



Expert Opinion by the Center for Reproductive Rights to the Constitutional Court of the Republic of Croatia Regarding the Review of the Constitutionality of the Act on Health Measures for the Realization of the Right to Freely Decide on the Childbirth

4 January 2017

The Center for Reproductive Rights respectfully submits this expert opinion to the Constitutional Court of the Republic of Croatia for its consideration in the context of its review of the constitutionality of the Act on Health Measures for the Realization of the Right to Freely Decide on the Childbirth (Act Official Gazette No. 18/78).

The Center for Reproductive Rights is one of the world's leading legal human rights organizations in the field of women's reproductive rights. For 25 years the Center has worked to advance the respect, protection and fulfillment of women's human rights in the field of reproductive health. To this end the Center engages in strategic litigation to advance women's human rights and in this capacity, has filed and won several high-profile cases on behalf of women whose reproductive rights have been violated. For example, these include European Court of Human Rights cases *P. and S. v. Poland* (2012) and *R.R. v. Poland* (2011), the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) cases *Alyne da Silva Pimentel Teixeira v. Brazil* (2011) and *L.C. v. Peru* (2011), and the Human Rights Committee cases *Mellet v. Ireland* (2016) and *K.L v. Peru* (2005). The Center has also filed and won major domestic cases on women's reproductive health and rights in a range of national jurisdictions. Most recently, in 2016, the Center won a groundbreaking case *Whole Woman's Health v. Hellerstedt* before the U.S. Supreme Court. The Center also regularly submits third-party interventions in national and international cases which are often relied upon by national courts and international bodies in their determinations. For example, in a case not dissimilar to the one currently before this Court, the Center submitted an Amicus brief on the constitutionality of Slovak laws allowing abortion on request, which was decided by the Constitutional Court of

the Slovak Republic in 2007. The Center's expertise is also frequently called upon by regional and international human rights bodies such as the treaty monitoring bodies, and the United Nations Human Rights Council.

This case raises the question of whether the Croatian Act on Health Measures for the Realization of the Right to Freely Decide on the Childbirth (1978 Act) complies with Article 21 of the Constitution of the Republic of Croatia and with international human rights law and standards. The petitioners argue that both Article 21 of the Constitution as well as international human rights treaties ratified by Croatia guarantee a right to life prior to birth. On the basis of this claim they then argue that by allowing women to access abortion in certain circumstances the 1978 Act contradicts Article 21 of the Constitution and relevant international human rights treaties. They also claim that the 1978 Act is unacceptable from the point of view of scientific, medical, moral, and legal considerations. The petitioners thus request that the Constitutional Court invalidate the 1978 Act.

This expert opinion explains that such a reading of the right to life would be inconsistent with international human rights law and standards. It outlines that the repeal or restriction of the 1978 Act would also contradict prevailing European legislative practice on abortion as well as the most recent developments in European constitutional jurisprudence. It also explains that repealing or restricting the 1978 Act would contradict international public health and clinical guidelines on safe abortion care, and would be inconsistent with international human rights law and standards. Accordingly, there is no warrant in either international human rights law, European comparative law or international public health and clinical standards for the invalidation of the 1978 Act.

This opinion is divided into six sections. Section I presents standard European legislative practice and the latest developments in European constitutional jurisprudence on abortion. Section II outlines key recommendations on safe abortion by international public health and medical bodies, in particular the World Health Organization. Section III focuses on the meaning and application of the right to life as enshrined in international human rights treaties and its interpretation by international and European human rights mechanisms. Section IV outlines the

way in which international and European human rights standards require States to protect women's access to safe and legal abortion services. Finally, Section V addresses the implications of the principle of non-retrogression under international human rights law and its application to this case. Section VI concludes the expert opinion.

I. Standard European Legislative and Constitutional Practice is to Legalize Abortion and Not to Recognize a Right to Life before Birth

Legislation in almost all European jurisdictions has legalized women's access to abortion in a similar manner to the Croatian 1978 Act. As outlined below, standard European legislative practice is to allow access to abortion on a woman's request or on broad socioeconomic grounds up until a specific term limit, and thereafter on a range of additional grounds. Moreover, the common approach to constitutional interpretation by European constitutional courts is not to recognize a "prenatal right to life" or a right to life before birth.

a) European Legislative Standard on Abortion

Apart from a very small number of countries (listed below), all countries in the European Union and the Council of Europe, including Croatia, legally allow abortion on a woman's request, usually in early pregnancy (i.e. for the first 10, 12 or 14 weeks of pregnancy).¹ Iceland, Finland and the United Kingdom differ very slightly in that their laws premise access on certification by two medical professionals (or social workers) confirming that a woman is eligible for abortion due to broadly framed socioeconomic reasons. However, due to the manner in which these three countries' laws are interpreted and implemented in practice, women in these jurisdictions who believe ending a pregnancy is the best decision in their circumstances can usually obtain legal abortion services within the time limits outlined.

All of these European countries' laws also provide that, once the timeframe for legal access to abortion on request or on broad socioeconomic grounds passes, medical professionals may still

¹ See, e.g., CENTER FOR REPRODUCTIVE RIGHTS, *The World's Abortion Laws 2016*, available at <http://worldabortionlaws.com/map/>.

perform abortions later in pregnancy on exceptional grounds, namely where necessary to avert a risk to a woman's life, to safeguard her physical and mental health, or where there is a serious/severe or fatal fetal impairment.

The only jurisdictions in Europe that do not allow women's access to abortion on request or broad socioeconomic grounds are Ireland, Malta, Northern Ireland, Poland and the microstates (Andorra, Liechtenstein, Monaco, and San Marino). All of these countries have been repeatedly criticized internationally for their highly restrictive laws and practices that put women's health and lives at risk.² Some have even been the subject of judgments of the European Court of Human Rights and the United Nations (UN) Human Rights Committee.³

b) European Constitutional Approach to the Right to Life and Abortion

Almost all European constitutions provide no explicit or implicit recognition of any right to life prior to birth. Indeed, Ireland is the only country that includes a provision explicitly recognizing the "right to life of the unborn" in its constitution.⁴ Moreover, modern European constitutional

² See, e.g., Human Rights Committee, *Concluding Observations: Ireland*, para. 9, U.N. Doc. CCPR/C/IRL/CO/4 (2014); *Monaco*, para. 12, U.N. Doc. CCPR/C/MCO/CO/3 (2015); *San Marino*, paras. 14-15, U.N. Doc. CCPR/C/SMR/CO/3 (2015); Committee Against Torture (CAT Committee), *Concluding Observations: Poland*, para. 23, U.N. Doc. CAT/C/POL/CO/5-6 (2013); Committee on Economic, Social and Cultural Rights (ESCR Committee), *Concluding Observations: Ireland*, para. 30, U.N. Doc. E/C.12/IRL/Co/3 (2015); *Poland*, paras. 46-47, U.N. Doc. E/C.12/POL/CO/6 (2016); Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *Concluding Observations: Andorra*, paras. 31(a)-(c), 32(a), U.N. Doc. CEDAW/C/AND/CO/2-3 (2013); *the United Kingdom of Great Britain and Northern Ireland*, paras. 50-51, U.N. Doc. CEDAW/C/GBR/CO/7 (2013); *Poland*, paras. 36, 37(a)-(c), U.N. Doc. CEDAW/C/POL/C/7-8 (2014); *Liechtenstein*, paras. 38-39, U.N. Doc. CEDAW/C/LIE/CO/4 (2011); *Malta*, paras. 34-35, U.N. Doc. CEDAW/C/MLT/CO/4 (2010); Council of Europe Commissioner for Human Rights, Report by Nils Muižnieks, following his visit to Poland from 9 to 12 February 2016, sec. 4.5.3, Doc. No. CommDH(2016)23; Council of Europe Commissioner for Human Rights, Report by Nils Muižnieks, following his visit to San Marino from 9 to 10 June 2015, paras. 2, 39, 44, 45, Doc. No. CommDH(2015)22.

³ See, e.g., *Tysiac v. Poland*, No. 5410/03 Eur. Ct. H.R. (2007); *R.R. v. Poland*, No. 27617/04 Eur. Ct. H.R. (2011); *P. and S. v. Poland*, No. 57375/08 Eur. Ct. H.R. (2012); *A, B and C v. Ireland*, No. 25579/05 Eur. Ct. H.R. (2010); *Mellet v. Ireland*, Human Rights Committee, Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016) [hereinafter *Mellet v. Ireland*].

⁴ Ireland has the most restrictive abortion law in Europe (except for Malta) and one of the most restrictive in the world. It has repeatedly been subjected to severe and extensive criticism from European and international human rights mechanisms. Every year thousands of women living in Ireland leave the country to access abortion services in another country in Europe. In 2016, the Irish government initiated a process to assess whether the constitutional provision protecting the "right to life of the unborn" should be removed from the constitution. Polling shows there is immense public support in Ireland for the removal of the provision and the liberalization of Irish abortion law. Three other constitutions (Czech, Hungarian and Slovak) do include some mention of 'prenatal life', however, they do not

jurisprudence on the matter has generally refused to find that implicitly a fetus enjoys the right to life.⁵ Instead, in recent years, when faced with challenges to abortion laws due to claims of constitutional protection for prenatal life, European constitutional courts have affirmed the constitutionality of legislation permitting abortion on request and denied recognition of a prenatal right to life.⁶ Even though the one exception to this, the German Federal Constitutional Court, recognized an implicit prenatal right to life, it nonetheless accepted as a matter of principle the constitutionality of abortion on request in early pregnancy.⁷

recognize a right to life prior to birth. Both the Czech and Slovak Constitutions include language about prenatal life, but this language only states that human life is worthy of protection before birth and this protection is provided in a separate sentence from the provision granting the right to life, indicating its lesser value than the right to life. As outlined in detail below, Slovak Constitutional Court has definitively ruled out any interpretation of the Slovak constitution as recognizing a right to life before birth. Constitution of the Slovak Republic, 460/1992 Coll., art. 15(1) (Slovakia); Charter of Fundamental Rights and Freedoms, Constitutional Act No. 2/1993 Coll. as amended by constitutional act No. 162/1998 Coll., art. 6(1) (Czech Rep.). Hungary's constitution, which entered into force in 2012, states: "Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception." Again this addresses protection to prenatal life in a separate clause to the right to life. Additionally, it is notable that Hungarian abortion law allows abortion on request. MAGYAR ORSZÁG ALAPTÖRVÉNYE, art. II (*adopted* April 25, 2011) (Hung.); Act No. LXXIX of 1992 on the Protection of Fetal Life (1992) (Hung.).

⁵ See, e.g., Decision of the Constitutional Court of 11 October 1974, 39 Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes (1974), summarized in Annual Review of Population Law, Vol. I, 49 (1974) (Austria); Conseil Constitutionnel [CC] [Constitutional Court] decision No. 74-54 DC, Jan. 15, 1975, Rec. 19 (Fr.); Juristenvereniging Pro Vita v. De Staat der Nederlanden, summarized in Annual Review of Population Law, 1991, Vol. 19, No. 5, 179-80 (1991) (Netherlands); Ústavný súd Slovenskej republiky [Constitutional Court of the Slovak Republic], PL. ÚS 12/01 (Dec. 4, 2007) Collection of Laws of the Slovak Republic No. 14/2008 vol. 8 (Slovakia) [hereinafter PL. ÚS 12/01]; Portuguese Constitutional Court, Acórdão n.º 75/2010 (2010) [hereinafter Acórdão n.º 75/2010].

⁶ See PL. ÚS 12/01, *supra* note 5; Acórdão n.º 75/2010, *supra* note 5.

⁷ Bundesverfassungsgericht [Federal Constitutional Court] May 28, 1993, 2 BvF 2/90 (Germany); Ruth Rubio-Marín, *Abortion in Portugal: New Trends in European Constitutionalism*, in *ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES*, at 49 (Rebecca J. Cook, Joanna N. Erdman, and Bernard Dickens eds., 2014) [hereinafter Rubio-Marín, *Abortion in Portugal*]. In its decision, the Federal Constitutional Court held that abortion on request within early pregnancy was not unconstitutional provided that a woman undergoes mandatory dissuasive counseling before abortion and the State adopts measures ensuring child-friendly society. Pursuant to the Court's decision German law allows abortion on request in the first 12 weeks of pregnancy. Mandatory dissuasive counseling on abortion contradicts World Health Organization (WHO) guidelines as well as international human rights standards. The WHO outlines that counseling about abortion should be voluntary, confidential, and non-directive. It considers that "[m]any women have made a decision to have an abortion before seeking care, and this decision should be respected without subjecting a woman to mandatory counseling." The WHO further emphasizes that the information given to women who are seeking abortion services must be unbiased, non-directive, and provided only on the basis of informed consent. See WORLD HEALTH ORGANIZATION (WHO), *SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS* 36, 97 (2d ed. 2012) [hereinafter WHO, 2012 *SAFE ABORTION GUIDANCE*]. United Nations treaty monitoring bodies have also expressed concerns about requirements of mandatory and biased counseling before abortion and urged States to eliminate such requirements. See CEDAW Committee, *Concluding Observations: Hungary*, para. 31(c), U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013); *Russian Federation*, paras. 35(b), 36(b), U.N. Doc. CEDAW/C/RUS/CO/8 (2015); *Slovakia*, para. 31(c), U.N. Doc. CEDAW/C/SVK/CO/5-6 (2015); ESCR Committee, *General Comment No. 22: on the right to sexual and*

Most recently, the constitutional courts of Slovakia and Portugal have reviewed and upheld their countries' permissive abortion laws.⁸ These courts have refused to interpret constitutional right to life provisions as applying prior to birth, and instead have made it clear that rights, including the right to life, accrue only at birth.⁹ They have held that a woman's decision to terminate her pregnancy on request without restriction as to reason within a certain legal time limit was grounded in the constitutional rights and interests of privacy, dignity, and reproductive autonomy.¹⁰ While acknowledging that the State has a legitimate interest in protecting prenatal life, these courts have clearly distinguished such an interest from a legally constructed right to life and emphasized that any steps the State takes to protect prenatal life must be consistent with women's fundamental rights.¹¹ In the context of abortion on request, the Slovak Constitutional Court has interpreted this to mean that the value of prenatal life can be "protected only to such extent that this protection did not cause an interference with the essence of a woman's freedom and her right to privacy."¹² It further specified that "if a woman, during a certain phase of her pregnancy, could not decide of her own accord whether to carry the fetus to term or have her pregnancy interrupted, then it would mean an obligation to carry the fetus to term, an obligation which has no support in the Constitution and at the same time it would infringe upon the essence of her right to privacy as well as her personal freedom."¹³

Accordingly, in this context, interpreting the right to life provision of the Croatian Constitution as applicable prior to birth and invalidating or restricting Croatia's 1978 Act would be a serious and significant departure from European constitutional jurisprudence on abortion. It would also

reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), para. 41, U.N. Doc. E/C.12/GC/22 (2016) [hereinafter ESCR Committee, *Gen. Comment No. 22*].

⁸ PL. ÚS 12/01, *supra* note 5; Acórdão n.º 75/2010, *supra* note 5. *See also* Rubio-Marín, *Abortion in Portugal*, *supra* note 7, at 47. In case of Slovakia, the petitioners challenged the law permitting abortion on request up to 12 weeks of pregnancy. They claimed that the law violated Article 15(1) of the Slovak Constitution, which reads: "Everyone has the right to life. Human life is worthy of protection even prior to birth." In case of Portugal, the petitioners challenged the abortion law permitting abortion on request up to 10 weeks of pregnancy after a woman consults with a physician, who is responsible for providing her with access to information relevant to her making a "free, conscious, and responsible decision," and after a mandatory waiting period. In both cases, the petitioners argued that the respective laws did not provide sufficient protection to "unborn human life" in early pregnancy.

⁹ PL. ÚS 12/01, *supra* note 5, at II.A Pt. (1.2); Acórdão n.º 75/2010, *supra* note 5, para. 11.4.2.

¹⁰ PL. ÚS 12/01, *supra* note 5, at II.A Pt. (2.2.), (2.4); Acórdão n.º 75/2010, *supra* note 5, para. 11.4.3.

¹¹ PL. ÚS 12/01, *supra* note 5, at II.A Pt. (2.4); Acórdão n.º 75/2010, *supra* note 5, para. 11.4.

¹² PL. ÚS 12/01, *supra* note 5, at II.A Pt. (2.4).

¹³ PL. ÚS 12/01, *supra* note 5, at II.A Pt. (2.4).

cause Croatian law to radically diverge from prevailing practice on abortion legislation in Europe.

II. International Public Health and Clinical Guidelines Provide that Women Should Be Able to Access Safe and Legal Abortion Services

International public health and clinical guidelines also highlight the need for women to be able to access safe abortion services and strongly recommend that States make these services legal and accessible to all women.

The World Health Organization (WHO) has outlined that “[a]bortion services should be integrated into the health system [...] to acknowledge their status as legitimate health services and to protect against stigmatization and discrimination of women and health-care providers,” and that safe abortion should be “delivered in a way that respects a woman’s dignity, guarantees her right to privacy and is sensitive to her needs and perspectives.”¹⁴ The International Federation of Obstetrics and Gynecology (FIGO) has similarly outlined that women should be able to access safe abortion services.¹⁵

The WHO recommends that “[l]aws and policies on abortion should protect women’s health and their human rights.”¹⁶ In that respect the WHO advises that States adopt comprehensive regulations and policies to ensure women can access safe abortion services.¹⁷ Such policies should aim, among others, to “respect, protect and fulfill the human rights of women, including women’s dignity, autonomy and equality [and to] promote and protect the health of women, as a state of complete physical, mental and social well-being.”¹⁸ They should also meet the particular needs of women from vulnerable and disadvantaged groups.¹⁹

¹⁴ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 64.

¹⁵ FIGO COMMITTEE FOR THE STUDY OF ETHICAL ASPECTS OF HUMAN REPRODUCTION AND WOMEN’S HEALTH, ETHICAL ISSUES IN OBSTETRICS AND GYNECOLOGY 132 (2012) [hereinafter FIGO, ETHICAL ISSUES IN OBSTETRICS AND GYNECOLOGY].

¹⁶ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 9.

¹⁷ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 98.

¹⁸ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 98.

¹⁹ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 98.

The WHO has made it clear that restrictive legal grounds for abortion and other legal, regulatory and administrative barriers in access to abortion contribute to unsafe abortion because they “deter women from seeking care [...], cause delay in access to services, which may result in denial of services due to gestational limits on the legal grounds, [and] create complex and burdensome administrative procedures.”²⁰ As such, the WHO has recommended that “[r]egulatory, policy and programmatic barriers that hinder access to and timely provision of safe abortion care should be removed.”²¹

Furthermore, the WHO has recognized the links between restrictive abortion laws, unsafe abortion, and maternal morbidity and mortality. Evidence shows that “[u]nsafe abortion is one of the four main causes of maternal mortality and morbidity”, accounting for “13% of maternal deaths, and 20% of the total mortality and disability burden due to pregnancy and childbirth.”²² In contrast, in countries where safe abortion services are legally available and accessible on request or on broad socioeconomic grounds, the WHO has outlined that both unsafe abortion and abortion-related mortality and morbidity are reduced.²³

The WHO has clearly underlined that restricting legal access to abortion leads only to illegal and often unsafe abortions, and to social inequities; it does not decrease the number of abortions or result in significant increases in birth rates.²⁴ The WHO has explained that: “[r]estricting legal access to abortion does not decrease the need for abortion, but it is likely to increase the number of women seeking illegal and unsafe abortions,”²⁵ and that in some countries with restrictive abortion laws women seek safe abortions from neighboring countries where abortion services are legal, “which is costly, delays access and creates social inequities.”²⁶ At the same time, it has outlined that, “laws and policies that facilitate access to safe abortion do not increase the rate or

²⁰ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 94.

²¹ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 9.

²² WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 87.

²³ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 90.

²⁴ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 90.

²⁵ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 90.

²⁶ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 90.

number of abortions. The principal effect is to shift previously clandestine, unsafe procedures to legal and safe ones.”²⁷

The WHO has also confirmed that “[w]hen performed by skilled providers using correct medical techniques and drugs, and under hygienic conditions, induced abortion is a very safe medical procedure.”²⁸ Indeed, as the FIGO has outlined, “[a]bortions for non-medical reasons, when properly performed, particularly during the first trimester when the vast majority take place, are in fact safer than term deliveries.”²⁹

Accordingly, in this context, invalidating or restricting Croatia’s 1978 Act and limiting women’s access to safe abortion services would directly contradict evidence-based international public health and clinical guidelines and recommendations on the provision of safe abortion services. Moreover, WHO guidelines clearly contradict the petitioners’ claims that the 1978 Act is unacceptable from the point of view of scientific and medical considerations.

III. International and European Human Rights Law Do Not Recognize a Right to Life Before Birth

No international or European human rights treaty or treaty monitoring body or Court provides that the right to life as enshrined in international or European human rights law applies before birth or that a “right to life of the unborn” is an interest protected by any relevant international or European treaty. Nor have they ever considered the protection of the “right to life of the unborn” to constitute a legitimate aim which limitations on certain rights may permissibly pursue.

²⁷ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 90.

²⁸ WHO, 2012 SAFE ABORTION GUIDANCE, *supra* note 7, at 21.

²⁹ FIGO, ETHICAL ISSUES IN OBSTETRICS AND GYNECOLOGY, *supra* note 15, at 131.

UDHR

Article 1 of the Universal Declaration of Human Rights states that “all human beings are born free and equal in dignity and rights.”³⁰ The *travaux préparatoires* indicate that the word “born” was used intentionally by the drafters of the Declaration to confirm that the rights set forth in the Declaration are “inherent from the moment of birth,” and to firmly and definitively exclude a prenatal application of the rights protected in the Declaration.³¹

ICCPR

The International Covenant on Civil and Political Rights (ICCPR)³² also excludes the application of the right to life, protected in Article 6(1), to prenatal life. As evident from the *travaux préparatoires* to the treaty, the drafters specifically rejected a proposal to provide protection to prenatal life or recognize a right to life prior to birth from the moment of conception.³³

Subsequent practice of the Human Rights Committee affirms the intention of the drafters and the Committee has refused to engage with State claims that the right to life under Article 6 of the Covenant accrues before birth.³⁴ On the contrary, in fact, the Committee has routinely emphasized the threat to women’s lives posed by illegal and unsafe abortions, and has outlined that restrictive abortion laws contravene States’ responsibilities under Article 6 of the ICCPR because they place women’s lives and health at risk.³⁵

³⁰ Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217 (III) A, Article 1, U.N. Doc. A/RES/3/217 A (1948).

³¹ U.N. GAOR 3rd Comm., 99th mtg., paras. 110-124, U.N. Doc. A/PV/99 (1948).

³² International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, art. 6(1), G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976).

³³ U.N. GAOR Annex, 12th Session, Agenda Item 33, ¶¶ 96, 113, 119, U.N. Doc. A/C.3/L.654. The drafters of the ICCPR refused to amend Article 6 to provide that “the right to life is inherent in the human person from the moment of conception, this right shall be protected by law.”

³⁴ *Mellet v. Ireland*, *supra* note 3.

³⁵ Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, (68th Sess., 2000), para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) [hereinafter Human Rights Committee, *Gen. Comment No. 28*].

CRC

Similarly, the Convention on the Rights of the Child does not provide any protection for the right to life prior to birth. Not only does the Convention define “a child” as “every *human being* below the age of eighteen years”³⁶ but preparatory materials make it crystal clear that the provisions of the Convention, particularly the right to life, do not extend to the “unborn child.” It was explicitly agreed that the inclusion of a phrase concerning prenatal life in the preamble of the Convention would not determine the interpretation of the Convention and did not create any right to life before birth.³⁷ Subsequent practice of the Committee on the Rights of the Child has also rejected any assertions that the Convention acknowledges a right to life prior to birth. Instead, the Committee has repeatedly expressed concerns over maternal mortality and morbidity in adolescent girls due to unsafe abortions, and specified that access to safe abortion services is an important part of ensuring adolescent girls’ enjoyment of the highest attainable standard of health as guaranteed under Article 24 of the Convention.³⁸

ECHR

Similarly, the European Court of Human Rights and the European Commission of Human Rights have repeatedly declined to find a fetus enjoys a right to life under Article 2 of the European

³⁶ Convention on the Rights of the Child, *adopted* Nov. 20, 1989, art. 1, G.A. Res. 44/25, annex U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (*entered into force* Sept. 2, 1990) (emphasis added).

³⁷ U.N. Working Group, *Question of a Convention on the Rights of the Child: Rep. of the Working Group*, U.N. Comm’n on Human Rights (36th Sess., 1980), U.N. Doc. E/CN.4/L.1542 (1980). *See also* U.N. Working Group, *Rep. of the Working Group on a Draft Convention on the Rights of the Child*, U.N. Comm’n on Human Rights (45th Sess., 1989), paras. 43-47, U.N. Doc. E/CN.4/1989/48 (1989).

³⁸ *See* Committee on the Rights of the Child (CRC Committee), *General Comment No. 4: Adolescent Health and Development in the Content of the Convention on the Rights of the Child*, (33rd Sess., 2003), para. 31, U.N. Doc. CRC/GC/2003/4 (2003); CRC Committee, *General Comment No. 15: The right of the child to the enjoyment of the highest attainable standard of health* (62nd Sess., 2013), U.N. Doc. CRC/GC/15 (2013); CRC Committee, *Concluding Observations: Chad*, para. 30, U.N. Doc. CRC/C/15/Add.107 (1999); *Chile*, para. 55, U.N. Doc. CRC/C/CHL/CO/3 (2007); *Palau*, para. 46, U.N. Doc. CRC/C/15/Add.149 (2001); *Uruguay*, para. 51, U.N. Doc. CRC/C/URY/CO/2 (2007).

Convention on Human Rights.³⁹ They have outlined that a fetus is not regarded as a person directly protected under Article 2 of the European Convention.⁴⁰

Accordingly, there is no basis in international and European human rights law and standards for the petitioners' claims that international human rights treaties recognize the right to life prior to birth. On the contrary, for this Court to recognize a constitutional right to life before birth would contradict international and European human rights law and the practice of relevant human rights mechanisms.

IV. International Human Rights Treaties Require States to Ensure and Protect Women's Access to Safe and Legal Abortion Services

International and European human rights treaties guarantee a wide range of human rights that are undermined when women's access to safe abortion services is jeopardized. As outlined below, international and European human rights courts and mechanisms (hereinafter "human rights mechanisms") have consistently and repeatedly expressed concerns over the criminalization of abortion, restrictive abortion laws and policies, and practical barriers to access to safe abortion care. They have specified that in order to comply with their obligations under relevant human rights treaties, States should decriminalize abortion, liberalize restrictive abortion laws and remove barriers that hinder women's access to safe abortion services. They have repeatedly

³⁹ See, e.g., *Vo v. France*, No. 53924/00 Eur. Ct. H. R., para. 82 (2004); *X v. the United Kingdom*, No. 7215/75 Eur. Ct. H. R. (1981); *H. v. Norway*, No. 17004/90 Eur. Ct. H. R. (1992); *Boso v. Italy*, No. 50490/99, Eur. Ct. H. R. (2002-VII); *A, B and C v. Ireland*, No. 25579/05 Eur. Ct. H. R., para. 227 (2010); *Open Door and Dublin Well Woman v. Ireland*, No. 14235/88 Eur. Ct. H.R., para. 68 (1992).

⁴⁰ *Vo v. France*, No. 53924/00, Eur. Ct. H.R., para. 80 (2004); *Paton v. United Kingdom*, App. No. 8416/79, para. 9, 19 Eur. Comm'n of H.R. Dec. & Rep. 244 (1980). The Inter-American Court of Human Rights has similarly found that an embryo does not constitute a person under the terms of the American Convention on Human Rights or for the purposes of enjoyment of the right to life thereunder. See *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, paras. 264, 273 (Nov. 28, 2012). Furthermore, the drafters of the African Charter explicitly rejected language extending the right to life prior to birth, and the Maputo Protocol's recognition of a right to abortion in certain circumstances implicitly demonstrates that such a right does not exist prior to birth. Compare *Frans Viljoen, The African Charter on Human and People's Rights/The Travaux Préparatoires in the Light of Subsequent Practice*, 25 HUM. RTS. L.J. 313, 314 (2004) (noting that the drafters of the African Charter relied largely on the American Convention on Human Rights), with Draft African Charter on Human and Peoples' Rights, art. 17, O.A.U. Doc. CAB/LEG/67/1 (1979) (adopting the language of art. 4(1) of the American Convention on Human Rights, but replacing "moment of conception" with the "moment of his birth"); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2nd Ordinary Sess., Assembly of the Union, adopted July 11, 2003, art. 14(2)(c).

called upon States with restrictive abortion laws, which permit abortion only in exceptional situations of risk to a woman's life or health, after sexual assault or in cases of severe or fatal fetal impairment, to liberalize their "restrictive" and "convoluted" laws.⁴¹

They have outlined that a State's failure to allow women's access to safe and legal abortion jeopardizes women's human rights to life, to freedom from torture and other forms of ill treatment, to privacy, to health and to equality and non-discrimination in the enjoyment of rights.

Right to life: Human rights mechanisms have held that the right to life is jeopardized where women's lives and health are placed at risk as a result of lack of access to safe and legal abortion services.⁴² In particular, they have recognized that unsafe abortion is a prominent cause of preventable maternal mortality and have underlined that restrictive abortion laws lead women to seek clandestine and unsafe abortions, putting their lives at risk.⁴³ In this context, they have criticized legislation that criminalizes and/or severely restricts access to abortion.⁴⁴ They have

⁴¹ See Human Rights Committee, *Concluding Observations: Poland*, para. 8, U.N. Doc. CCPR/CO/82/POL (2004); ESCR Committee, *Concluding Observations: Poland*, para. 29, U.N. Doc. E/C.12/1/Add.82 (2002); CEDAW Committee, *Concluding Observations: New Zealand*, para. 34, U.N. Doc. CEDAW/C/NZL/CO/7 (2012); CRC Committee, *Concluding Observations: Zimbabwe*, para. 60(c), U.N. Doc. CRC/C/ZWE/CO/2 (2016); *Poland*, para. 39(b), U.N. Doc. CRC/C/POL/CO/3-4 (2015).

⁴² Human Rights Committee, *Gen. Comment No. 28*, *supra* note 35, para.10; Human Rights Committee, *Concluding Observations: Ireland*, para. 9, U.N. Doc. CCPR/C/IRL/CO/4 (2014); *San Marino*, paras. 14-15, U.N. Doc. CCPR/C/SMR/CO/3 (2015); *El Salvador*, para. 14, U.N. Doc. CCPR/CO/78/SLV (2004); *Kenya*, para. 14, U.N. Doc. CCPR/CO/83/KEN (2005); *Paraguay*, para. 10, U.N. Doc. CCPR/C/PRY/CO/2 (2006); *Peru*, para. 20, U.N. Doc. CCPR/CO/70/PER (2000).

⁴³ See, e.g., Human Rights Committee, *Concluding Observations: Poland*, para. 8, U.N. Doc. CCPR/CO/82/POL (2004); *Poland*, para. 23, U.N. Doc. CCPR/C/POL/CO/7 (2016); *Dominican Republic*, para. 15, CCPR/C/DOM/CO/5 (2012); *Jamaica*, para. 14, CCPR/C/JAM/CO/3 (2011); *Zambia*, para. 18, U.N. Doc. CCPR/C/ZMB/CO/3 (2007); CEDAW Committee, *Concluding Observations: Panama*, para. 43, U.N. Doc. CEDAW/C/PAN/CO/7 (2010); ESCR Committee, *Concluding Observations: Sri Lanka*, para. 34, U.N. Doc. E/C.12/LKA/CO/2-4 (2010); CAT Committee, *Concluding Observations: Peru*, para. 15, U.N. Doc. CAT/C/PER/CO/5-6 (2013).

⁴⁴ See, e.g., Human Rights Committee, *Concluding Observations: Honduras*, para. 8, U.N. Doc. CCPR/C/HND/CO/1 (2006); *Ireland*, para. 14, CCPR/C/IRL/CO/3 (2008); *Paraguay*, para. 10, U.N. Doc. CCPR/C/PRY/CO/2 (2006); *Poland*, para. 8, U.N. Doc. CCPR/CO/82/POL (2004); *Dominican Republic*, para. 15, CCPR/C/DOM/CO/5 (2012); CEDAW Committee, *Concluding Observations: Chile*, para. 19, U.N. Doc. CEDAW/C/CHI/CO/4 (2006); *Mauritius*, para. 30, U.N. Doc. CEDAW/C/MAR/CO/5 (2006); CAT Committee, *Concluding Observations: Peru*, para. 15, U.N. Doc. CAT/C/PER/5-6 (2013); ESCR Committee, *Concluding Observations: Peru*, para. 22, U.N. Doc. E/C.12/SLV/CO/3-5 (2014).

specified that in order to ensure women's right to life States should liberalize their abortion laws, including by repealing legislation criminalizing abortion⁴⁵ and removing procedural barriers.⁴⁶

Freedom from torture and other cruel, inhuman or degrading treatment or punishment:

Human rights mechanisms have repeatedly held that laws which prohibit and/or criminalize abortion in certain situations and practices that restrict or deny access to legal abortion services can give rise to cruel or inhuman or degrading treatment or punishment.⁴⁷ In a range of situations they have found individual women's rights to freedom from cruel, inhuman or degrading treatment to have been violated by restrictive abortion laws or practices.⁴⁸

Right to privacy: Human rights mechanisms have consistently held that a woman's decision whether or not to continue a pregnancy falls within the sphere of her right to privacy, and they have raised considerable concerns regarding respect for this right in situations where restrictive domestic laws, policies or practices interfere with a woman's decision to terminate a pregnancy.⁴⁹ In a wide range of cases they have held that restrictive abortion laws and practices have violated women's right to privacy.⁵⁰

⁴⁵ See, e.g., Human Rights Committee, *Concluding Observations: El Salvador*, para. 10, CCPR/C/SLV/CO/6 (2010); *Jamaica*, para. 14, CCPR/C/JAM/CO/3 (2011); CEDAW Committee, *Concluding Observations: Andorra*, para. 48, U.N. Doc. A/56/38 (2001).

⁴⁶ Human Rights Committee, *Concluding Observations: Macedonia*, para. 11, U.N. Doc. CCPR/C/MKD/CO/3 (2015).

⁴⁷ See, e.g., CAT Committee, *Concluding Observations: Poland*, para. 23, U.N. Doc. CAT/C/POL/CO/5-6 (2013); *Peru*, para. 15, U.N. Doc. CAT/C/PER/CO/5-6 (2013); *Nicaragua*, para. 16, U.N. Doc. CAT/C/NIC/CO/1 (2009); *El Salvador*, para. 23, U.N. Doc. CAT/C/SLV/CO/2 (2009); Human Rights Committee, *Concluding Observations: Ireland*, para. 9, U.N. Doc. CCPR/C/IRL/CO/4 (2014); *Malta*, para. 13, U.N. Doc. CCPR/C/MLT/CO/2 (2014); *Nicaragua*, para. 13, U.N. Doc. CCPR/C/NIC/CO/3 (2008).

⁴⁸ See *P. and S. v. Poland*, No. 57375/0 Eur. Ct. H.R. (2012); *R.R. v. Poland*, No. 27617/04 Eur. Ct. H.R., paras. 159-160 (2011); *Mellet v. Ireland*, Human Rights Committee, para. 7.4, Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016); *K.L. v. Peru*, Human Rights Committee, Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); *L.M.R. v. Argentina*, Human Rights Committee, Commc'n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).

⁴⁹ See, e.g., Human Rights Committee, *Concluding Observations: Malta*, para. 13, U.N. Doc. CCPR/C/MLT/CO/2 (2014); *Ireland*, para. 9, U.N. Doc. CCPR/C/IRL/CO/4 (2014); *Sierra Leone*, para. 14, U.N. Doc. CCPR/C/SLE/CO/1 (2014).

⁵⁰ *Mellet v. Ireland*, *supra* note 3, para. 7.8; *Tysiaç v. Poland*, No. 5410/03 Eur. Ct. H.R. (2007); *R.R. v. Poland*, No. 27617/04 Eur. Ct. H.R. (2011); *P. and S. v. Poland*, No. 57375/0 Eur. Ct. H.R. (2012); *A, B and C v. Ireland*, No. 25579/05 Eur. Ct. H.R. (2010); *K.L. v. Peru*, Human Rights Committee, para 6.4, Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); *L.M.R. v. Argentina*, Human Rights Committee, Commc'n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).

Right to health: Human rights mechanisms have also held that restrictive laws and policies on abortion undermine women’s right to the highest attainable standard of health. Treaty monitoring bodies have repeatedly expressed concerns about restrictive abortion laws and practices and urged States to make abortion legal and accessible in order to respect, protect and fulfil the right to health.⁵¹ In its 2016 General Comment on the Right to Sexual and Reproductive Health, the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) outlined that “[p]reventing unintended pregnancies and unsafe abortions requires States to adopt legal and policy measures to ... liberalize restrictive abortion laws; to guarantee women and girls access to safe abortion services and quality post-abortion care... and to respect the right of women to make autonomous decisions about their sexual and reproductive health.”⁵² Human rights mechanisms have also urged States to remove procedural barriers to access to abortion care, such as third-party authorization requirements⁵³ and medically unnecessary mandatory waiting periods, and to abolish biased counseling requirements.⁵⁴ They have also urged States to ensure the confidentiality of personal data of women and girls seeking abortion services,⁵⁵ and to lower the cost of abortion services and cover them under public health insurance.⁵⁶ They have also specified that where health practitioners are allowed under domestic law to refuse to provide

⁵¹ See, e.g., CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, para. 14, U.N. Doc. A/54/38/Rev.1 (1999) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*]; CEDAW Committee, *Concluding Observations: Poland*, paras. 36, 37(a)-(c), U.N. Doc. CEDAW/C/POL/C/7-8 (2014); *Andorra*, paras. 31(a)-(c), 32(a), U.N. Doc. CEDAW/C/AND/CO/2-3 (2013); *Liechtenstein*, paras. 38-39, U.N. Doc. CEDAW/C/LIE/CO/4 (2011); *the United Kingdom of Great Britain and Northern Ireland*, paras. 50-51, U.N. Doc. CEDAW/C/GBR/CO/7 (2013); *Malta*, paras. 34-35, U.N. Doc. CEDAW/C/MLT/CO/4 (2010); *Indonesia*, para. 42, U.N. Doc. CEDAW/C/IDN/CO/6-7 (2012); *New Zealand*, paras. 33-34, U.N. Doc. CEDAW/C/NZL/CO/7 (2012), *Pakistan*, para. 32(d), U.N. Doc. CEDAW/C/PAK/CO/4 (2013); ESCR Committee, *Concluding Observations: Poland*, paras. 46-47, U.N. Doc. E/C.12/POL/CO/6 (2016); *Ireland*, para. 30, U.N. Doc. E/C.12/IRL/Co/3 (2015); *Nicaragua*, para. 26, U.N. Doc. E/C.12/NIC/CO/4 (2008); CRC Committee, *Concluding Observations: Poland*, paras. 38-39, U.N. Doc. CRC/C/POL/CO/3-4 (2015); *Costa Rica*, para. 64(d), U.N. Doc. CRC/C/CRI/CO/4 (2011); *Nicaragua*, para. 59(b), U.N. Doc. CRC/C/NIC/CO/4 (2010); *L.C. v. Peru*, CEDAW Committee, Commc’n No. 22/2009, para. 9(b)(i), U.N. Doc. CEDAW/C/50/D/22/2009 (2011).

⁵² ESCR Committee, *Gen. Comment No. 22*, *supra* note 7, para. 28.

⁵³ See, e.g., CEDAW Committee, *Concluding Observations: Slovakia*, para. 31, U.N. Doc. CEDAW/C/SVK/CO/5-6 (2015); CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 51, para. 14; ESCR Committee, *Gen. Comment No. 22*, *supra* note 7, para. 41.

⁵⁴ See, e.g., CEDAW Committee, *Concluding Observations: Hungary*, para. 30, U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013); *Russian Federation*, paras. 35-36, U.N. Doc. CEDAW/C/RUS/CO/8 (2015); *Slovakia*, para. 31, U.N. Doc. CEDAW/C/SVK/CO/5-6 (2015); see also ESCR Committee, *Gen. Comment No. 22*, *supra* note 7, para. 41.

⁵⁵ See, e.g., ESCR Committee, *Concluding Observations: Slovakia*, para. 24, U.N. Doc. E/C.12/SVK/CO/2 (2012); CEDAW Committee, *Concluding Observations: Slovakia*, para. 31, U.N. Doc. CEDAW/C/SVK/CO/5-6 (2015).

⁵⁶ CEDAW Committee, *Concluding Observations: Croatia*, para. 31, U.N. Doc. CEDAW/C/HRV/CO/4-5 (2015); *Slovakia*, para. 31, U.N. Doc. CEDAW/C/SVK/CO/5-6 (2015); ESCR Committee, *Concluding Observations: Slovakia*, para. 24, U.N. Doc. E/C.12/SVK/CO/2 (2012).

abortion services on grounds of conscience, States must adopt a regulatory framework that guarantees that women's access to abortion services is not undermined by such refusals.⁵⁷

Rights to non-discrimination and equality: Human rights mechanisms have repeatedly considered failures to ensure women and girls' unhindered access to safe and legal abortion, to be forms of discrimination and inequality in the enjoyment of rights.⁵⁸ For example, the CEDAW Committee has outlined that laws that prohibit or undermine women's ability to access reproductive health services that only women need violate their rights to equality and non-discrimination.⁵⁹ The ESCR Committee has also explicitly recognized that criminalization of abortion and restrictive abortion laws undermine women's autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health.⁶⁰ It has specified that the realization of women's right to health and to gender equality requires States to liberalize restrictive abortion laws and to ensure women's ability to access safe abortion services.⁶¹ The UN Working Group on the Issue of Discrimination against Women in Law and in Practice has similarly outlined that "[e]quality in reproductive health requires access, without discrimination, to ... safe termination of pregnancy."⁶² It has recommended that in order to end discrimination against women, States should "[r]ecognize women's right to be free from

⁵⁷ See, e.g., International Planned Parenthood Federation – European Network (IPPF EN) v. Italy, European Committee of Social Rights, No. 87/2012 (2014); CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 51, para. 11; ESCR Committee, *Gen. Comment No. 22*, *supra* note 7, paras. 14, 43; CEDAW Committee, *Concluding Observations: Croatia*, para. 31, U.N. Doc. CEDAW/C/HRV/CO/4-5 (2015); *Hungary*, paras. 30-31, U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013); CRC Committee, *Concluding Observations: Slovakia*, paras. 40(f), 41(f), U.N. Doc. CRC/C/SVK/CO/3-5 (2016); ESCR Committee, *Concluding Observations: Poland*, para. 28, U.N. Doc. E/C.12/POL/CO/5 (2009).

⁵⁸ See, e.g., CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 51, paras. 11-12; ESCR Committee, *Gen. Comment No. 22*, *supra* note 7, paras. 9-10; Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover*, paras. 16, 34, U.N. Doc. A/66/254 (Aug. 3, 2011) [hereinafter 2011 Special Rapporteur on Health Report].

⁵⁹ *Alyne da Silva Pimentel Teixeira v. Brazil*, CEDAW Committee, Commc'n No. 17/2008, paras. 7.6-7.7, U.N. Doc. CEDAW/C/49/D/17/2008 (2011); *L.C. v. Peru*, CEDAW Committee, Commc'n No. 22/2009, paras. 8.11, 8.15, U.N. Doc. CEDAW/C/50/D/22/2009 (2011); CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 51, para. 11. See also ESCR Committee, *Gen. Comment No. 22*, *supra* note 7, para. 28.

⁶⁰ ESCR Committee, *Gen. Comment No. 22*, *supra* note 7, para. 34.

⁶¹ ESCR Committee, *Gen. Comment No. 22*, *supra* note 7, para. 28.

⁶² U.N. Working Group on the Issue of Discrimination against Women in Law and Practice, *Rep. of the Working Group*, Human Rights Council (32nd Sess., 2016), para. 23, U.N. Doc. A/HRC/32/44 (2016) [hereinafter Report of the U.N. Working Group on Discrimination against Women].

unwanted pregnancies and ensure access to affordable and effective family planning measures. Noting that many countries where women have the right to abortion on request supported by affordable and effective family planning measures have the lowest abortion rates in the world, States should allow women to terminate a pregnancy on request during the first trimester.”⁶³

Accordingly, in this context, the 1978 Act is consistent with Croatia’s international human rights obligations regarding access to safe abortion. Invalidating or restricting the Act would contradict international human rights standards and jurisprudence and would call into question Croatia’s compliance with its international legal obligations.

V. Any Measure to Restrict Croatia’s Abortion Law Would be an Unjustified Retrogressive Step at Odds with International Human Rights Law and Standards

Under international human rights law, the introduction of retrogressive measures - deliberately backward steps in law or policy that directly or indirectly impede or restrict enjoyment of a right - will almost never be permissible.⁶⁴ Under the International Covenant on Economic, Social and Cultural Rights (ICESCR), this principle applies to the right to health and generally precludes the adoption of retrogressive measures in the health care sphere.⁶⁵ As such, state laws, policies, and practices that introduce new restrictions on the exercise of the right to health, or that erect new barriers in access to health services, will immediately call into question compliance with international human rights law and standards.⁶⁶

⁶³ Report of the U.N. Working Group on Discrimination against Women, *supra* note 62, para. 107(c).

⁶⁴ See Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, para. 1)*, (5th Sess., 1990), para. 9, U.N. Doc. E/1991/23 (1990) [hereinafter ESCR Committee, *Gen. Comment No. 3*]; International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Guideline 14(e): Violations through Acts of Commission (1997), available at <http://www.refworld.org/docid/48abd5730.html>; United Nations Commission on Human Rights, *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Principle 72, U.N. Doc. E/CN.4/1987/17 (1987).

⁶⁵ ESCR Committee, *Gen. Comment No. 22*, *supra* note 7, para. 38.

⁶⁶ See ESCR Committee, *General Comment No. 3*, *supra* note 64, para. 9; Committee on Economic, Social, and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, (22nd Sess., 2000), paras. 32, 48, 50, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter ESCR Committee, *Gen. Comment No. 14*].

Repealing the 1978 Act, or otherwise restricting women's access to abortion from what Croatian law currently allows, would be a retrogressive step that has no justification in international public health and clinical guidelines or international human rights law. As a result, it would contravene the international requirement of non-retrogression and violate Croatia's international human rights obligations.

Indeed, there is no evidence-based recommendation from an international public health or medical body that calls on Croatia, or any other State, to restrict its abortion laws or to prohibit abortion on a woman's request. On the contrary, as this submission has outlined, evidence-based public health and clinical standards recommend that States ensure timely access to safe abortion services in practice in order to reduce negative physical and mental health outcomes for women and to promote and protect women's health.

Similarly, repealing or restricting the 1978 Act has no justification in international and European human rights law. On the contrary, repeated articulation of concerns by international human rights mechanisms regarding restrictive abortion laws and practices and their calls on States to guarantee access to safe abortion services clearly shows that international human rights law requires States to move towards the legalization of abortion on request and not towards increased restrictions.⁶⁷ As in the case of public health and clinical standards, there has never been any recommendation by international or European human rights mechanism that has called for the restriction of an abortion law that allows women to access abortion services.

Lastly, repealing or restricting the 1978 Act cannot be justified as an effective means of state protection of prenatal life. As outlined in Section II, evidence demonstrates that restricting legal access to abortion does not lead to fewer abortions. Nor does it reduce a need for abortion. Instead, restrictive abortion laws put women's health and lives at risk by forcing them to terminate unwanted pregnancies through clandestine and often unsafe procedures, or to travel abroad to obtain legal abortion services. Moreover, as the Special Rapporteur on the Right to

⁶⁷ See Section IV and accompanying text. See also COUNCIL OF EUROPE PARL. ASS., *Resolution on Access to Safe and Legal Abortion in Europe*, 15th Sess., Doc. No. 1607 (2008).

Health has outlined, “[p]ublic morality cannot serve as a justification for enactment or enforcement of laws that may result in human rights violations, including those intended to regulate sexual and reproductive conduct and decision-making.”⁶⁸ As such, he has specified that “[w]hen criminal laws and legal restrictions used to regulate public health are neither evidence-based nor proportionate, States should refrain from using them to regulate sexual and reproductive health, as they not only violate the right to health of affected individuals, but also contradict their own public health justification.”⁶⁹ Instead of criminalizing or restricting access to abortion, States that wish to protect prenatal life should do so through measures that respect women’s autonomy in reproduction and their human rights.⁷⁰

VI. Conclusion

There is no basis in international human rights law for invalidating Croatia’s 1978 abortion law or for recognizing a prenatal right to life. The 1978 law is consistent with Croatia’s international human rights treaty obligations as well as with its obligations under European human rights law. It is also consistent with the standard legislative and constitutional practice of European States. Any decision to restrict the law would gravely jeopardize women’s lives and health, would undermine women’s equality and would constitute an unjustifiable retrogressive step in direct contravention of Croatia’s international legal obligations.

⁶⁸ 2011 Special Rapporteur on Health Report, *supra* note 58, para. 18.

⁶⁹ 2011 Special Rapporteur on Health Report, *supra* note 58, para. 18.

⁷⁰ See, e.g., Acórdão n.º 75/2010, *supra* note 5, para. 11.4.18; Rubio-Marín, *Abortion in Portugal*, *supra* note 7, at 51. The Portuguese Constitutional Court outlined that the State protection of prenatal life is more effective when it is realized through education and social policy measures “favoring responsible conception as well as willingness to continue pregnancy,” such as providing sexuality education, family planning services, as well as ensuring decent living and working conditions. See also CENTER FOR REPRODUCTIVE RIGHTS, *Whose Right to Life? Women’s Rights and Prenatal Protections under Human Rights and Comparative Law*, sec. IV (2014), available at https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP_RTL_ENG_Updated_8%2014_Web.pdf.