



Rio de Janeiro, June 25 2015

## **General Comment No. 36 - Article 6: Right to life**

### **Introduction**

This contribution presents a Brazilian perspective to the Human Rights Committee, as part of the preparatory work for formulation of a General Comment on the “right to life” in relation to preventable deaths due to unsafe abortion. In addition, we bring to this Committee two landmark constitutional precedents from the Brazilian Supreme Court that have advanced the interpretation of the right to life in a manner that is consistent with women’s sexual and reproductive rights; and regional human rights standards on the right to life adopted by the Inter-American Court of Human rights in the case *Artavia Murillo vs. Costa Rica*.

We expect that this submission can provide useful information and guidance for the progressive interpretation of the right to life that takes into account women’s right to life, health and equality and non-discrimination in the context of reproductive health.

Yours sincerely,



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## The impact of abortion criminalization: violations on women's right to life

In Brazil, abortion is only legally permitted in cases of rape or to save the life of a pregnant woman. In all other circumstances, Brazil's Penal Code penalizes women who undergo induced abortions with 1-3 years of imprisonment; physicians who provide abortions can receive up to 20 years' imprisonment (Penal Code articles 123-128). More recently in 2013, the Supreme Court has decided that women can legally terminate their pregnancies in cases of anencephaly. Access to abortion in cases where is not against the law is still very limited: between 1989 and 2008, only 1606 women were able to have legal abortions in Brazil.<sup>1</sup>

A survey carried out by *Instituto Anis* and the University of Brasília showed that 1 in every 7 women up to 40 years old has had an abortion; when considering only women aged 35-39, the rate falls to 1 in every 5. The survey interviewed 2002 women aged 18-to-39 who lives in state capitals and in municipalities of over 5000 inhabitants; rural illiterate dwellers were excluded.<sup>2</sup>

As a result of the criminal law's restrictions, one million unsafe abortions are estimated to occur each year in Brazil, with women running the risks of suffering short- and long-term maternal morbidity, as well as death. As many as a quarter million women are treated annually in hospitals for complications from unsafe abortions.<sup>3</sup> Maternal mortality rates in Brazil remain high. Although there has been a significant drop in the maternal mortality ratio (MMR) between 1990 and 2000 (from 143.2 per 100,000 live births to 73.3 per 100,000 live births), this fall suffered big slowdown and stabilization trend in next decade. The latest official data from 2011, show that 64.8 women in every 100,000 mothers died from problems during pregnancy or childbirth, which is nearly double the target to be met as part of the fifth Millennium Development Goal (ODM), which is to reduce by three-quarters of MMR by 2015, representing less than or equal to 35 deaths per 100,000 live births by reference to the estimated level for 1990. A recent World Health Organization report reveals that Brazil is the fourth slowest country in reducing maternal mortality in the period from 200 to 2013.<sup>4</sup> In this period, Brazil had equivalent performance to Madagascar, with an average annual decrease of 1.7 % in maternal mortality rate. The brand is well below the average of the whole group of 75 countries analyzed, which was 3.1% per year.

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<sup>1</sup> Católicas pelo direito de decidir. 2006. *Panorama do aborto legal no Brasil*. São Paulo. See also: Rosângela Aparecida Talib and Maria Teresa Citeli. 2005. *Serviços de aborto legal em hospitais públicos brasileiros (1989-2004) Dossiê. Cadernos Católicos pelo direito de decidir*.

<sup>2</sup> DINIZ, D. e MEDEIROS, M. Itineraries and methods of illegal abortion in five Brazilian state capitals. *Ciênc. saúde coletiva* [online]. 2012, vol.17, n.7, pp. 1671-1681. Accessible at: [http://www.scielo.br/scielo.php?script=sci\\_abstract&pid=S1413-81232012000700002&lng=pt&nrm=iso&tlng=en](http://www.scielo.br/scielo.php?script=sci_abstract&pid=S1413-81232012000700002&lng=pt&nrm=iso&tlng=en)

<sup>3</sup> Ministério da Saúde. 2005. *Norma Técnica para Atenção Humanizada ao Abortamento*, Brasília, Ministério da Saúde.

<sup>4</sup> Trends in Maternal Mortality: 1990 to 2013. Estimates by WHO, UNICEF, UNFPA, The World Bank and the United Nations Population Division. 2014. Accessible at: [http://apps.who.int/iris/bitstream/10665/112682/2/9789241507226\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/112682/2/9789241507226_eng.pdf?ua=1)

While abortion is the fourth cause of maternal mortality in the country, in some specific settings it is still the first cause.<sup>5</sup>

Ipas and Grupo Curumim have studied the quality of care for women having an abortion through testimonials from health professionals and women treated in health services in five different Brazilian states. The findings reveal that women seeking post-abortion care have to face delay in receiving treatment, despite being in a situation from obstetric emergency that presents a risk to their life and health. An 'informal policy' exists that prioritizes the care of pregnant women in birthing processes, in detriment of women experiencing miscarriages. In some of the services that had been surveyed, it was found that when women arrive bleeding because of an abortion procedure, they typically have to wait several hours at the reception or screening, even when they are in great pain.

Among the examples of institutional violence in the public health system environment that negatively impact on the enjoyment of human rights by women who have undergone clandestine and unsafe abortions we can list: the delay in care, the requirement of prolonged fasting, the feeling of social isolation, lack of information and communication between the patient and the health care team about your health, and lack of listening and guidance from professionals, explicit discrimination damning words and attitudes, according to most accounts of the women interviewed.

Several human rights bodies have called on Governments to review and amend restrictive abortion laws because these legal restrictions imply gender and race based discrimination, infringement of the right to health (which is enshrined in the Brazilian Constitution) and can in extreme situations violate women's right to life.<sup>6</sup> According to the Special Rapporteur on violence against women, its causes and consequences, the absolute prohibition of abortion is an example of how State action can lead to violence against women and have a direct impact on maternal mortality and morbidity, as well as teenage suicides.<sup>7</sup>

### **Denial of right to life in the context of unsafe abortion and preventable deaths: the cases of Jandira and Elizangela**

At the end of August 2014, Jandira Magdalena dos Santos Cruz, a 27-year-old women living in Rio de Janeiro, decided to end her pregnancy. In a context of abortion illegality, as it happens in many other cases, a friend gave her the name of a clandestine abortion provider, and she agreed to pay the equivalent of U.S. \$2,200 for the procedure. On August 26, Cruz, who had no other information other than a card with the doctor's name and phone number, met a stranger in the bus station who was supposed to drive her to the clinic. Her ex-husband was the last person to see her when he dropped her off in the morning; when he went to pick her up in the afternoon, she had not returned. Cruz was discovered when the press in Rio reported that the police had found a mutilated body in the trunk of a car: a woman who had been shot in the head, with her arms, legs, and teeth removed, leaving officials unable to identify her. Cruz's case is exemplary of the dire effects of abortion criminalization.

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<sup>5</sup> Cook R. & Galli Bevilacqua M. B. *Invoking human rights to reduce maternal deaths*. The Lancet 02/2004; 363(9402):73.

<sup>6</sup> E/C.12/1/Add.66, E/C.12/PRY/CO/3 and CRC/C/15/Add.107.

<sup>7</sup> A/HRC/17/26/Add.2, paras. 65-68. See also Report of the Office of the United Nations High Commissioner for Human Rights. Practices in adopting a human rights-based approach to eliminate preventable maternal mortality and human rights. A/HRC/18/27, para 28.

Another case occurred in Rio de Janeiro also reveals the violation of the right to life experience by Brazilian women who seek clandestine unsafe abortions. Elizângela Barbosa, 32 years old, was found dead on Sunday night on the Ititioca Road, in the district of the same name, in Niteroi, a city neighbouring Rio de Janeiro. According to relatives of the victim, who have since then been indicted by and interrogated by the Murder Division of the Public Security Department, she left home on Saturday morning to get a clandestine abortion and never returned home. Elizângela had three children and did not want a fourth. She was five months pregnant. Her greatest desire was to find a job to achieve financial independence as to be able to properly take care of her children. Although there were job opportunities, she knew she would not be hired while she was pregnant. Elizângela left home around 8pm on the Saturday, with R\$ 2,800, to obtain an abortion, led by a man who also gave evidence to the police. Two hours later, Elisângela phoned her husband to request additional 700 Reais to pay for the abortion. After the call, she sent text message to his cell phone, informing that she would be back home on Saturday. Later in the evening she sent another message delaying the return to Sunday. On Sunday evening at 5:50pm she called to saying that procedure had finished and that was getting back home. Two hours later, however, she sent a message requesting her husband to call in 40 minutes. He said he tried to call but could not make contact.

Around 11pm Sunday evening Elizângela's brother received a phone call from a public hospital named Azevedo Lima. Elizângela had arrived dead to the emergency room. Her genitals were bleeding. hospital.

### **Constitutionally grounded jurisprudence developed by the Brazilian Supreme Court on the interpretation of legal protection of the right to life**

The Brazilian Federal Supreme Court has properly addressed the false dilemma between the embryo's right to life and women's right to health care in two landmark decisions. They are presented further ahead as sharp illustrations of the jurisprudential trend observed in the Latin American in recent years, which does not interpret the legal protection of the right to life as absolute and, consequently, affirms that as such it should not be used by states to deny women's right to safe abortion care. Equivalent interpretation has been issued by the Mexican Supreme Court when the constitutionality of the Mexico City's legislation legalizing abortion was contested as well as in the decision of the Colombian's Constitutional Court issued in May 2006, ruling that abortion was to be permitted when a pregnancy threatens a woman's life or health, in cases of rape, incest and in cases where the fetus has malformations incompatible with life outside the womb.<sup>8</sup>

#### **1. First decision of the Brazilian Supreme Court (ADIN no. 3510/ May 29 2008)**

The Attorney General of the Brazilian State filed an action of unconstitutionality against Article 5 of Law No. 11.105, of 03/24/2005, known as the Biosecurity Act, which provides for the use, for therapeutic and research purposes of stem cells obtained from human embryos produced by in vitro fertilization, and which were not transferred to the uterus. In their judgement, the Supreme Court's ministers

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<sup>8</sup> Zampas C. and Gher J. M. Gher. *Abortion as a Human Right International and Regional Standards*. HRLR 8 (2008), 249-294.

concluded that the Brazilian Constitution does not guarantee the inviolability of life and the dignity of born persons to the embryo.<sup>9</sup>

The Supreme Court interpreted the scope of legal protection of the right to life established by the Brazilian Constitution stating that the protection of the right to life begins at birth with life, this being moment when humans beings become holders various fundamental rights such as the right to life, liberty, autonomy, equality, security, among other rights established in in Article 5 of the Constitutional text. According to the Minister who was the Rapporteur of ADIN 3510, there is no correspondence between human life and the human person, as the embryo cannot be fully conceptualized within the category of a person with ownership of fundamental rights because the right to life pertains exclusively to living and born human. In his view the notion human life is to be clad within a biographical frame that goes beyond its purely biological dimension. The standard established by this decision is therefore that there is no automatic correspondence between biological human life and the human person. Consequently the embryo and fetus cannot be classified as a full subject to rights.

### **Decision of the Supreme on the Lawsuit on the Breach of Fundamental Precept – (ADPF No. 54/DATA)**

In 2004, the National Confederation of Health Professionals (CNTPS) raised an argument of unconstitutionality – known in juridical language the Action aimed at the Breach of Fundamental Precept No. 54 (ADPF 54) – in respect to the application of the criminal law criminalizing abortion in cases of anencephaly. Lawsuit ADPF 54 sought to apply the above ADPF to interpret the breach on Constitutional premises of Articles 124, 126 and 128, sections I and II, of the Penal Code (Decree-Law No. 2,848 / 40) that prevent the interruption of pregnancy for therapeutic reasons in the hypothesis delivery of anencephalic fetus pregnancy, previously diagnosed by a qualified professional. The purpose of the proposed interpretation was the recognition of the right of pregnant women to undergo the abortion procedure without being obliged to seek judicial authorization or any other form of permission from the state. One core argument of ADPF no 54 was that anencephaly is a fetal abnormality incompatible with life outside the uterus that implies a high risk pregnancy. It is case in which abortion is the only medically effective therapy to ensure that women are not submitted to undue health risk and suffering.

The Supreme Court jurisprudence in this case followed the previous interpretation mentioned above, which coincides with decisions adopted by other courts to resolve legal uncertainties generated by the conflict between the reproductive rights of women and the expectation of the right to potential life of the embryo. In a previous lawsuit presented to the Brazilian Supreme Court in relation to the outcome of a pregnancy of an anencephalic fetus, the opinion delivered by Minister Joaquim Barbosa was that although the anencephalic fetus is biologically alive it is legally dead and therefore does not enjoy legal protection. His conclusion was that in such circumstances does not constitute a crime against life because it is an atypical behavior. The Minister Rapporteur of case, Marco Aurelio de Mello, said in his final statement that an abortion of an anencephalic fetus is consistent with the Constitution, especially

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<sup>9</sup> “**The concept of life is coated with a biographical dimension more than just biological**, which is materialized in an individual capable to acquire rights and obligations in its own name from live birth.” (free translation) Minister Carlos Ayres Brito Rapporteur their vote on Article 5 of the Biosafety Law, Supreme Federal Court. Unconstitutionality Lawsuit No. 3,510. [www.stf.jus.br](http://www.stf.jus.br)

under the provisions that guarantee the *laïcité* of the state, women's human dignity, right to life and protection of their autonomy, freedom, privacy and health.

### **Regional Precedents in respect to the gradual protection of the human right to life**

The November 2012 decision by the Inter-American Court of Human Rights (the Court) regarding the case of *Artavia Murillo et al. v. Costa Rica*<sup>10</sup> has also generated landmark jurisprudence on women's human right to life. The ruling provides solid grounds for challenging laws in other countries that refer to absolute protection of life from the moment of conception and ground the criminalization of women's access to safe and legal abortion.

The *Artavia Murillo* case was brought to the Inter-American Court of Human Rights in 2011, on behalf of nine Costa Rican infertile couples, by the Inter-American Commission on Human Rights (IACHR). The claim argued that when, in 2000, in vitro fertilization (IVF) was declared unconstitutional the State of Costa Rica denied these infertile couples alternative means to have the children they wanted. The Court's judgment concluded that it is not admissible to grant the status of person to the embryo (paragraph 223) and that the protection of the right to life, under Article 4 (Right to life) of the American Convention, is not absolute, but rather gradual and incremental according to its development (paragraph 264).

In considering the decision of the Constitutional Chamber of the State of Costa Rica, the Court approached the matter by clarifying aspects referring to fertilization and conception: "the Court underscores the scientific evidence that marks a difference between two complementary and essential moments of embryonic development: fertilization and implantation. The Court observes that it is only after completion of the second moment that the cycle is concluded, and that conception can be understood to have occurred" (paragraph 186).

Of particular importance was the final Court's opinion that the right to life does not guarantee absolute protection of the right to life while this life is still in gestation. In the view of Court an approach that favors the rights of embryos over women's rights has negative effects on the ability of women to exercise their rights to life, health, liberty and reproductive autonomy, equality and non-discrimination, sexual and reproductive self-determination, and their right to reproductive health. Unconditional protection of life still in gestation can generate limitations or barriers to exercising human rights, contrary to what has been established by international human rights treaties. In regard to the legal status on an embryo, the Court determined that "...the regulatory trends in international law do not lead to the conclusion that the embryo should be treated in the same way as a person, or that it has a right to life" (paragraph 253). As in what concerns the right to life broadly speaking, the Court interpreted the use of the words "in general" in Article 4 of the ACHR and concluded in the following terms: "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" (paragraph 264).

### **Conclusions**

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<sup>10</sup> *Artavia Murillo et al vs. Costa Rica*, Judgment of November 28, 2012 (Inter-American Court of Human Rights). Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_257\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf)

The right to life is a fundamental human right, central to the enjoyment of all other human rights. The fundamental right to life is well established under many human rights treaties. As shown in examples offered above neither the Americas 'regional human rights law and its interpretation, nor the jurisprudence developed by the Brazilian Supreme Court recognize full protection of the right to life of embryos and fetuses. As seen these bodies have systematically supported a position that the recognition of right to life since conception can interfere significantly with women's basic human rights, increasing their risks to life and health and denying their reproductive and sexual autonomy. Laws criminalizing abortion violate the right to life of women and girls, as they force women to seek unsafe abortions and contribute to maternal morbidity and mortality.

The Human Rights Committee in 2000 has called upon states to inform the committee of 'any measures taken by the state to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions'.<sup>11</sup> States in this regard have a duty to provide ways in which to protect the lives of women and girls.

International human rights law and jurisprudence have interpret this basic right to be enforceable from the moment of birth, and international and regional human rights bodies, as well as courts worldwide, have clearly established that any prenatal life protections should not be used to deny basic women's human rights especially human right to life, to sexual and reproductive health care, to be free from torture, unhuman and degrading treatment, and the right to equality and non-discrimination.<sup>12</sup> Las but not least international human rights bodies have in recent years increasingly recognized that criminalization of abortion leads women to obtain unsafe abortions, threatening their lives and health, and recent national-level developments in the field.<sup>13</sup>

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<sup>11</sup> United Nations Human Rights Committee, 'General Comment 28', 2000, UN Doc. CCPR/C/21/Rev/1/Add/10, art. 3, para. 10.

<sup>12</sup> *Whose Right to Life? Women's Rights and Prenatal Protections under Human Rights and Comparative Law*. Center for Reproductive Rights  
[http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL\\_Updated\\_8.18.14.pdf](http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_Updated_8.18.14.pdf)

<sup>13</sup> Zampas C. and Gher J. M. Gher. *Abortion as a Human Right International and Regional Standards*. HRLR 8 (2008), 249-294