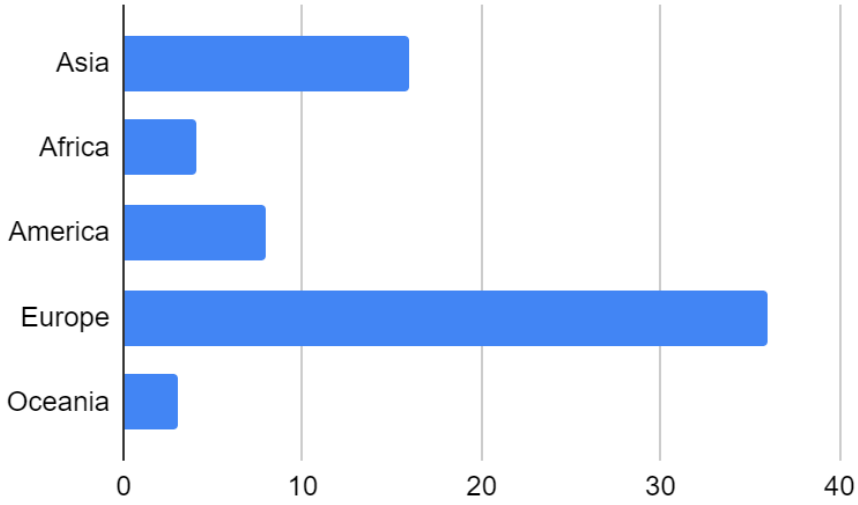

*103.**Figure 2**: Number of countries of each region which fall under the 'most liberal' category.*
104.

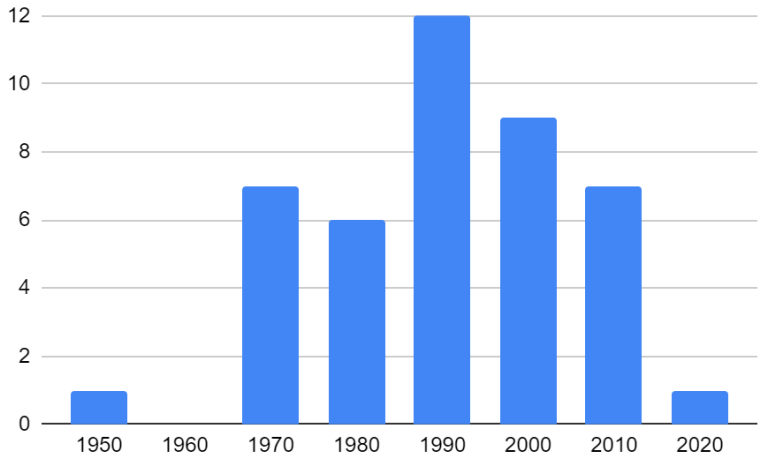

***Figure 3:** The approximate years in which the respective liberal abortion legislation was adopted.*

Category 2: Semi liberal

105. This category includes the 59 percent of women of reproductive age living in countries where abortion is allowed on specified grounds. These specified grounds are subdivided into: risk for the woman's life, health grounds and broad social or economic grounds.

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106. 95 countries fall into this category. When we disaggregate by region, we find 5 out of 45 countries in Europe, 26 out of 45 countries in Asia, 16 out of 31 countries in the Americas, 42 out of 53 countries in Africa and 6 out of 10 countries in Oceania.

107. In the following sections we disaggregate the data according to the specific grounds under which abortion is allowed.

Abortion to save the life of the woman

108. The first sub-category consists of countries where abortion is explicitly allowed if the women's life is at risk. 22 percent of the women of reproductive age live in those countries. A total of 39 countries fall under this group, of which 10 countries allow legal abortion under other reasons, such as in cases of fetal anomalies or in cases of rape or incest.

Abortion on health grounds

109. This category includes countries where abortion is permitted on health grounds. 14 percent of women of reproductive age live in those countries. A total of 56 countries allow abortion on health grounds, with 25 countries considering the preservation of a woman's mental health to be a valid reason. According to the World Health Organisation, this category should be understood to mean that health is a "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[120] A majority of those countries allow women to obtain abortion on additional grounds such as where pregnancy results from rape or incest, or in cases of fetal anomalies.

Abortion on broad social or economic grounds

110. This sub-category consists of countries where abortion is allowed for broad social and economic grounds: 23 percent of the women of reproductive age live in those countries. These countries often take into account a woman's actual or reasonably foreseeable environment and her social or economic circumstances in considering the potential impact of pregnancy and childbearing. A total of 14 countries fall under this group, all of them allow women to obtain abortion on additional grounds such as where pregnancy results from rape or incest, or in cases of fetal anomalies.

[120] Constitution of the World Health Organization, Preamble.

111. Below you can find the chart representing the percentage of world population of the countries which fall under the semi liberal category for each region (3) and a graph illustrating the period in which they adopted their legislation on abortion (4). As you can see from the first graph, countries which belong to this category are mostly in the region of Asia, Africa and Latin America.

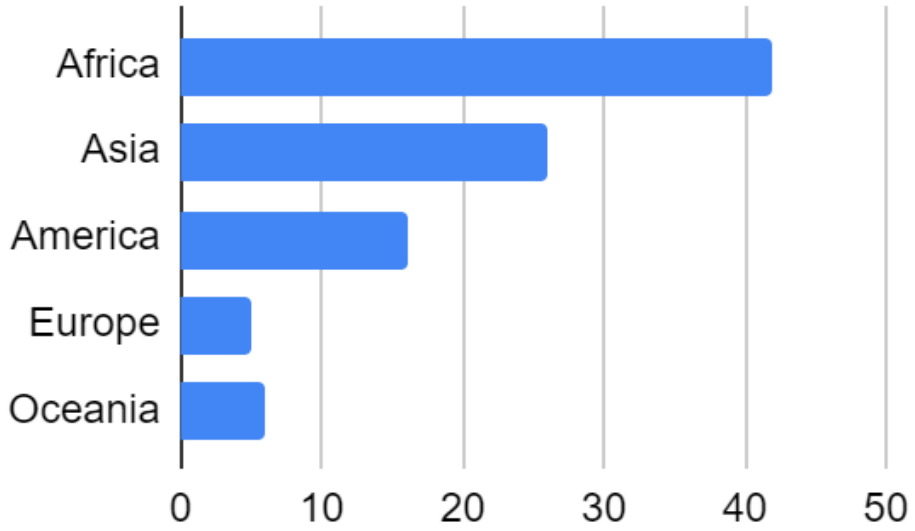

***Figure 5**: Number of countries of each region which fall under the 'semi-liberal' category.*

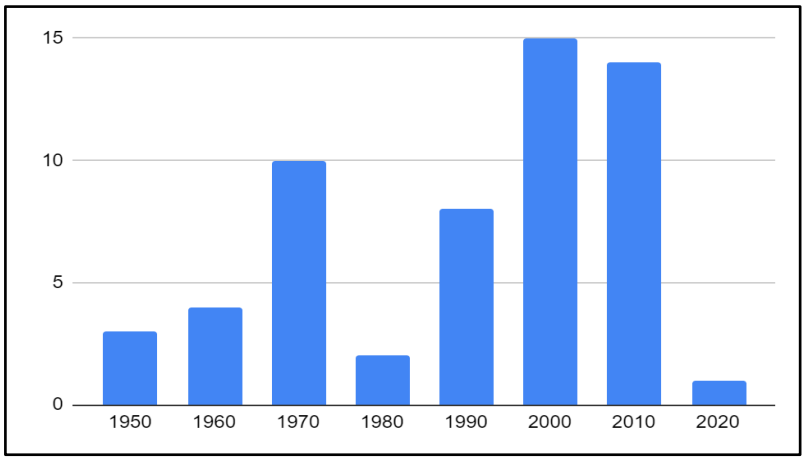

***Figure 6:** The approximate years in which the respective semi liberal abortion legislation was adopted.*

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Category 3: Least liberal

112. This category includes the 5 percent of women of reproductive age who live in countries that prohibit abortion altogether. These countries do not allow abortion under any circumstances, not even when the woman's life or health is at risk. There are 26 countries globally that fall within this category. These countries are mostly located in Africa (7 countries), Asia (4 countries), and Latin America (10 countries), as well as three European microstates and Oceania (2 countries).

***Figure 7**: Percentage of the world population living in the countries that fall under the 'least liberal' category.*

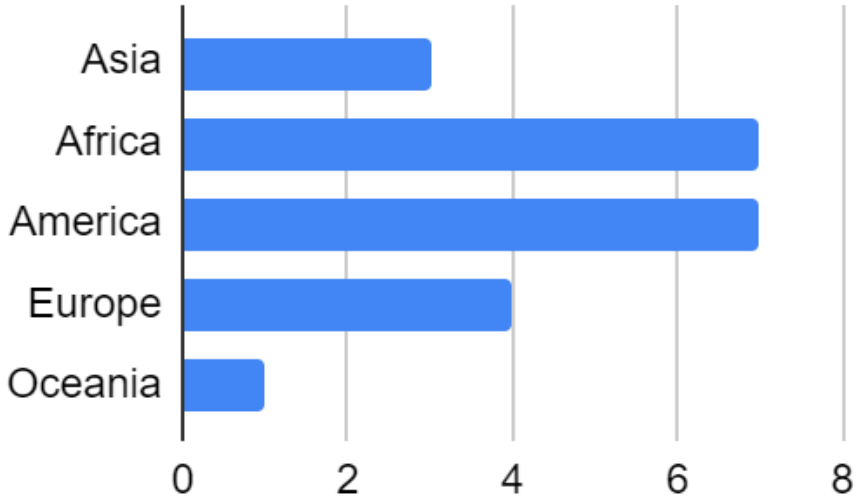

***Figure 8**: Number of countries of each region which fall under the 'least liberal' category.*

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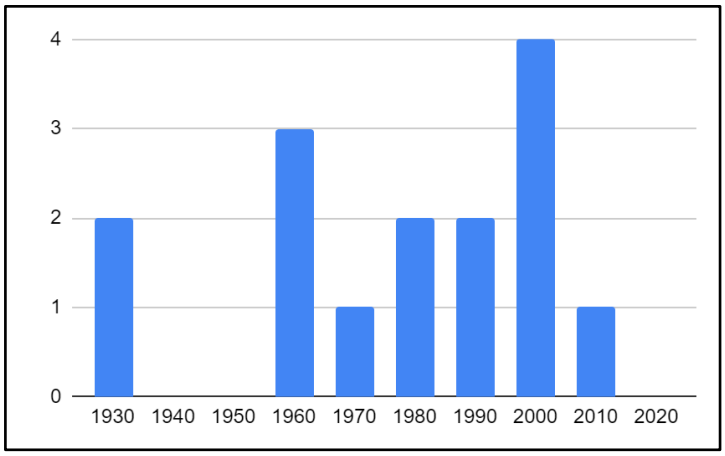

Figure 9: *The approximate years in which the respective least liberal abortion legislation was adopted.*

Criminalisation of Abortion

List of countries of each category and their world's population percentages (data used for the graphs)

	Asia	Americas	Europe	Africa	Oceania
Most liberal	China 18.47% Vietnam 1.25% Cambodia 0.21 % Nepal 0.37% Mongolia 0.04 % Turkmenistan 0.08 % Uzbekistan 0.43 %	United States 4.25 % Canada 0.48 % Guyana 0.01 % French Guiana 0.00 % Uruguay 0.04 % Cuba 0.15 % Greenland 0,00%	Spain 0.60 % Portugal 0.13 % Italy 0.78 % France 0.84 % Germany 1.07 % Denmark 0.07 % The Netherlands 0.22 %	South Africa 0.76 % Guinea-Bissau 0.03% Tunisia 0.15% Mozambique 0.40%	Australia 0.33 % New Zealand 0.06 % New Caledonia 0.00%

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	Azerbaijan 0.13 % Russia 1.87% Armenia 0.04 % North Korea 0,33% Kazakhstan 0,24% Kyrgyzstan 0,08% Tajikistan 0,12% Georgia 0,05% Turkey 1,08%	Puerto Rico 0,04%	Belgium 0.15 % Czech Republic 0.14 % Austria 0,12% Switzerland 0.11 % Slovak Republic 0.07 % Slovenia 0.03 % Bosnia and Herzegovina 0.04 % Croatia 0.05 % Albania 0.04 % Greece 0.13 % Bulgaria 0.09 % Romania 0.25 % Hungary 0.12 % Moldova 0.05 % North Macedonia 0.03 %		

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			Ukraine 0.56 % Belarus 0.12 % Latvia 0.02 % Estonia 0.02 % Lithuania 0.03 % Norway 0.07 % Sweden 0.13 % Iceland 0,00% Ireland 0,06% Northern Ireland 0.05% Serbia 0,11% Montenegro0,01% Kosovo 0.05% Cyprus 0.02%		
Semi-liberal	Yemen 0,38% Oman 0,07% UAE	Guatemala 0,23% Costa Rica 0,07% Panama 0,06%	UK 0,87% Finland 0,07% Poland	Mali 0,26% Libya 0,09% Gambia	Fiji 0,01% Vanuatu 0,00% Papua New Guinea 0,11%

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	0,13 % Lebanon 0,09% Syria 0,22% Iran 1,08% Afghanistan 0,50% Bhutan 0,01% Bangladesh 2,11% Sri Lanka 0,27% Myanmar 0,70% Indonesia 3,51% Brunei 0,01% Israel 0,11% Jordan 0,13% Saudi Arabia 0,45% Qatar 0,04% Kuwait 0,05% Pakistan 2,83% Thailand 0,90%	Venezuela 0,36% Colombia 0,65% Trinidad 0,02% Peru 0,42% Bolivia 0,15% Paraguay 0,09% Chile 0,25% Ecuador 0,23% Mexico 1,65% Brazil 2,73% Argentina 0,58% Belize 0,01% Bahamas 0,01%	0,49% Liechtenstein 0.00 % Monaco: 0,00%	0,03% Côte d'Ivoire 0,34% Nigeria 2,64% Sudan 0,56% South Sudan 0,14% Gabon 0,03% Uganda 0,59% Tanzania 0,77% Malawi 0,25% Somalia 0,20% Morocco 0,47% Algeria 0,56% Guinea 0,17% Liberia 0,06% Ghana 0,40% Togo 0,11% Benin 0,16%	Solomon Islands 0,01% Tuvalu 0,00% Nauru 0,00%

	Malaysia 0,42% South Korea 0,66% Maldives 0.01 % India 17,70 % Taiwan 0,31% Japan 1,62%			Burkina Faso 0,27% Niger 0,31% Chad 0,21% Cameroon 0,34% Equatorial Guinea 0,02% Central African Republic 0,06% Democratic Republic of Congo 1,15% Burundi 0,15% Kenya 0,69% Namibia 0,03% Botswana 0,03% Zimbabwe 0,19% Eswatini 0,01% Lesotho 0,03% Eritrea 0,05% Djibouti 0,01% Mauritius 0,02%	

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				Comoros 0,01% Seychelles 0,00% Zambia 0,24% Rwanda 0,17% Ethiopia 1,47% Zambia 0,24%	
Least liberal	Philippines 1.41 % Iraq 0.52% Laos 0.09%	El Salvador 0.08 % Dominican Republic 0.14 % Haiti 0.15 % Honduras 0.13 % Nicaragua 0.08 % Suriname 0.01 % Jamaica 0.04%	Andorra 0.00 % Holy See / Vatican City 0.00 % Malta 0.01 % San Marino 0.00 %	Congo 0.07% Democratic Republic of Congo 1.15 % Gabon 0.03 % Madagascar 0.36 % Senegal 0.21 Mauritania 0.06% Sierra Leone 0.10% Angola 0.42% Egypt 1.31%	Palau 0.00 %

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Annex B. Criminalisation of Abortion

1. There are 185 countries that still criminalise abortion in the world.[121] Out of those, 140 countries penalise the woman. In all regions, this will occur in addition to penalties on the doctor and/or on the person who assists. In Europe, the abortion legislation in 25 countries does not sanction the woman, but instead imposes penalties on the doctor or the person who assists. This is also, to a lesser extent, the case in Asia, where abortion is criminalised in 46 countries, but penalties are imposed on the woman in only 30 countries. Latin America and Africa remain the regions in which abortion laws impose the heaviest penalties on both the woman and the doctor performing the abortion. Out of 33 countries in Latin America, 30 countries criminalise the woman, and 32 criminalise the doctor and any person who assists. In Africa, abortion is criminalised in 50 countries and women are criminalised in 49 of them. In North America, Canada does not penalise the woman, the doctor or any person who assists, whereas in several US states, penalties on all parties involved in an abortion may be imposed should certain conditions/gestational time limits not be respected. In sum, a worldwide comparison of abortion legislation demonstrates that for all regions, the number of countries criminalising the woman is lower than the number of countries that criminalise abortion. This is especially the case in Europe and Asia, where countries have moved away from penalising the woman, even where abortion is still illegal.
2. An important point to note is that there are not yet any countries that have stopped penalising doctors. Yet with the exception of the 26 countries that have completely banned abortion, abortion legislation will usually provide for certain defences for a doctor on specific grounds such as if they carry out an abortion on health/socio-economic grounds. For the countries with the most liberal abortion legislation, in which abortion is available 'upon request', doctors will only face penalties for carrying out abortions deemed 'unsafe' in that they fall outside what the law deems to be the acceptable gestational limits.
3. Notably, there are countries in which abortion may be punishable by fine as an alternative to imprisonment. One such country is Armenia, in which Article 22 of the Armenian Criminal Code states that abortions are 'punished with a fine in the amount of up to 100 minimal salaries, or corrective labor... or with arrest... or with deprivation of the right to hold certain posts...'. In Azerbaijan, only doctors can escape imprisonment by paying a fine, while those 'not having higher medical education' are punished with arrest or restraint of liberty for up to two years.[122]

[121] World Health Organisation, 'Global Abortion Policies Database: Penalties' <https://abortion-policies.srhr.org/countries/?r%5B%5D=r18&hrt=&co=&pia=1> (accessed 30 November 2020>.
[122] Article 156, Belarus Penal Code.

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4. Other countries with similar provisions for doctors providing for alternatives to imprisonment by way of a fine include: China,[123] Cuba,[124] Denmark,[125] Kazakhstan,[126] and Latvia.[127]
5. Overall, it seems that while doctors are criminalised more often women for abortion, they may also face lighter penalties where the crime is made punishable by fine, or where they may escape penalties altogether, should they be able to plead a defence.

Regions	Countries in which abortion is criminalised	Criminalisation of the woman	Criminalisation of the doctor	Criminalisation of the person who assists
Asia (48 countries)	46	30	46	31
Africa (54 countries)	50	49	50	48
Europe (44 countries)	44	19	44	30
Latin America (33 countries)	32	30	32	32
North America (2 countries)	1	1	1	1
Oceania (16 countries)	12	11	12	11
Total countries	185	140	181	153

***Figure A**: Countries in which abortion is criminalised and the distribution of penalties*
Source: World Health Organisation, 'Global Abortion Policies Database: Penalties'. The data here reflects a strict reading of the black letter law in effect in each country.

[123] Law of the People's Republic of China on Maternal and Infant Health Care Article 36.
[124] Article 267 of the Cuban Penal Code 1967.
[125] Article 269 of the Penal Code.
[126] Article 117 of the Penal Code.
[127] Section 135, Latvian Criminal Code.

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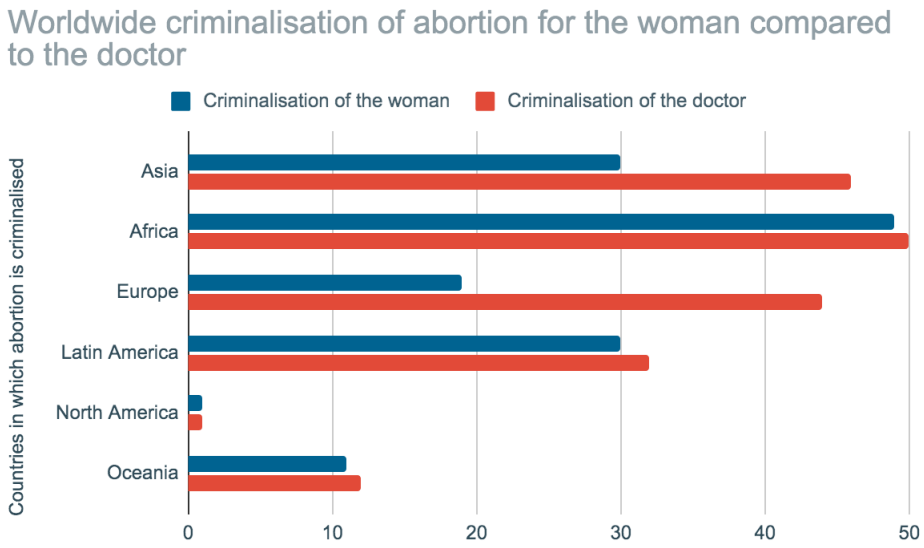

Figure 1: *Criminalisation of women and doctors for abortion worldwide*

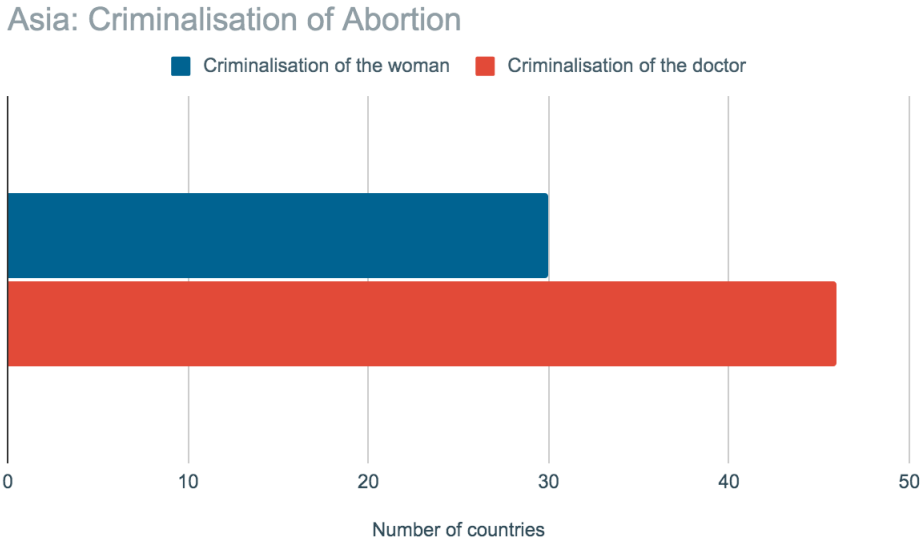

Figure 2: *Criminalisation of women and doctors for abortion in Asia*

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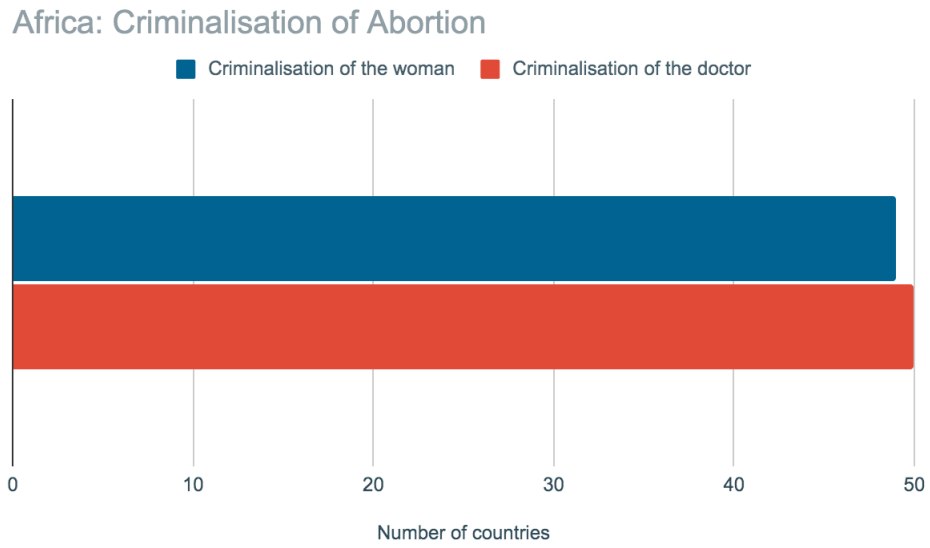

Figure 3: *Criminalisation of women and doctors for abortion in Africa*

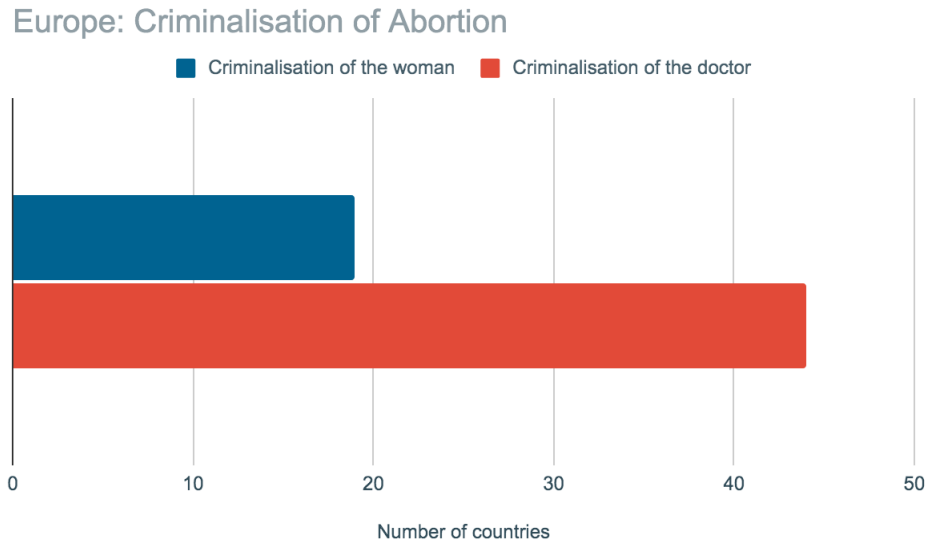

Figure 4: *Criminalisation of women and doctors for abortion in Europe*

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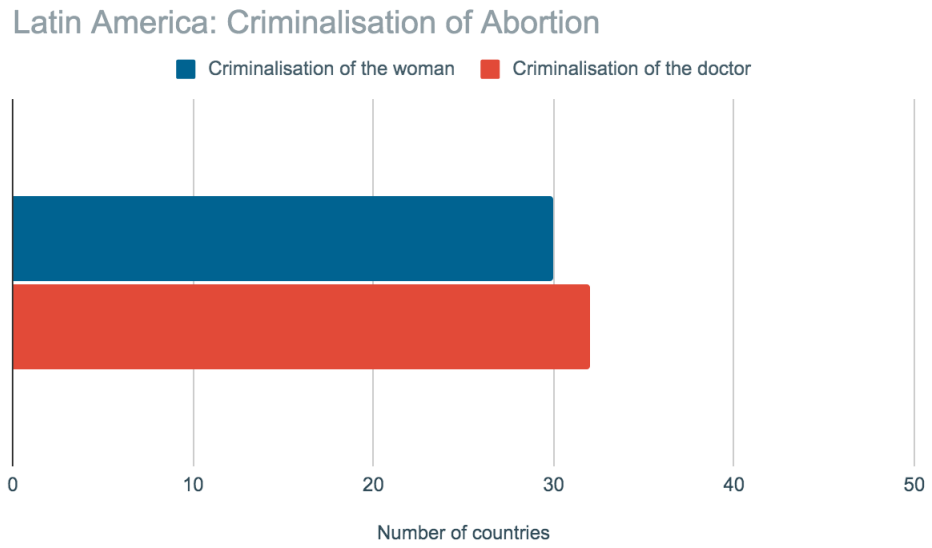

Figure 5: *Criminalisation of women and doctors for abortion in Latin America*

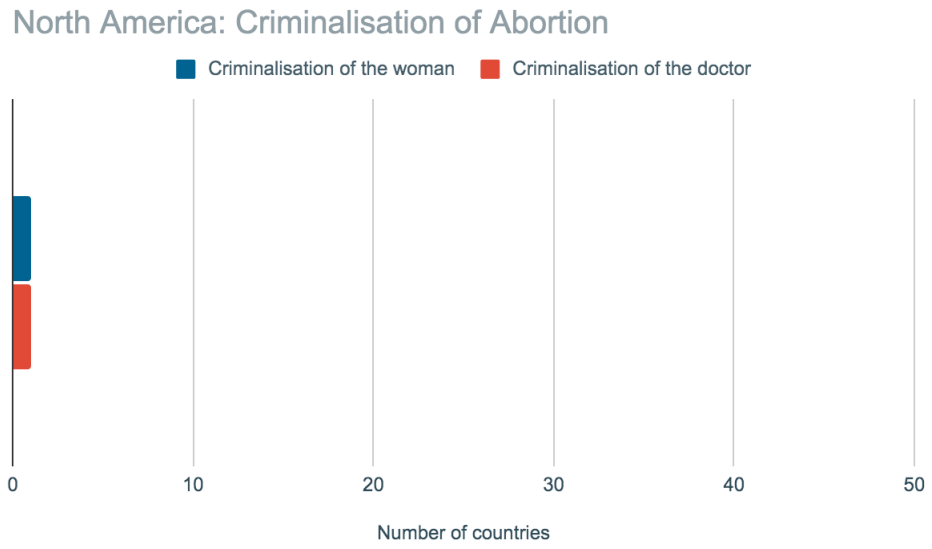

Figure 6: *Criminalisation of women and doctors for abortion in North America*

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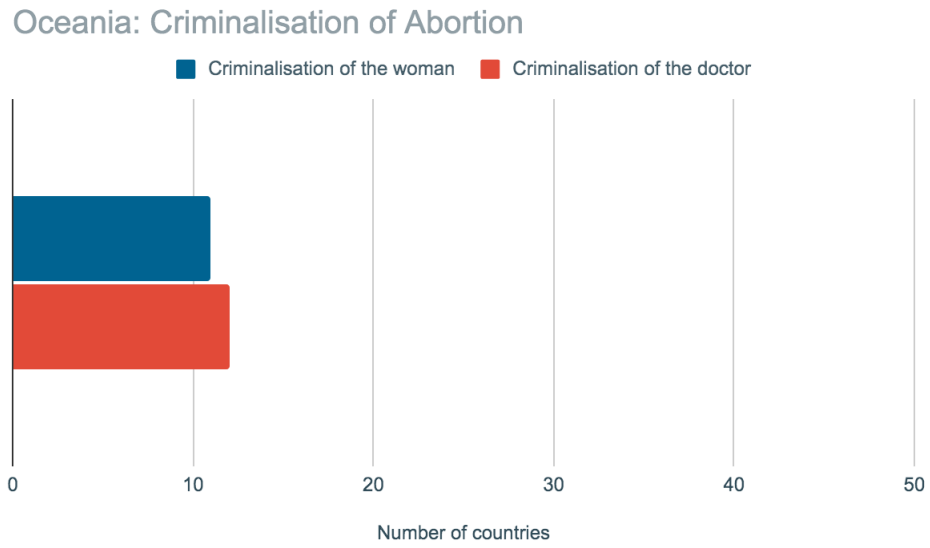

Figure 7: *Criminalisation of women and doctors for abortion in Oceania*

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