



INTERNATIONAL COMMISSION OF JURISTS

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COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN: CASE OF ALYNE DA SILVA PIMENTEL V. FEDERATIVE REPUBLIC OF BRAZIL

LEGAL OPINION BY THE INTERNATIONAL COMMISSION OF JURISTS

I. INTRODUCTION

1. This Legal Opinion is provided by the *International Commission of Jurists* at the request of the Center for Reproductive Rights, for submission to the Committee on the Elimination of Discrimination Against Women, in relation to that Committee's consideration of the *Case of Alyne da Silva Pimentel v. Federative Republic of Brazil*.
2. The *International Commission of Jurists* is an international non-governmental organization, established in 1952 and headquartered in Geneva, Switzerland. It comprises 60 eminent jurists, who represent the different legal systems of the world. It works to advance the rule of law and to ensure the domestic implementation of international human rights law. In this context it endeavors to promote States' compliance with their international human rights legal obligations, to support efforts to combat impunity and ensure legal accountability for human rights violations, and to advance victims' access to remedies, including reparations.
3. In the *Case of Alyne da Silva Pimentel v. Federative Republic of Brazil* the applicants allege that through its failure to provide Alyne da Silva Pimentel with appropriate maternal health care, including emergency services, which resulted in her death, the Federative Republic of Brazil violated its international legal obligations to ensure the right of women to exercise and enjoy their rights to life and the highest attainable standard of health on a basis of equality with men and free of discrimination on the basis of sex. In this regard the applicants allege a violation of Articles 2 and 12 of the Convention on the Elimination of Discrimination Against Women.
4. This Legal Opinion will address the content of general international human rights law as it pertains to the provision of appropriate maternal health care and specifically emergency obstetric care. In that framework, it will consider whether the right to the highest attainable standard of health (hereinafter the right to health) requires States to provide a certain quality or standard of maternal health care, and specifically emergency obstetric care. It will then address the application of the right of women to exercise and enjoy the right to health, and the right to life, on a basis of equality with men, and free from discrimination on the basis of sex, in relation to the provision of good quality maternal health care, and specifically emergency obstetric care. Finally it will address the international obligation, including under the Convention on the Elimination of All Forms of Discrimination Against Women, to provide the victims of human rights violations with an effective remedy.
5. It is important to recall at the outset that under international human rights law a State cannot excuse itself from performance of a legal obligation by delegating its responsibilities under that obligation to a private body or individual.¹ In the words of the Inter-American Court of Human Rights, the conduct "of a person or entity which, though not a state body, is authorized by the State legislation to exercise powers entailing the authority of the State (...) must be deemed to be an act by the State, inasmuch as such person acted in such capacity. Hence, the acts performed by any entity, either public or private, which is empowered to act in

¹ See generally: Inter-American Court of Human Rights, *Case of Ximenes-Lopes v. Brazil*, 4 July 2006; European Court of Human Rights, *Case of Costello-Roberts v. United Kingdom*, 25 March 1993, Application No. 13134/87.

a State capacity, may be deemed to be acts for which the State is directly liable, as it happens when services are rendered on behalf of the State.”²

6. It is notable, in the context of the present case, that the Inter-American Court has directly applied this reasoning to the provision of health care in the Federative Republic of Brazil, holding that in relation to public health care, the system in that country is such that, “when health care services are public, it is the State which renders them directly to the population, through its Single Health System. This public health care system is primarily offered at public hospitals; notwithstanding when in a region of the country there are not enough public hospitals to provide health care services to all patients, private institutions, as supplementary agents and by virtue of contracts or agreements entered into (...) may also provide health care under the umbrella of the Single Health System. In both cases, whether the patient is admitted into a public hospital or a private institution which operates by virtue of a contract or an agreement entered into with the SUS, the patient is under the care of the Brazilian public health system, that is, of the State.”³

II. THE INTERNATIONAL LEGAL OBLIGATION ON STATES TO REALIZE THE RIGHT TO HEALTH

7. International human rights law obliges States to realize the right to health. This means that States must not only refrain from interfering in the enjoyment of the right to health but that they must take positive proactive measures to realize the right.⁴ Conduct involving affirmative acts and conduct of omission or failure to take necessary measures can give rise to a violation of the right to health.⁵
8. Safeguarding the right to health, among other things, requires States to ensure the provision of “timely and appropriate health care.”⁶ States must also ensure “the appropriate training of doctors and other medical personnel,”⁷ while “functioning public health and health-care facilities, goods and services (...) have to be available in sufficient quantity,”⁸ and “must also be scientifically and medically appropriate and of good quality.”⁹
9. Compliance with the correlative obligations stemming from the right to health, including the obligation to ensure the provision of timely and appropriate health care, places particular requirements on States in relation to maternal health. Specifically, it necessitates the provision of appropriate maternal health care. The Committee on Economic, Social and Cultural Rights, in its analysis of the obligation to realize the right to health under Article 12 of the International Covenant on Economic, Social and Cultural Rights, has affirmed that States are required “to ensure reproductive, maternal (pre-natal as well as post-natal) and child health care.”¹⁰ The Convention on the Elimination of All Forms of Discrimination against Women enshrines this obligation expressly, providing in Article 12(2) that States “shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period.”¹¹
10. Ensuring the provision of “appropriate services” in respect of reproductive and maternal health care necessarily includes the requirement that States provide emergency obstetric

² Inter-American Court of Human Rights, *Case of Ximenes-Lopes v. Brazil*, 4 July 2006, Paras. 86-87.

³ *Ibid.* Para. 95.

⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health (hereinafter CESCR General Comment No.14), Para. 33. See also, Maastricht Guidelines on Violations of Economic, Social, Cultural Rights (hereinafter Maastricht Guidelines), January 1997, Para. 6.

⁵ CESCR General Comment No.14. Paras. 48 and 49. See also, Maastricht Guidelines, Paras. 14 and 15.

⁶ CESCR General Comment No.14. Para. 11. See also, Para. 36.

⁷ CESCR General Comment No.14. Para. 36.

⁸ CESCR General Comment No.14. Para. 12(a).

⁹ CESCR General Comment No.14. Para. 12(d).

¹⁰ CESCR General Comment No.14, Para 44(a). See also, Para 14. See also Article 24(d), International Convention on the Rights of the Child.

¹¹ Article 12(2), Convention on the Elimination of All Forms of Discrimination against Women. See also, Committee on the Elimination of Discrimination against Women, General Recommendation No. 24, Women and Health, (hereinafter CEDAW General Recommendation No. 24.), Para. 26.

services. In the words of the Committee on the Elimination of Discrimination against Women, “it is a duty of States to ensure women’s right to safe motherhood and emergency obstetric services.”¹² Similarly the Committee on Economic, Social and Cultural Rights has emphasized that “public health infrastructures should provide for sexual and reproductive health services, including safe motherhood,”¹³ and that Article 12.2(a) of the Convention on Economic, Social and Cultural Rights, “may be understood as requiring (...) pre and post-natal care, emergency obstetric services.”¹⁴ Additionally, the United Nations Special Rapporteur on the Right to Health has underlined that the right to health of women entitles them to “key technical interventions for the prevention of maternal mortality, including (...) emergency obstetric care.”¹⁵

11. In line with the analysis above, the scope of the State’s obligation in respect of the right to health extends beyond mere “provision” by States of maternal health care and services. In order to comply with their obligations States must ensure that the maternal health care, including emergency obstetric care, they provide to women, is readily available, accessible, medically appropriate, of good quality and that doctors and medical personnel are appropriately trained.¹⁶

The Nature of the Obligation on States to Provide Maternal Health Care, Including Obstetric Care

12. International human rights law imposes certain obligations in relation to the right to health which States must perform to immediate effect.¹⁷ Other right to health obligations are subject to progressive realization, meaning that they do not necessarily need to be realized fully at once, but instead, in the words of the Committee on Economic, Social and Cultural Rights, may be subject to a “specific and continuing obligation to move as expeditiously and effectively as possible towards (...) full realization.”¹⁸
13. Certain obligations which must be performed to immediate effect are classed as “minimum core obligations.”¹⁹ These oblige States to “ensure the satisfaction of, at the very least, minimum essential levels”²⁰ of the right to health. In the words of the Committee on Economic, Social and Cultural Rights “a State cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations.”²¹ As a matter of course it follows that violations of the right to health occur when a State fails to satisfy its minimum core obligations.²²
14. The Committee on Economic Social and Cultural Rights has affirmed that the obligation on States “to ensure reproductive, maternal (pre-natal as well as post-natal) and child health care”²³ is of “comparable priority”²⁴ to States’ minimum core obligations.

¹² CEDAW General Recommendation No. 24. Para. 27.

¹³ CESCR General Comment No. 14, Para. 36.

¹⁴ CESCR General Comment No. 14, Para. 14.

¹⁵ The United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Report to the General Assembly, 13 September 2006, U.N. Doc. A/61/338, (hereinafter Report of the Special Rapporteur on the Right to Health), Para. 13.

¹⁶ See Paragraph 8 above.

¹⁷ CESCR General Comment No. 14, Para. 30. See also Committee on Economic, Social and Cultural Rights, General Comment No.3, *The Nature of States Parties Obligations*, (hereinafter CESCR General Comment No.3), Paras.1, 9 and 10; The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, (hereinafter Limburg Principles) Paras. 21 and 22; The Maastricht Guidelines, Paras. 8 and 9.

¹⁸ CESCR General Comment No.14, Para. 31. See also, CESCR General Comment No. 3, Para. 9; Limburg Principles, Para. 21; Maastricht Guidelines, Para.8.

¹⁹ CESCR General Comment No. 3, Para. 10. See also CESCR General Comment No. 14, Para. 43.

²⁰ CESCR General Comment No. 14, Para. 43. See also, CESCR General Comment No. 3, Para. 10.

²¹ CESCR General Comment No. 14, Para. 47.

²² CESCR General Comment No. 14, Para 47. See also, Maastricht Guidelines, Paras. 9 and 15(h).

²³ CESCR General Comment No. 14, Para. 44(a). And see analysis in Paragraphs 3 – 5 above.

²⁴ CESCR General Comment No. 14, Para. 44(a).

15. Moreover “minimum essential levels” of the right to health to which the “minimum core obligations”²⁵ of the right to health apply, have been widely and explicitly held to include “essential primary health care.”²⁶ In turn, primary health care has been defined as “essential health care,”²⁷ and is recognized as including maternal health care.²⁸ More specifically, there can be no question but that certain essential forms of obstetric care which can, and are necessary to, save the life of a woman in a pregnancy or childbirth related emergency²⁹ are encompassed within essential primary health care.
16. Accessible, medically appropriate and good quality maternal health care, including emergency obstetric care, is no doubt a core minimum obligation constitutive of the right to health. It should be noted, however, that even if aspects of the obligation to provide good quality maternal health-care and emergency obstetric care were considered to be subject to progressive realization, the failure of a State to ensure the provision of good quality maternal health-care and emergency obstetric care would nonetheless amount to a violation of women’s right to health, unless that State were able to demonstrate that “every effort has nevertheless been made to use all available resources at its disposal”³⁰ to provide such health-care, “as expeditiously and effectively as possible”³¹ and “as a matter of priority.”³²

III. THE INTERNATIONAL LEGAL OBLIGATION TO ENSURE THE RIGHT OF WOMEN TO EXERCISE AND ENJOY THEIR HUMAN RIGHTS ON THE BASIS OF EQUALITY WITH MEN AND FREE FROM DISCRIMINATION ON THE BASIS OF SEX

17. States are obliged under international human rights law to ensure the equal right of men and women to the enjoyment of all human rights and to guarantee its corollary: the exercise of those rights without discrimination of any kind on the basis of sex.³³ As defined by Article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women*, such discrimination is “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

²⁵ CESCR General Comment No.3, Para.10; CESCR General Comment No. 14, Para. 43.

²⁶ CESCR General Comment No. 14, Para. 43. See also, CESCR General Comment No. 3, Para.10; Maastricht Guidelines, Para. 6; Article 10, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

²⁷ Article 10, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, September 1978 (hereinafter Declaration of Alma-Ata), Para. VI.

²⁸ Declaration of Alma-Ata, Para. VII (3): “Primary health care (...) includes at least (...) maternal and child health care.” See also: Article 49, ILO Convention Concerning Minimum Standards of Social Security, 28 June 1952; Report of the Special Rapporteur on the Right to Health, Para. 16; Beijing Platform for Action, Fourth World Conference on Women, September 1995, (hereinafter Beijing Platform for Action), Para. 106(e); Programme of Action of the International Conference on Population and Development, 18 October 1994, A/CoN.171/13: Report of the ICPD, (hereinafter Cairo Programme of Action), Para. 8.22.

²⁹ Regarding the importance of providing emergency life-saving medical treatment generally, see: Indian Supreme Court, *Paschim Banga Khet Mazdoor Samity and others v. State of West Bengal and another*, (1996) AIR SC 2426, Para. 9 and South African Constitutional Court, *Soobramoney v. Minister of Health*, 27 November 1997, Case CCT 32/97, Paras.18 – 21.

³⁰ CESCR General Comment No. 14, Para. 47. See also, CESCR, General Comment No. 3, Para. 9; Limburg Principles, Para. 21.; Maastricht Guidelines, Para. 8.

³¹ CESCR General Comment No. 3, Para. 9; CESCR General Comment No. 14, Para. 31.

³² CESCR General Comment No. 14, Para. 47.

³³ Article 3, International Covenant on Civil and Political Rights; Article 3 International Covenant on Economic, Social and Cultural Rights; Articles 1 and 2, Convention on the Elimination of All Forms of Discrimination Against Women; Committee on Economic, Social and Cultural Rights, General Comment No. 16, *The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, 11 August 2005, (hereinafter CESCR General Comment No.16), Paras. 1 and 10; Committee on Economic, Social and Cultural Rights, General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights*, 10 June 2009, U.N. Doc. E/C.12/GC/20, (hereinafter CESCR General Comment No. 20), Paras. 2, 3, 4 and 20.

18. The obligation to guarantee women's right to the equal enjoyment of human rights requires States to respect, protect and fulfill this right.³⁴ Within this obligation, States must "refrain from discriminatory actions that directly or indirectly result in the denial of the equal right of men and women"³⁵ in the enjoyment of human rights. They also must take positive proactive "steps to ensure that in practice men and women enjoy their (...) rights on a basis of equality."³⁶ Conduct comprising either actions or failures to act (omissions) can amount to a violation of the obligation to guarantee women's equal right to the enjoyment of human rights and non-discrimination on the basis of sex.
19. In addition, these obligations concerning the equal enjoyment of rights require States to ensure "both *de facto* and *de jure* equality,"³⁷ and to eliminate both formal and substantive discrimination.³⁸ In that context impermissible discrimination on grounds of sex and women's inequality in relation to the enjoyment of human rights may result not only from legislation and legal measures, but from a range of conduct and practice. States must ensure the equal enjoyment of human rights and non-discrimination in respect of those rights, in both law and practice.³⁹ Towards that end, the enactment of legal and/or policy frameworks that mandate equal treatment and/or proscribe discrimination in relation to the exercise of human rights will constitute necessary steps. By themselves, however, such steps will rarely be adequate. As the Committee on the Elimination of Discrimination against Women has underlined a "purely formal legal or programmatic approach is not sufficient to achieve women's *de facto* equality with men."⁴⁰ Instead, in the words of the Committee on Economic, Social and Cultural Rights, "eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice (...) States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination."⁴¹
20. Furthermore, the obligation to ensure that women are not subjected to discrimination on grounds of sex in the exercise of human rights extends to both direct and indirect discrimination on the basis of sex.⁴² Consequently, States must both eliminate plainly discriminatory laws, policies, programmes and practices and they must ensure that seemingly gender-neutral measures do not have a discriminatory effect in real terms. Discrimination and inequality in the enjoyment of human rights may be both covert and overt.⁴³ Moreover, conduct which results effectively in discrimination on grounds of sex need not be undertaken with discriminatory intent in order to contravene the right of women to equal enjoyment of human rights and non-discrimination in the exercise of those rights on the basis of sex.⁴⁴
21. Crucially, ensuring women's equal enjoyment of human rights and non-discrimination in the exercise of those rights will at times require States to recognise gender differences and act accordingly. In this respect, the Committee on the Elimination of Discrimination against Women has asserted that "it is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences

³⁴ CESCR General Comment No. 16, Para. 17; Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 25, Article 4, Paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women on Temporary Special Measures* (hereinafter CEDAW General Recommendation No. 25), Para. 4.

³⁵ CESCR General Comment No. 16, Para. 18.

³⁶ *Ibid.* Para. 21. See also Paras. 2 and 19. And see, CEDAW General Recommendation No. 25, Paras.7-8; CESCR General Comment No. 20, Para. 8(b).

³⁷ CESCR General Comment No. 16, Para. 7; CEDAW General Recommendation No. 25, Para. 4.

³⁸ CESCR General Comment No. 20, Para. 8.

³⁹ CESCR General Comment No. 16, Paras. 6-8; CEDAW General Recommendation No. 25, Paras. 4-10.

⁴⁰ CEDAW General Recommendation No. 25, Para. 8.

⁴¹ CESCR General Comment No. 20, Para. 8(b).

⁴² CEDAW General Recommendation No. 25, Para. 7; CESCR General Comment No. 16, Paras. 12-13; CESCR General Comment No. 20, Para. 10.

⁴³ CESCR General Comment No. 16, Para. 5; CESCR General Comment No. 14, Para. 19.

⁴⁴ CESCR General Comment No. 20, Para. 7: discrimination results when something "has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing," of human rights. See also, European Court of Human Rights, *Case of Opuz v. Turkey*, 9 June 2009, Application No. 33401/02, Para. 200.

between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences.”⁴⁵

(a) The Right to Health

22. As a matter of course these obligations regarding non-discrimination and equality apply in relation to the right to health,⁴⁶ and this has been explicitly confirmed by both the Committee on Economic, Social and Cultural Rights⁴⁷ and by the Committee on the Elimination of Discrimination against Women.⁴⁸ More specifically, the obligation to ensure women’s equal enjoyment of human rights is an “immediate and primary obligation,”⁴⁹ while the requirement that States “ensure the right of access to health facilities, goods and services on a non-discriminatory basis,”⁵⁰ is recognized as one of the *minimum core obligations* forming part of the obligation to realize the right to health. As such, a State must, with immediate effect, guarantee the right of women to exercise and enjoy their right to health on the basis of equality with men and free from discrimination based on sex.⁵¹ Indeed, as the Committee on Economic, Social and Cultural Rights has underlined, a failure to ensure formal and substantive equality in women’s enjoyment of the right to health constitutes a violation of that right.⁵²
23. Article 12(1) of the Convention on the Elimination of Discrimination against Women obliges States to “take all appropriate measures to (...) to ensure, on a basis of equality of men and women, access to health care services.” Similarly in the context of its analysis of equality and non-discrimination in relation to the right to health the Committee on Economic, Social and Cultural Rights has emphasized the need to ensure “equality of access to health care and health services,”⁵³ and has underlined the obligation on States to “prevent any discrimination on internationally prohibited grounds in the provision of health care and health services.”⁵⁴ In interpreting the meaning of Article 12(1) of the Convention on the Elimination of all Forms of Discrimination against Women the Committee on the Elimination of Discrimination against Women has held that, “the duty of States to ensure, on a basis of equality between men and women, access to health care services (...) implies an obligation to respect, protect and fulfill women’s rights to health care.”⁵⁵
24. Specifically, the Committee has noted that “measures to eliminate discrimination against women are considered to be inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women.”⁵⁶ As such, health-care policies and measures must address the “distinctive features and factors which differ for women in comparison to men, such as (...) their menstrual cycle and their reproductive function.”⁵⁷
25. As a result of their biological features and reproductive function, only women, not men, suffer obstetric complications. The health-care interventions needed to save their lives in pregnancy or childbirth related emergencies are well known. Indeed it is estimated that 74 per cent of maternal deaths could be prevented if all women had access to such interventions.⁵⁸ Yet in

⁴⁵ CEDAW General Recommendation No. 25, Para. 8.

⁴⁶ Article 3, International Covenant on Economic, Social, Cultural Rights; Article 1 and Article 12, Convention on the Elimination of All Forms of Discrimination Against Women; CESCR General Comment no. 14, Paras. 18 and 19; CEDAW General Recommendation No. 24, Paras. 1 and 2.

⁴⁷ CESCR General Comment No. 16; CESCR General Comment No. 20; CESCR General Comment No. 14.

⁴⁸ CEDAW General Recommendation No. 24.

⁴⁹ CESCR General Comment No. 16, Para. 40. See also, CESCR General Comment No. 20, Para. 7.

⁵⁰ CESCR General Comment No. 14, Para. 43(a).

⁵¹ See Paragraphs 12 – 13 above.

⁵² CESCR General Comment No. 16, Para. 41.

⁵³ CESCR General Comment No. 14, Para. 19.

⁵⁴ CESCR General Comment No. 14, Para. 19.

⁵⁵ CEDAW General Recommendation No. 24, Para. 13.

⁵⁶ CEDAW General Recommendation No. 24, Para. 11.

⁵⁷ CEDAW General Recommendation No. 24, Para. 12(a). See also, CEDAW General Recommendation No. 25, Para. 8.

⁵⁸ Report of the Special Rapporteur on the Right to Health, Para. 7.

many countries there has been no significant reduction in the rates of maternal mortality,⁵⁹ even while progress has been made in the provision of health-care more generally, and in tackling certain health concerns which apply to both men and women. Moreover, as highlighted by the United Nations Special Rapporteur on the Right to Health, “there is no single cause of death and disability for men between the ages of 15 and 44 that is close to the magnitude of maternal death and disability.”⁶⁰

26. Rates of maternal mortality in a State that are relatively and disproportionately high compared to other countries of a similar level of development and economic growth, may reveal de facto discrimination and inequality in relation to women’s enjoyment and exercise of the right to health. Indeed they may reflect the assessment of the Committee on Economic, Social and Cultural Rights that “women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination.”⁶¹ In that context, a State’s failure to provide, and/or prioritise the provision of good quality maternal health care and specifically emergency obstetric services, may contravene its obligation to guarantee the right of women to the equal enjoyment of the right to health, and to the exercise of that right free from discrimination based on sex, including through equal access to health-care.
27. Indeed the United Nations Special Rapporteur on the Right to Health has observed the principles of equality and non-discrimination “underpin prioritization of interventions – such as emergency obstetric care – that can guarantee women’s right to health on the basis of non-discrimination and equality.”⁶² Likewise, the Committee on Economic, Social and Cultural Rights considers that in order to eliminate discrimination against women, a major goal of any national health strategy “should be reducing women’s health risks, particularly lowering rates of maternal mortality.”⁶³
28. It follows that, as expressly provided for under Article 12(2) of the Convention on the Elimination of Discrimination against Women, States must “ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period.” To that end, States must allocate the maximum extent of all available resources to the provision of emergency obstetric services.⁶⁴
29. A failure by a State over a number of years to reduce the rates of preventable maternal mortality as a result of “inappropriate health resource allocation”⁶⁵ will amount to impermissible discrimination. Indeed, as expressed by the Committee on the Elimination of Discrimination against Women, “studies such as those which emphasize the high maternal mortality and morbidity rates (...) provide an important indication for States parties of possible breaches of their duties to ensure women’s access to health care.”⁶⁶

(b) Right to Life

30. Depending on the particular circumstances a State’s failure to provide good quality maternal health care may also impact women’s equal enjoyment and exercise of a number of rights beyond the right to health.⁶⁷ For example where a woman dies as a result of a failure to

⁵⁹ Report of the Special Rapporteur on the Right to Health, Para. 11

⁶⁰ Report of the Special Rapporteur on the Right to Health, Para. 9.

⁶¹ CESCR General Comment No. 16, Para. 5.

⁶² Report of the Special Rapporteur on the Right to Health, Para. 28(b)

⁶³ CESCR General Comment No. 14, Para. 21.

⁶⁴ CEDAW General Recommendation No. 24, Para. 27.

⁶⁵ CESCR General Comment No. 14, Para. 19: “inappropriate health resource allocation can lead to discrimination which may not be overt.”

⁶⁶ CEDAW General Recommendation No. 24, Para. 17.

⁶⁷ These might include the right to privacy, to freedom from torture, cruel, inhuman and degrading treatment. For example, the failure to provide women with specific health care interventions, related to their sexual and reproductive rights, has been held to constitute a violation of the right to privacy (European Court of Human Rights, *Case of Tysi c v. Poland*, 20 March 2007, Application No. 5410/03) and a violation of the right to freedom from torture, cruel, inhuman and degrading treatment (Human Rights Committee, *Case of Karen Noelia Llantoy Huam n v. Peru*, Communication No. 1153/2003, 24 October 2005).

provide good quality emergency obstetric care, the responsibility of the state may be engaged in respect of a violation of the right to life, including as provided under the International Covenant on Civil and Political Rights and the American Convention on Human Rights.⁶⁸

31. Under international human rights law States are obliged not only to refrain from the unlawful taking of life, but also to take steps to safeguard the lives of those within its jurisdiction.⁶⁹ In some instances this includes the obligation to provide health-care, and specifically emergency health care.⁷⁰ In order to ensure the right of women to exercise and enjoy their right to life on the basis of equality with men and free from discrimination on the basis of sex, States must take adequate measures to safeguard the lives of women on an equal basis with those of men, including, where applicable, in the provision of emergency health-care. In line with the analysis of the principles of equality and non-discrimination above, such measures must address “distinctive features and factors which differ for women in comparison to men, such as (...) biological factors which differ for women in comparison with men, such as (...) their reproductive function.”⁷¹
32. As a result, in order to protect women’s enjoyment of the right to life on an equal basis with men, States must provide full and timely access of women to good quality emergency obstetric care. Indeed, the Committee on the Elimination of Discrimination against Women has held that measures should be taken “to reduce maternal mortality rates and protect women’s right to life by ensuring full and timely access of all women to emergency obstetric care.”⁷² Moreover, in its analysis of the right of women to the enjoyment of the right to life on an equal basis with men, the Human Rights Committee has highlighted the need for States to look at rates of “pregnancy and childbirth related deaths of women.”⁷³ It has also noted that “so as to guarantee the right to life, the State party should strengthen its efforts in that regard, in particular in ensuring the accessibility of health services, including emergency obstetric care. The State party should ensure that its health workers receive adequate training.”⁷⁴

(c) Inter-Sectional/Multiple Discrimination

33. States’ obligations to ensure the right of women to exercise and enjoy their human rights on a basis of equality with men, and free from discrimination on the basis of sex, require an additional level of vigilance and prioritization in relation to ensuring access to good quality maternal health-care, including emergency obstetric care, by women who may be at risk of multi-dimensional or intersectional discrimination.
34. In the words of the Committee on Economic Social and Cultural Rights “some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination

⁶⁸ Article 6, International Covenant on Civil and Political Rights; Article 4, American Convention on Human Rights.

⁶⁹ See generally, Human Rights Committee, General Comment No. 6, The Right to Life, U.N. Doc. HRI/GEN/1/Rev.1; Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (hereinafter HRC General Comment No. 31); Inter-American Court of Human Rights, *Case of Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988; Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, Judgment of 31 January 2006; Inter-American Court of Human Rights *Case of Ximenes-Lopes v. Brazil*, 4 July 2006; European Court of Human Rights, *Case of L.C.B. v. The United Kingdom*, Judgment 9 June 1998, Application No. 23413/94; European Court of Human Rights, *Case of Osman v. The United Kingdom*, Judgment 28 October 1998, Application No. 23452/94; European Court of Human Rights, *Case of Calvelli and Ciglio, v. Italy*, 17 January 2002, Application No. 32967/96; European Court of Human Rights, *Case of VO v. France*, 8 July 2004, Application No. 53924/00.

⁷⁰ E.g. Indian Supreme Court, *Paschim Banga Khet Mazdoor Samity and others v State of West Bengal and another*, (1996) AIR SC 2426, Para. 9.

⁷¹ CEDAW General Recommendation No. 24, Para. 12(a). See also, CEDAW General Recommendation No. 25, Para. 8.

⁷² Committee on the Elimination of Discrimination against Women, Concluding Observations, Morocco, CEDAW, A/52/38/Rev.1 part I (1997) 11, Para. 78.

⁷³ Human Rights Committee, General Comment No. 28, Equality of Rights between Men and Women, U.N. Doc. CCPR/C/21/Rev.1/Add.10, (hereinafter HRC General Comment No. 28), Para. 10.

⁷⁴ Human Rights Committee, Concluding Observations, Mali, ICCPR, CCPR/CO/77/MLI, 16 April 2003, Para. 14

has a unique and specific impact on individuals and merits particular consideration and remedying.”⁷⁵ This aspect of discrimination has also been underlined by the Committee on the Elimination of Discrimination against Women, which has noted that “certain groups of women in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, case or other factors.”⁷⁶ Similarly the Human Rights Committee has noted that discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷⁷ The Committee on the Elimination of Racial Discrimination has noted that “there are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way or to a different degree than men,”⁷⁸ and “racial discrimination may have consequences that affect primarily or only women.”⁷⁹

35. The heightened impact of such multiple forms of discrimination has a definitive effect in relation to women’s access to good quality maternal health-care, including emergency obstetric care. Indeed, the Special Rapporteur on the Right to Health has underlined that “marginalized women, such as women living in poverty and ethnic minority or indigenous women are more vulnerable to maternal mortality.”⁸⁰ The Committee on the Elimination of Discrimination against Women has stressed that States must pay particular attention to the rates at which they have reduced maternal mortality “in vulnerable groups, regions and communities.”⁸¹ Moreover, in the words of the Special Rapporteur on the Right to Health, the principles of equality and non-discrimination give rise to the need to “promote more equitable distribution of health care, including provision in rural or poor areas, or areas with high indigenous or minority populations.”⁸²

IV. THE INTERNATIONAL LEGAL OBLIGATION TO ENSURE AN EFFECTIVE REMEDY AND APPROPRIATE REPARATION IN CASES OF VIOLATIONS OF THE RIGHTS TO LIFE AND HEALTH AND THE RIGHT OF WOMEN TO EXERCISE AND ENJOY THESE RIGHTS ON THE BASIS OF EQUALITY WITH MEN AND FREE FROM DISCRIMINATION ON THE BASIS OF SEX.

36. It is a general principle of all legal systems that the violation of a legal right gives rise to the right to a remedy, and indeed, States are obliged under international human rights law to provide an effective remedy to anyone who alleges a violation of their human rights.⁸³ This obligation is enshrined in international and regional human rights instruments⁸⁴ and its importance has been outlined and underscored repeatedly in the jurisprudence of international and regional judicial and quasi-judicial bodies.⁸⁵ Remedies must be both

⁷⁵ CESCR General Comment No. 20, Para. 17. See also, CESCR General Comment No. 16, Para. 5.

⁷⁶ CEDAW General Recommendation No. 25, Para.12.

⁷⁷ HRC General Comment No. 28, Para. 30.

⁷⁸ Committee on the Elimination of Racial Discrimination, General Recommendation No. 25, Gender Related Dimensions of Racial Discrimination, U.N. Doc. A/55/18, annex V, Para.1.

⁷⁹ *Ibid*, at Para. 2.

⁸⁰ The Report of the Special Rapporteur on the Right to Health, Para. 10.

⁸¹ CEDAW General Recommendation No. 24, Para. 26. See also, the commitment of States enshrined in the Beijing Platform for Action, Para. 32, to “intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people.”

⁸² Report of the Special Rapporteur on the Right to Health, Para. 28(b).

⁸³ See for a general analysis, International Commission of Jurists, Practitioner’s Guide No. 2: The Right to a Remedy and to Reparation for Gross Human Rights Violations, available at: http://www.icj.org/news.php?id_article=4530&lang=en.

⁸⁴ Article 2(3), International Covenant on Civil and Political Rights; Article 25 American Convention on Human Rights; Article 13, European Convention for the Protection of Human Rights and Fundamental Freedoms. See also Article 2, Convention on the Elimination of All Forms of Discrimination against Women.

⁸⁵ Committee on Economic Social and Cultural Rights, General Comment No. 9, The Domestic Application of the Covenant, U.N. Doc. E/C.12/1998/24, (hereinafter CESCR General Comment No. 9). See also HRC General Comment No. 31, Paras. 15 -20; Inter-American Court of Human Rights, *Case of Ximenes-Lopes v. Brazil*, 4 July 2006, Paras. 175 et. seq.; Inter-American Court of Human Rights, *Case of the Rochela Massacre v. Colombia*,

procedural and substantive. This means that the State must provide access to a remedial forum, unencumbered by jurisdictional or other procedural barriers which would render the formal right illusory or ineffective and that it must provide for appropriate reparation in the event that a violation is established.

37. As a matter of course this obligation applies in relation to alleged violations of the rights to life, health and equality and non-discrimination in the enjoyment and exercise those rights.
38. Indeed, the Convention on the Elimination of All Forms of Discrimination against Women requires States to “establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.”⁸⁶ In the specific context of women’s right to health the Committee on the Elimination of Discrimination against Women has underlined that “the duty of States to ensure, on a basis of equality between men and women, access to health care services (...) implies an obligation to respect, protect and fulfill women’s right to health care. States parties have the responsibility to ensure that legislation and executive action comply with these three obligations. They must also put in place a system which ensures effective judicial action. Failure to do will constitute a violation.”⁸⁷
39. The Committee on Economic Social and Cultural Rights has indicated that in relation to the rights enshrined in the International Covenant on Economic, Social, Cultural Rights “the fundamental requirements of international human rights law must be borne in mind. Thus (...) appropriate means of redress, or remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.”⁸⁸ More specifically in relation to the right to health, the Committee has underlined that “any person or group victim of violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.”⁸⁹ Moreover, in relation to the right of women to exercise and enjoy their human rights on the basis of equality with men and free from discrimination on the basis of sex the Committee has reiterated that when that right is called into question States are required to “make available and accessible appropriate remedies.”⁹⁰
40. The Human Rights Committee has held that in order to comply with their obligations to guarantee the rights enshrined in the International Covenant on Civil and Political Rights, including both the right to life, and the right of women to exercise and enjoy that right on the basis of equality with men and free from discrimination on the basis of sex, States “must ensure that individuals also have accessible and effective remedies.”⁹¹

What Constitutes an Effective Remedy?

41. As will be explained below the forum and nature of a remedy may be variable depending on the formal source of right. However, in order to meet the requirements of international human rights law, whatever its nature or form, the remedy must not be theoretical or illusory, but meaningful in practice. It must entail recourse to an independent and impartial authority, which has the power and capacity to (a) investigate and decide whether or not a violation has taken place and (b) offer an appropriate remedy in terms of ordering cessation and/or reparation. Moreover the process must be prompt and accessible and any decision made must be enforceable.

Paras. 216 et. seq.; European Court of Human Rights, Case of Keenan v. United Kingdom, 3 April 2001, Application No. 27229/95, Paras. 123 et. seq.

⁸⁶ Article 2(a), Convention on the Elimination of All Forms of Discrimination against Women.

⁸⁷ CEDAW, General Comment No. 24, Para. 13.

⁸⁸ Committee on Economic Social and Cultural Rights, General Comment No. 9, The Domestic Application of the Covenant, U.N. Doc. E/C.12/1998/24, (hereinafter CESCR General Comment No. 9), Para.2.

⁸⁹ CESCR, General Comment No. 14, Para. 59.

⁹⁰ CESCR General Comment No. 16, Para. 21. See also CESCR General Comment No. 20, Para. 40: “institutions dealing with allegations of discrimination (...) should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially and independently and address alleged violations.”

⁹¹ HRC General Comment No. 31, Para. 15.

(a) Judicial Remedies

42. In many instances compliance with the obligation to provide an effective remedy will require States to provide a *judicial* remedy. This right to a judicial remedy will be unrestricted when a woman dies in a pregnancy related emergency which gives rise to allegations of violations of her right to life; right to health and/or to her right to exercise and enjoy these rights on the basis of equality with men and free from discrimination on the basis of sex. Indeed, as noted above the Committee on the Elimination of Discrimination against Women has underlined that in the context of ensuring women's equal enjoyment and exercise of the right to health, States must also "put in place a system which ensures effective judicial action. Failure to do so will constitute a violation."⁹²
43. It is notable that the Inter-American Court of Human Rights requires States to afford effective judicial remedies to the victims of all human rights violations under the American Convention without exception.⁹³ Additionally, the Committee on Economic, Social and Cultural Rights has noted that there are some obligations, "such as (...) those concerning non-discrimination, in relation to which the provision of (...) a judicial remedy would seem indispensable."⁹⁴ Furthermore, the European Court of Human Rights also requires a judicial remedy in cases where a violation of the right to life is alleged.⁹⁵ Indeed, it has specifically noted that the obligations to guarantee the right to life and the right to an effective remedy "require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession (...) can be determined and those responsible made accountable."⁹⁶
44. Even in situations where a judicial remedy is not always required, other remedies may need to be "reinforced or complemented by judicial remedies,"⁹⁷ and "an ultimate right of judicial appeal"⁹⁸ will usually be appropriate.

(b) General Requirements

45. In certain instances although a State may have some discretion as to what kind of judicial remedy it makes available, it must nonetheless ensure that the remedy is *effective*. This means that a remedy must meet the requirements outlined in Paragraph 40 above. It must not be theoretical or illusory, but meaningful in practice. It must entail recourse to an independent and impartial authority, which has the power and capacity to (a) investigate and decide whether or not a violation has taken place and, (b) offer an appropriate remedy in terms of ordering cessation and/or reparation. Moreover the process must be prompt and accessible and any decision made must be enforceable.
46. The Committee on Economic, Social and Cultural Rights has held that in general "remedies should be accessible, affordable, timely and effective."⁹⁹ Likewise, in the specific context of discrimination in the exercise of human rights, it has noted that institutions dealing with allegations of discrimination "should adjudicate or investigate complaints promptly, impartially and independently and address alleged violations."¹⁰⁰
47. The Inter-American Court of Human Rights has underlined that it is not sufficient to simply provide a formal judicial remedy: "it must also be effective, i.e., it must be capable of

⁹² CEDAW, General Comment No. 24, Para. 13.

⁹³ Inter-American Court of Human Rights, *Case of Ximenes-Lopes v. Brazil*, 4 July 2006, Para. 175.

⁹⁴ CESCR General Comment No. 9, Para 9.

⁹⁵ European Court of Human Rights, *Case of Calvelli and Ciglio v. Italy*, 17 January 2002, Application No. 32967/96, Para.49. See also *Case of VO v. France*, 8 July 2004, Application No. 53924/00, Paras. 88 – 89.

⁹⁶ European Court of Human Rights, *Case of Calvelli and Ciglio v. Italy*, 17 January 2002, Application No. 32967/96, Para. 49.

⁹⁷ CESCR General Comment No. 9, Para 3.

⁹⁸ *Ibid.* Para.9.

⁹⁹ CESCR General Comment No. 9, Para.9.

¹⁰⁰ CESCR General Comment No. 20, Para 40.

producing results or providing answers to violations of rights.”¹⁰¹ It must provide “effective recourse to guarantee the rights to justice, the knowledge of the truth and reparations to the relatives,”¹⁰² and must effectively contribute to “ending impunity, ensuring non-repetition of the harmful acts and guaranteeing the free and full exercise of the rights protected.”¹⁰³ As such, a remedy must be capable of giving rise to “a statement on the State’s responsibility for the violation of rights,”¹⁰⁴ and must be concluded within a reasonable time-period.¹⁰⁵ In assessing whether or not the time-period concerned has been reasonable the *Inter-American Court of Human Rights* will consider “(a) the complexity of the matter, (b) the procedural activities carried out by the interested party, and (c) the conduct of the judicial authorities.”¹⁰⁶ Indeed, in one case the Court held that where no decision had been given six years after legal proceedings were initiated regarding a situation involving, “only one victim, who has been clearly identified and who died in a health care institution,”¹⁰⁷ a remedy had not been provided within a sufficiently prompt time-frame.

48. Similarly the European Court of Human Rights has held that a remedy “must be ‘effective’ in practice as well as in law. In particular its exercise must not be unjustifiably hindered by the acts or omissions of the authorities.”¹⁰⁸ The remedy must be capable of establishing what happened, whether or not a violation took place, and of identifying the source of responsibility.¹⁰⁹ Indeed, as noted above, the Court has underlined that when a patient dies in the care of the medical profession a remedy must be provided which is capable of establishing the cause of death and holding those responsible accountable.¹¹⁰ Moreover, the Court has held repeatedly that any such remedies must be provided within a reasonable time. In assessing whether a State has complied with this requirement it will look at factors similar to those taken into account by the Inter-American Court of Human Rights, including the complexity of the case, whether or not the conduct of the applicants contributed to the length of time involved, and the nature of the relevant authorities’ conduct.¹¹¹
49. As such it is clear that in any assessment of whether or not a particular set of legal proceedings comply with the requirements of the obligation to provide an effective remedy, the amount of time which lapses between the commencement of those proceedings and a final decision, will be a key consideration. Although the particular circumstances of every individual situation must be taken into account, where over a number of years a set of legal proceedings have not progressed significantly and where that lack of progression is not attributable to the conduct of the applicants, those proceedings presumptively will not constitute an effective remedy as required by international human rights law. This is all the more probable where the situation at issue involves only one victim whose identity is not in question.
50. Furthermore, the competency and capacity of the judicial or non-judicial body in question to find that a human rights violation has occurred, to ensure an investigation and, to identify those responsible will also be important factors in determining whether or not a remedy is effective. To satisfy the requirements of the international legal obligation to provide an effective remedy, legal proceedings must at their conclusion provide an explicit recognition as

¹⁰¹ Inter-American Court of Human Rights, *Case of Ximenes-Lopes v. Brazil*, 4 July 2006, Para. 192.

¹⁰² Inter-American Court of Human Rights, *Case of Ximenes-Lopes v. Brazil*, 4 July 2006, Para. 171. See also, Inter-American Court of Human Rights, *Case of the Rochela Massacre v. Colombia*, Para. 216.

¹⁰³ Inter-American Court of Human Rights, *Case of the Rochela Massacre v. Colombia*, Para. 217.

¹⁰⁴ Inter-American Court of Human Rights, *Case of the Rochela Massacre v. Colombia*, Para. 216.

¹⁰⁵ Inter-American Court of Human Rights, *Case of Ximenes-Lopes v. Brazil*, 4 July 2006, Paras. 195 – 203.

¹⁰⁶ Inter-American Court of Human Rights, *Case of Ximenes-Lopes v. Brazil*, 4 July 2006, Para. 196.

¹⁰⁷ Inter-American Court of Human Rights, *Case of Ximenes-Lopes v. Brazil*, 4 July 2006, Para. 197.

¹⁰⁸ European Court of Human Rights, *Case of Keenan v. United Kingdom*, 3 April 2001, Application No. 27229/95, Para. 123.

¹⁰⁹ European Court of Human Rights, *Case of Keenan v. United Kingdom*, 3 April 2001, Application No. 27229/95, Paras. 123 & 132.

¹¹⁰ European Court of Human Rights, *Case of Calvelli and Ciglio v. Italy*, 17 January 2002, Application No. 32967/96, Para. 49; *Case of VO v. France*, 8 July 2004, Application No. 53924/00, Paras. 88 – 89.

¹¹¹ European Court of Human Rights, *Case of Ruiz-Mateos v. Spain*, 23 June 1993, Application No. 12952/87, Paras. 38 – 53.

to whether or not a human rights violation has taken place, and the extent and nature of State responsibility in that regard.

51. The substantive reparation which States are required to ensure to victims of human rights violations includes, but is not limited to, monetary damages. Restitution, rehabilitation, satisfaction and guarantees of non-repetition may be required in addition to compensation.¹¹² The stated needs and wishes of the victims are paramount in determining the appropriate forms of reparation. For example, in practical terms, compensation may include both material and moral damages; satisfaction may take the form of a recognition of wrongful behavior and apology, while guarantees of non-repetition might require States to take measures to address the immediate cause of the violation and/or to systematically reform laws, policies or practices giving rise to the violation.

¹¹² United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted by General Assembly resolution 60/147 of 16 December 2005, Paras. 18-23. See also for a general analysis, International Commission of Jurists, Practitioner's Guide No. 2: The Right to a Remedy and to Reparation for Gross Human Rights Violations, available at: http://www.icj.org/news.php?id_article=4530&lang=en.