The Right to Health and the Criminalization and Regulation of Sexual and Reproductive Health

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I would like to thank the organizers of this important conference, PROMSEX, GIRE and Planned Parenthood, and Ximenes Casas in particular, for inviting me to present here today. My comments will be based largely on the report of the UN Special Rapporteur on the Right to Health, Mr. Anand Grover on the right to sexual and reproductive health. I had the opportunity to work with Anand as a Senior Research Officer in New Delhi, India from 2010 to 2012 and I worked closely with him on the conceptualization and drafting of the report, which was submitted to the UN General Assembly in 2011. The report examines the criminalization and regulation of sexual and reproductive health in the context of the international right to health.

I. Introduction

The use of overt physical coercion by the State in the area of sexual and reproductive health, such as in cases of forced sterilization and forced abortion, has long been recognized as an egregious human rights violation. Similarly, when the State uses the law as a tool to regulate and control the conduct and decision-making of women in the area of sexual and reproductive health, it coercively substitutes its will for that of the individual. This coercion, in many instances, also amounts to a serious human rights violation.

Laws that regulate women's conduct and decision-making in the area sexual and reproductive health take on a variety of forms around the world. They include criminal laws prohibiting induced abortion, municipal regulations prohibiting the sale of certain contraceptives, administrative rules requiring abstinence-only sex education in schools, and laws criminalizing the transmission of HIV from mother-to-child. In practice, these laws affect a wide range of individuals, including women who attempt to undergo abortions or seek contraception; friends and family members who assist women to access contraception and abortions; medical professionals that provide sexual and reproductive health services; teachers that provide sex education; adolescents seeking access to contraception for consensual sexual activity; pharmacists that supply contraceptives; employees of institutions that distribute family planning goods and services; and human rights defenders advocating for sexual and reproductive health rights.

Criminal laws and other legal regulations affecting sexual and reproductive health infringe women's dignity, impermissibly restrict their autonomy, stigmatize their behavior, and place their health and lives at risk. These laws also reduce the availability of and access to family planning goods and services, sexual and reproductive health information, and safe abortions.

Dignity and Autonomy

The right to health, like all human rights, is founded upon the normative imperative to respect human dignity and personal autonomy. In the context of the

right to health, respect for dignity and autonomy requires States and non-state actors:

(1) To treat individuals, including women and girls, as subjects rather than objects under the law;
(2) To refrain from intruding into the intimate, physical and emotional spheres wherein health-related decisions are made; and
(3) To abstain from enacting laws or policies that increase physical or mental health risks for individuals or communities, and instead to take positive steps toward promoting the health of individuals and communities.

Criminal laws and other legal restrictions in the area of sexual and reproductive health infringe upon each of these imperatives that underlies respect for human dignity and personal autonomy: First, these laws treat woman and girls as objects under the law, in that they restrict or eliminate women's agency in the area of sexual and reproductive health; Second, they intrude into the intimate spaces where sexual and reproductive health decisions are made by severely limiting the range of available options and often forcing women to make reproductive choices under the undue influence of unsympathetic family members and heath professionals; and Third, they increase health risks for women, contributing to alarmingly high levels of maternal morbidity and mortality amongst women across the world.

To illustrate this last point, I would like to share some statistics:

- Each year, 20 million unsafe abortions are performed, constituting half of all abortions performed globally.
- These unsafe abortions account for 13% of all maternal deaths globally.
- A further 5 million women and girls suffer short- and long-term injuries resulting from unsafe abortions.
- 222 million women in the developing world have an unmet need for family planning, and would like to stop bearing children but are unable to do so.
- In sub-Saharan Africa, only 36% of young men and 28% of young women have a comprehensive and accurate understanding of HIV.

Criminal laws and other regulations affecting sexual and reproductive health disempower women. Such laws deter women from taking steps to protect their health in order to avoid legal liability and out of fear of stigmatization. By restricting access to sexual and reproductive health goods, services and information, these laws also have a discriminatory effect. That is, they disproportionately affect individuals in need of such resources, namely women. As a result, women and girls are punished both when they abide by these laws, and are thus subjected to poor physical and mental health outcomes, and when they do not, and thus face punitive sanction and even incarceration.

States most frequently cite two grounds for implementing criminal and other restrictive laws affecting sexual and reproductive health: public health and public morality. However, is well established that public morality cannot serve as a legitimate justification for the enactment or enforcement of laws that result in human rights violations, including those intended to regulate sexual and

reproductive conduct and decision-making. And although promoting public health is a legitimate State aim, measures taken to fulfill this aim must be both evidence-based and proportionate to ensure respect of human rights. In most cases, however, criminal laws and other legal restrictions used to regulate sexual and reproductive health are neither evidence-based nor proportionate. They therefore contradict their own public health justification.

II. Right to Sexual and Reproductive Health in International Law

The right to sexual and reproductive health is recognized and protected under international law. Most significantly, it is a fundamental part of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights. I will refer to this right as the international right to health. It is important, in this respect, to note that every country in Central and South America has signed and ratified this Covenant.

The UN Committee on Economic, Social and Cultural Rights is the treaty body tasked with monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights. General Comment 14 is the Committee's authoritative elaboration on the content and scope of the international right to health in Article 12 of the Covenant.

General Comment No. 14 provides in paragraph 14 that the right to health includes measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, prenatal and post-natal care,

emergency obstetric services, and access to information, as well as to resources necessary to act on that information. It further notes in paragraph 21 that women's right to health requires *the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health*. Finally, footnote 12 in General Comment 14 states: "reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as the right of access to appropriate" maternal health care services.

The Convention to Eliminate All Forms of Discrimination against Women explicitly mentions the right of women to access family planning in three separate provisions. For example, Article 12 of the Convention directs States to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure . . . access to health care services, including those related to family planning." Article 16 mandates that women be provided the "rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise those rights."

The Convention on the Rights of the Child affirms the international right to health for children and adolescents and directs States to take appropriate measures "to develop . . . family planning education and services."

Reproductive rights also feature prominently in the Programme of Action of the 1994 International Conference on Population and Development, the 1995 Beijing Platform for Action, and the Millennium Development Goals. These instruments affirm the right of women to control all aspects of their health, the right to respect for bodily autonomy and integrity, and the right to decide freely in matters relating to sexuality and reproduction, free of discrimination, coercion and violence. The Beijing Platform for Action further directs States to consider removing punitive measures against women who have undergone abortions.

I will now briefly consider the impact of criminal laws and other legal restrictions on four areas where these laws intersect with sexual and reproductive health. These are: contraception and family planning; the criminalization of conduct during pregnancy; sexual and reproductive health information and education; and abortion.

III. Contraception and Family Planning

First, contraception and family planning:

Access to family planning goods and services is an integral component of the right to health. The WHO defines family planning as a process that allows people to attain their desired number of children and determine the spacing of pregnancies, which is achieved through use of contraceptive methods and the treatment of infertility. Family planning empowers women to make autonomous and informed choices about their sexual and reproductive health. It also reduces

maternal mortality and morbidity: evidence shows that access to voluntary family planning can reduce maternal deaths by between 25 and 40 per cent.

Access to family planning lies at the core of the right to sexual and reproductive health because it directly implicates two necessary conditions for respect for human dignity in the context of health: First, the right to make health-related decisions free from intrusion by the State; and Second, the obligation that the State refrain from enacting laws or policies that increase health risks. That is, criminal laws and other regulations that restrict access to family planning interfere with women's decision-making in the intimate area of sexual and reproductive health and result in increased exposure to maternal mortality and morbidity.

Moreover, in empowering women to choose whether and when to reproduce, family planning is integral to the development and full participation of women in society. In fact, strong links have been observed between women's use of contraception and opportunities to work outside of the home. For instance, in one country, the average income growth for women with one to three pregnancies was twice that of women who had been pregnant more than seven times. Another survey has suggested that the number of woman in the labor force is directly related to national birth rates.

Criminal laws and other legal restrictions that reduce or deny access to family planning goods and services, including modern contraceptive methods, such as emergency contraception, infringe upon the right to health. Nonetheless, some

States have criminalized the distribution and use of emergency contraception or have restricted access to tubal ligation, a safe and effective sterilization procedure for women. In both instances, women are likely to seek contraceptive alternatives on the informal market and may be exposed to increased health risks due to the unregulated nature of illegal health services. Some jurisdictions have banned so-called “artificial” contraception, others require women to obtain their husband’s consent and adolescents to obtain parental consent to obtain various forms of contraception, still others allow pharmacists to refuse to dispense emergency contraception, which is otherwise legally available. These laws directly infringe upon the right of women and girls to make free and informed choices about their sexual and reproductive health and reflect discriminatory notions of women’s roles in family and society.

The obligation to respect the right to health requires that States abstain from limiting access to contraceptives. Criminal laws and other regulations limiting access to family planning goods, services and information should therefore be removed immediately, in accordance with the right to health. Moreover, the obligation to fulfill the right to health requires states to take positives steps to ensure the availability and accessibility of a broad range of family planning goods and services.

IV. Criminalization of Conduct During Pregnancy

Second, the criminalization of conduct during pregnancy:

In several jurisdictions, pregnant women have been prosecuted for various types of conduct during pregnancy. Many of the prosecutions have occurred in relation to the use of illicit drugs by pregnant woman, under pre-existing laws related to child abuse, attempted murder, manslaughter and criminally negligent homicide. Criminal laws have also been used to prosecute women for other conduct during pregnancy, including: alcohol use; failing to follow a doctor's orders; concealment of birth; failing to refrain from sexual intercourse; the birth of stillborn babies; and the miscarriage of a fetus.

Some States have also criminalized perinatal HIV transmission. In one country in West Africa, a person living with HIV, who is aware of the fact, must "'take all reasonable measures and precautions to prevent the transmission of HIV to others." This includes the transmission of HIV from a pregnant woman to a fetus. Criminal sanctions are imposed for the failure to take all reasonable measures to avoid transmission and no exception or defense is allowed based on the unavailability of HIV medicines, such as anti-retrovirals. This means a woman can be criminally prosecuted for transmitting HIV to a fetus even when she lacks access to medicines to prevent such transmission. Statutes from other jurisdictions that criminalize HIV transmission generally may also be applied to pregnant women.

The criminalization of conduct during pregnancy impedes access to sexual and reproductive health goods and services and infringes the right to health of pregnant women. When women fear criminal prosecution, they are deterred from seeking health services and pregnancy-related information. For example, women

living with HIV may not seek out antenatal care if they are faced with the risk of prosecution from transmitting HIV. They may also simply avoid HIV testing altogether. This poses a risk to the health of both the woman and the fetus and undermines public health objectives related to HIV.

As with many criminal laws in the area of health, the criminalization of conduct during pregnancy is justified on grounds of public health. As mentioned before, while concerns for public health may justify some degree of interference with personal freedoms, in most cases public health goals are not realized through criminalization, but are rather undermined by it, as in the case of the criminalization of unintentional HIV transmission.

Additionally, the application of criminal law to regulate conduct such as alcohol consumption during pregnancy is a disproportionate measure and an ineffective deterrent. In order to protect women's right to health and simultaneously promote public health, States should not criminalize such conduct during pregnancy. Rather, they should ensure access to health goods, services and information that promote health throughout pregnancy and childbirth.

V. Sexual and Reproductive Health Information and Education

Third, sexual and reproductive health information and education:

The provision of comprehensive education and information on sexual and reproductive health is an essential component of the right to health. It is also critical to the realization of other rights, such as the right to education and the right of access to information. Knowledge about sexual and reproductive health

has proven to be effective in lowering rates of maternal mortality; delaying the onset of sexual intercourse; increasing knowledge about family planning; protecting against gender-based violence; and preventing unintended pregnancies, unsafe abortions, and exposure to HIV and other sexually transmitted infections. The obligation of States to fulfill the right to health requires that they develop strategies to ensure that comprehensive sexual and reproductive health education and information is available to everyone, especially women and young girls.

[INTERNATIONAL LAW] General Comment 14 of the Committee on Economic, Social and Cultural Rights emphasizes the importance of access to health information as a part of the right to health. It states explicitly that the right to health includes “access to health-related education and information, including on sexual and reproductive health.” The Committee on the Elimination of Discrimination against Women has declared that a comprehensive understanding of the content of sexual and reproductive education includes topics such as responsible sexual behavior, prevention of sexually transmitted infections, prevention of teenage pregnancies, family planning, and reproductive rights. The International Guidelines on Sexuality Education developed by UNESCO describe optimal sexual education as “an age-appropriate, culturally sensitive and comprehensive approach … that includes programmes providing scientifically accurate, realistic, non-judgmental information”.

In jurisdictions where aspects of sexual and reproductive health are criminalized or highly regulated, the availability of related information is greatly

restricted. For example, penal codes may contain specific provisions that prohibit dispensing information on the prevention or interruption of pregnancies, such as how to use contraception and other family planning services as well as medically accurate information on abortion. Punishments under such laws can range from fines to imprisonment. The restriction of information relating to sexual and reproductive health can also be an unintended consequence of laws regulating other activities, such as pornography laws and laws that restrict discussions of homosexuality in the classroom.

In many cases, laws and policies that restrict access to information about sexual and reproductive health fuel stigma and discrimination of vulnerable minorities. These include laws and policies that censor discussions of non-hetero sexual orientations in the classroom and those that promote abstinence-only education as a means to avoiding sexually transmitted infections and unintended pregnancies. Abstinence-only education, for instance, focuses solely on procreation and provides a narrow and incomplete perspective on sexual and reproductive health. This reduces sexual education to images and stereotypes of heteronormativity. Abstinence-only programs also often lack accurate, evidence-based information and have been shown to have minimal or no effect on reducing the transmission of sexually transmitted infections. Moreover, these laws and policies perpetuate false and negative stereotypes about sexuality, they alienate and stigmatize students of different sexual orientations, and they prevent *all* students from making fully informed choices regarding their sexual and reproductive health.

Laws that restrict access to comprehensive sexual and reproductive health education and information disproportionally impact women and girls. This both generates and exacerbates gender inequalities. The lack of access to accurate sexual and reproductive health information forces women and girls to obtain information through informal sources, such as friends and family members and community and religious leaders. Information from these nonprofessional sources is often inaccurate and incomplete. This in turn may reinforce negative gender stereotypes and lead to medically unsafe choices. As a result, young women are unprepared for their sexual and reproductive lives. This leaves them vulnerable to coercion, abuse and exploitation, and it increases the risk of unintended pregnancy, unsafe abortion, maternal mortality, and exposure to HIV and other sexually transmitted infections.

Accurate and comprehensive information about sexual and reproductive health empowers women. It enhances their freedom to make informed decisions about their health and sexuality. This is especially important as women often lack equal power or control in their relationships with men. In this sense, providing women and girls this knowledge gives them a tool with which to begin dismantling deeply entrenched systems of patriarchy. Accurate and comprehensive information about sexual and reproductive health also cultivates positive health outcomes and promotes women's equal participation in society. The right to health thus requires states to remove barriers *and* to take positive steps to develop strategies to ensure women and girls have access to

comprehensive and accurate sexual and reproductive health information and education.

VI. Abortion

Lastly, abortion:

Criminal laws penalizing and restricting induced abortion are paradigmatic examples of impermissible barriers to the realization of women's right to health. These laws infringe women's dignity and autonomy by severely restricting decision-making in the area of sexual and reproductive health and requiring women to continue unplanned pregnancies and give birth when it is not their choice to do so. Moreover, such laws consistently generate poor physical health outcomes, resulting in preventable deaths, morbidity and ill health. They also contribute to negative mental health outcomes, in part because of the anguish women experience when they risk being thrust into the criminal justice system as a result of choosing to terminate a pregnancy.

[INTERNATIONAL LAW] The Committee on the Elimination of Discrimination against Women has strongly disapproved of restrictive abortion laws, especially those that prohibit and criminalize abortion in all circumstances. The Committee has also confirmed that these laws do not prevent women from procuring unsafe, illegal abortions. The Committee on the Rights of the Child has urged States to develop and implement programs that provide adolescents access to sexual and reproductive health services, including safe abortions. The Committee against Torture has stated that punitive abortion laws should be reassessed because

they may lead to violations of women's right to be free from inhuman and cruel treatment. The UN Human Rights Committee has expressed the need to review restrictive abortion laws to ensure equality between men and women in the area of health and to eliminate discrimination in the provision of health goods and services. The former Special Rapporteur on the right to health, Mr. Paul Hunt, called for removal of punitive measures against women who seek abortions during his tenure as Special Rapporteur.

The WHO has confirmed that it is *the law* largely determines whether women with unplanned pregnancies have a safe or an unsafe abortion. Because legal restrictions primarily influence whether abortion is safe or unsafe, and not whether women seek out the procedure, more unsafe abortions are likely to occur under legal regimes that restrict access to abortion. In fact, the WHO has shown that abortion-related mortality is higher in regions where restrictive abortion laws prevail. Therefore both the incidence of unsafe abortions and the ratio of unsafe to safe abortions are directly correlated to the degree to which abortion laws are restrictive and/or punitive.

The WHO defines an unsafe abortion as "a procedure for terminating an unintended pregnancy carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both." The conditions under which unsafe abortions occur include: situations where women lack access to information, particularly concerning when and how legal abortions may be obtained; situations where abortion is induced by unskilled practitioners, in unhygienic conditions, or by healthcare workers outside

of appropriate medical facilities; and instances when abortion is induced by women themselves or by traditional practitioners. The criminalization of abortion creates and perpetuates these unsafe conditions. Moreover, in States where abortion is prohibited, health and safety regulations necessary to ensure safe abortions, such as provisions for the training and licensing of health-care workers, do not exist. This further increases the likelihood that women will undergo unsafe abortions.

Even where clandestine abortions are performed in relatively safe, hygienic settings, they may be financially inaccessible to disadvantaged women. In these circumstances, poor women may instead turn to unsafe, self-induced abortions. For instance, in one Latin American country, among women obtaining an abortion, the proportion of women who go to traditional birth attendants is three times as high among poor rural women than among wealthier urban women. In Guatemala and Mexico, 42 to 67 per cent of poor women who have an abortion experience health complications that require medical treatment, compared with only 28 to 38 per cent of wealthier women. In this sense, restrictive abortion laws are discriminatory in effect.

However, in more liberal regimes, where abortion is not criminalized, unsafe abortions are rare. In these countries, women are able to legally seek abortion services through professional healthcare providers, under safe and medically appropriate circumstances, including the use of medical abortion pills. In fact, the WHO has stated that, when performed by trained health-care providers under

appropriate conditions, abortion is one of the safest medical procedures available.

The criminalization of abortion stigmatizes the medical procedure as well as the women who seek abortions. Abortion-related stigma prevents women from seeking abortions and prevents those who undergo abortions from requesting treatment for resulting medical complications. Women who have had abortions are often marginalized in their communities and face discrimination as a result of the stigmatization surrounding the procedure. Where narrow exceptions to the criminalization of abortion exist, such as to save the life of the woman, women are often unaware of the exceptions because the stigma surrounding abortion prevents open and accurate discussion about the procedure and the law that regulates it. The gross underreporting of abortion is another indicator of the magnitude of the stigma attached to abortion: only an estimated 35 to 60 per cent of abortions are reported.

Stigma resulting from the criminalization of abortion creates a vicious cycle: criminalization results in women seeking clandestine, unsafe abortions; the stigma resulting from procuring an unsafe, illegal abortion—and thereby breaking the law—perpetuates the notion that abortion is an immoral practice and that the procedure is inherently unsafe; this in turn supports the continuing criminalization of the procedure.

The criminalization of abortion also has a severe impact on women's mental health. The need to seek illegal health services and the intense stigmatization of

both the abortion procedure and the women who seek the procedure can negatively impact mental health. In some cases, women have committed suicide because of accumulated pressures and stigma related to abortion.

Pursuant to the right to health, states should decriminalize abortion and take measures to ensure that safe abortion services are available, accessible, and of good quality. Safe abortions, however, will not immediately be available upon decriminalization unless the conditions under which they may be provided are fostered. These include: the provision of training on the abortion procedure for physicians and health workers; the enactment of medical licensing requirements; the availability of effective medicines and equipment; and accessible health clinics.

Finally, regardless of the legal status of abortion, women are entitled under the right to health to access good quality health services for the management of complications arising from unsafe abortions and miscarriages. Laws in restrictive regimes must not require health workers to report women for abortion-related care to law enforcement or judicial authorities. Such care must be available unconditionally, even where the threat of criminal punishment is present. Moreover, it should not be contingent on a woman's cooperation in a subsequent criminal prosecution or used as evidence in a legal proceeding against her or the abortion providers.

VII. Conclusion

In conclusion, the right to sexual and reproductive health is an integral part of the international right to health enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights. The right to health requires states to remove barriers and to take positive steps to ensure access to family planning goods and services. It requires the removal of laws that criminalize certain conduct during pregnancy, including alcohol consumption and mother-to-child transmission of HIV. The right to health recognizes the importance of accurate and comprehensive information and education on sexual and reproductive health and requires states to ensure women and girls have access to such information. Finally, the right to health directs states to remove laws that criminalize abortion and, regardless of the legal status of the procedure, to ensure access to good quality health services for the management of complications arising from unsafe abortions and miscarriages.