

# WHEN ABORTION IS A CRIME

The threat to vulnerable  
women in Latin America



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# **When Abortion Is a Crime**

## **The threat to vulnerable women in Latin America**

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## Executive Summary

While abortion is one of the world's oldest medical practices, laws criminalizing abortion are a relatively new phenomenon. The assumed intent is that the threat of arrest or imprisonment will prevent women from having abortions. But it is clear that criminal abortion laws do not stop abortion and have devastating negative effects on women's lives.

From 2011 to 2013, Ipas conducted an investigation into the enforcement of laws criminalizing abortion in three South American countries—Bolivia, Brazil and Argentina. The project sought to answer some fundamental questions: How many women are being arrested? How are these laws being enforced? What is the impact on women, their families and health-care providers when the law makes them criminals for terminating a pregnancy?

This report reveals the varied ways in which the punitive power of the state harms women's reproductive autonomy, puts them at risk of arrest and imprisonment, and forces health-care providers to make unethical decisions about their patients.

In Bolivia, Brazil and Argentina, abortion is highly restricted. In the rare occasions when abortion is legal, the barriers to access are insurmountably high. These barriers include refusal by medical professionals to provide care, legal requirements necessitating a judge's authorization before an abortion is permitted, and burdensome waiting periods, among others.

As a result, women who feel they cannot carry a pregnancy to term risk their health and lives by resorting to unsafe abortion; they also risk being charged with a crime.

This report documents accounts of hundreds of women and health-care providers who have been reported, arrested, charged, detained and sometimes imprisoned for violating abortion-related laws. It is based on both quantitative and qualitative data, mainly focused on the period between 2006 and 2012. It includes statistics from police archives and judicial records; media reports; medical records; in-depth interviews with women and agents of the state; and analysis of judicial proceedings.

It is the first in a series that Ipas will issue on the impact of criminalization of abortion in countries around the world.

### Selected findings

In **Bolivia**, police investigations were initiated in 775 cases from 2008-2012, although relatively few led to convictions. Under Bolivian law, women who are pregnant as the result of rape must begin criminal proceedings against the perpetrator before they can request judicial authorization for an abortion. But judges rarely authorize abortions, generally claiming conscientious objection based on religious and moral grounds. In one troubling case, **a 28-year-old woman in the city of Santa Cruz become pregnant as the result of rape.** She attempted to self-induce an abortion and ended up in the hospital with severe complications. While in the hospital, she was reported to the police authorities by her doctor, was apprehended and handcuffed on charges of illegal abortion. She spent her 10-day hospital stay under police custody and was then **transferred to a prison where she subsequently spent eight months in preventive detention.**

In **Brazil**, between 2007-2011 in Rio de Janeiro state, there were 334 police reports involving women who had had illegal abortions. Court records from 2007-2010 show that 128 women were prosecuted. In one case a **woman was arrested in the hospital after seeking postabortion care**. She was unable to afford bail and remained handcuffed to her hospital bed for three months.

This report also examines the human rights violations that occurred when police, in search of abortion law violations, raided a private family planning clinic in **Mato Grosso do Sul in 2007, confiscating the medical records of more than 9,600 female patients**. Four staff members at the clinic were prosecuted for participating in abortions and received prison sentences ranging from four to seven years.

In **Argentina**, 417 cases of women or providers arrested for illegal abortions were identified in the period from 1990-2008. In 2011, one case involved a young physician with two children who was arrested and spent more than a year under threat of criminal prosecution because she had prescribed misoprostol, a medical drug recommended by the World Health Organization for termination of pregnancy. The physician knew that prescribing the drug was illegal in Argentina, but the pregnant 12-year-old girl she was working with had made it clear that she intended to end the pregnancy at any cost. The charges against the doctor were eventually dismissed, but she had to suffer the stigma and uncertainty of the case against her for more than a year.

### **Human rights obligations**

These cases and others documented in this report clearly demonstrate that criminalization of abortion raises significant human rights as well as ethical and public health concerns. When women and, in some cases, the health-care providers who assist them, become targets of enforcement, they often are stripped of their rights to due process and judicial guarantees and protections. The right to equal treatment and non-discrimination is violated when, as in each of these countries, women who are poor, young and uneducated are most likely to be prosecuted. By contrast, women who are older, have resources and are educated can travel, if necessary, to obtain safe and legal abortions without fear of arrest. The right to privacy and medical confidentiality is violated when confessions are obtained while women are receiving care in hospitals or during gynecological exams. The right to privacy also is violated when providers report women who are hospitalized to law enforcement authorities. As this report shows, many providers do, even though the abortion laws in Argentina, Bolivia and Brazil do not require them to report illegal abortion.

In addition, the findings in this report are further evidence that criminalizing abortion does not prevent abortion. Criminal abortion laws simply force women to obtain illegal and unsafe abortions. Approximately 21 million women undergo unsafe abortion each year, almost exclusively in countries with restrictive abortion laws. The end result is that 47,000 women die each year and millions more are treated for complications that often result in lifelong injuries and disabilities.



## Recommendations

In light of these findings, Ipas recommends that all governments with restrictive laws take steps to:

- Remove abortion from criminal or penal codes and treat it as any other health-care service
- Eliminate barriers to access to safe and legal abortion
- Educate the judiciary, police and health sectors on sexual and reproductive rights and how to implement laws in accordance with these rights.
- Make reproductive health services and information available to all people of reproductive age
- Develop guidelines and policies for health-care providers on the importance of preserving patient confidentiality and safeguarding medical records

Until laws can be changed, governments and policymakers should take immediate action to ensure that any woman or health provider investigated or criminally charged for abortion receives full procedural protections in accordance with the right to judicial due process.

Abortion will always be necessary. The World Health Organization states that an estimated 33 million contraceptive users worldwide are expected to experience accidental pregnancy annually while using contraception. Laws that govern such areas as health care, the medical professions and medical malpractice can and should be used to appropriately penalize individuals who provide abortion without adequate skill. But laws should not be used to scare, shame and imprison women for seeking a health care service. Such laws do grave harm to women's health and human rights and further stigmatize abortion, a safe and common medical procedure.

## Introduction

Throughout history, women have terminated unwanted pregnancies. While abortion is one of the oldest practices—dating to ancient Egypt, Greece and Rome (Devereux 1976)—criminalization of the procedure and the incarceration of women is a more recent phenomenon.

In South America, half of the nations' criminal laws policing women's reproductive choices were drafted before the articulation of modern human rights (UN Population Division 2001, UN Population Division, 2002).<sup>1</sup> Their continued enforcement negatively affects the health and violates the rights of women in many ways.

Because abortion is highly stigmatized, simply being accused of an abortion-related offence can negatively impact a woman's relationship with her family, employer and community (Kumar et al. 2009). Investigation, prosecution and imprisonment can have even more detrimental effects, contributing to a climate of intimidation and fear that has damaged the lives of millions of women and girls wherever criminal abortion laws are in place and enforced.

The problems are hardly restricted to South America. Across the world, from the mass arrests in Brazil<sup>2</sup> to a woman in Idaho in the United States,<sup>3</sup> there is ample evidence in the popular media of women being reported or detained for illegal abortions. **Newspaper articles from 2006 to 2011 show that women have been arrested for illegal abortions in at least 30 countries.**

### Investigating the problem

Ipas sought to determine the magnitude of the problem: How many women are being arrested? How is the law being enforced? What is the role of health-care providers in enforcing laws? And most importantly, what is the impact on women and their families—and in some instances, health-care providers—when the law makes them criminals for terminating an unwanted pregnancy?

From 2011 to 2013, Ipas conducted an investigation into the enforcement of laws criminalizing abortion in Argentina, Bolivia and Brazil. **The findings reveal the selective enforcement of such abortion laws and the discriminatory and humiliating treatment women receive for not choosing motherhood. Women and health-care providers are subjected to police investigations, prosecutions, preventive detention and arrests. Violators may be threatened or penalized with fines, public service or prison, serving sentences ranging from a few days to several years. Most women who are arrested are already marginalized in some way—poor, Afro-descendent, indigenous, or young, and lacking competent legal defense.**

This toxic mix of unjust laws and misapplication by some judges and law enforcement officials results in serious violations of women's basic human rights. Data from this study also show that providers are primarily responsible for reporting women to the police. The majority of women in this study were reported to the police when they arrived in hospitals

for emergency treatment for complications from unsafe abortion. Doctors who report women to law enforcement violate their legal obligations<sup>4</sup> to protect women's privacy and their ethical duty to maintain doctor-client confidentiality (McNaughton et al. 2006 and Cavallo 2011).

When alerted, police enter health-care centers and hospitals— sometimes arresting women, sometimes handcuffing women to hospital beds while they recover from botched abortions.<sup>5</sup> Generally, these are women with no criminal records; it is their first encounter with the penal system and they are subject to degrading treatment from hospital staff.<sup>6</sup>

## Methodology

This project applied a human rights fact-finding methodology (Orentlicher 1990) and collected and reviewed materials from the police, health and criminal justice systems. Because of the sheer scale and population of the countries being investigated, and because of the difficulty in accessing public records, the study focuses on select cities and states. Ipas looked into records of the largest or most influential cities in each country: Buenos Aires, La Paz and Rio de Janeiro. In Argentina and Brazil, state-level data also was reviewed.

The investigation was divided into two parts. A preliminary quantitative phase looked at the incidence of reports, arrests and imprisonment or alternative penalties in each country. The qualitative phase consisted of in-depth investigation and documentation of judicial cases and, when possible, included interviews with women and their relatives, lawyers, judges and prison administrators. Completion of the second phase varied by country and depended on access to the individuals involved.

The quantitative data reviewed in the first phase came from police, judicial and hospital archives and media reports (including newspapers, magazines, the Internet, TV and radio) between 2006 and present day. Results varied depending on the information publicly available in each country. In Argentina, for example, in order to access public legal and hospital records researchers first had to file formal freedom of information requests with the government. The Argentine government did not honor all requests filed. In Rio de Janeiro, record keeping in the police system is substandard and the data collected had many inconsistencies and was sometimes incomplete. In Bolivia, not all of the judicial archives are digitized and records in some states date back only to 2008.

Gaining access to all these records was challenging and in no country was there access to the full range of materials outlined above. **Notwithstanding these challenges, there is sufficient evidence in public documents reviewed to show that criminal abortion laws are being enforced in larger numbers than anticipated and that the effect of the discriminatory enforcement negatively impacts the health and lives of women in all three counties.**

## Findings

### Bolivia

The situation in Bolivia is alarming. The study found that it was almost always poor women who were reported to the police. Reports were generally filed by a health-care provider, a relative, a partner or the public prosecutor's office. In some cases, the Ombudsman for Children and Adolescents filed a police report on behalf of the fetus.

Abortion cases languish for months at a time. Often it will take years for a case to be archived.<sup>7</sup> Once a case is archived it can be reactivated if new evidence is found and presented. While waiting for their cases to go forward women are in a legal limbo, uncertain about what will happen and how long it will take. According to Bolivian attorney César Quiroga, a legal expert on reproductive rights and Bolivia's penal systems, **"Complaints filed against women are used as a scare tactic or to teach women a lesson."**

Articles 263 to 269 of the Penal Code criminalize abortion in Bolivia; penalties are differentiated based on the action, actor, and in some cases, the motivation. For example, punishment can be reduced for a woman or a provider if an abortion is performed to "save a woman's honor."<sup>8</sup> Punishments range from prison terms of one to six years.

### Methodology

Data were examined from media, police records and judicial records in the cities of La Paz and Santa Cruz.

*Public prosecutor's office:* Both the public prosecutor's office and the police can receive and issue complaints against an individual for actions related to an illegal abortion. If a complaint goes before the police, the police are then obligated to inform the prosecutor's office and either the police or the prosecutor must begin an investigation. Because all official documents related to cases prosecuting abortion are held in the public prosecutors' database, we did not look at police records.<sup>9</sup>

Data review covered the years 2008-2012. A review of the prosecutors' records found that investigations of illegal abortions were initiated in 775 cases.<sup>10</sup> In the city of Santa Cruz, there were 80 cases, and in La Paz, 349 cases.<sup>11</sup> Of these cases one ended in a conviction and the woman in question, Helena, was imprisoned for eight months.

### Court records

Judicial data reviewed from 2005 to 2013 came from the Supreme Court of Justice and the Constitutional Court's database. Both of these courts have national jurisdiction. Archives from the departmental courts of the districts of La Paz and Santa Cruz were also reviewed.

*Supreme Court of Justice:* This is the final court to hear and process cases. Five cases arrived at this Court through an appeals process; one was against a resident doctor for providing an illegal abortion at Oruro General Hospital. The other four cases date prior to 2005 and are not included in the investigation.

*Justice Department Courts:* All cases being appealed go through this department. From 2006 to 2012, 71 cases of illegal abortions were filed in La Paz and 61 were filed in Santa Cruz. It should be noted that La Paz's population is significantly larger than that of Santa Cruz. For the majority of women, after their illegal abortions were reported, their cases were dropped either because the accuser didn't follow up or the police or the judicial system did not take action.

### **The case of Helena**

Twenty-eight-year-old Helena<sup>12</sup> is an indigenous Guaraní Indian. She lives in extreme poverty with her young daughter in the city of Santa Cruz. In January 2012, she was pregnant as a result of rape. She neither reported the rape nor asked for judicial authorization: She said she was afraid the police wouldn't believe her if she reported the rape and she was unaware that she could have a legal abortion. She did not know she could go to jail for having an abortion. In her twenty-third week of pregnancy she took misoprostol, suffered severe complications and went to the Percy Boland Maternity Hospital for care. She delivered the fetus at the hospital, was handcuffed and then apprehended while still in the hospital. Helena was in police custody, guarded by two police officers, for the duration of her 10-day hospital stay while being investigated by the police's homicide unit. She was then reported for the crime of abortion to the public prosecutor's office by the Ombudsman for Children and Adolescents.

During the investigation it was determined that a friend had purchased the pills for Helena from a pharmacy. Consequently the police raided several pharmacies and closed them down for selling misoprostol without a prescription. No one was arrested.

On February 3, 2012, Helena was formally charged and placed in preventive detention<sup>13</sup> in Palmasola jail in Santa Cruz. Helena's public defender immediately appealed the preventative detention order but after a lengthy delay the appeal was denied by the First Supreme Departmental Court of Santa Cruz on April 16, 2012. Helena remained in prison for eight months until her case concluded in October 2012. She was jailed in poor conditions and despite not having been given a formal prison sentence, was made to share her space with people convicted for a variety of crimes.

On June 6, 2012, Helena requested a hearing in order to plead guilty to the crime of abortion so she could expedite her case and return to her daughter. Helena's mother took care of her daughter while she was in prison. Because of the stigma around abortion, Helena never told her family what happened and explained her absence by saying she was working in Argentina. Helena's hearing request was rescheduled three times before taking place in October. Her public defender never showed up to represent her. She was sentenced to two years of prison. However, Bolivian legislation permits the option to serve the sentence outside of prison if a judicial pardon is requested. Helena made and was granted the pardon. Eight months after her initial charge, on October 17, 2012, following various administrative complications in Palmasola prison, Helena was finally freed.

## **Brazil**

This study found several **cases of women handcuffed to their beds** after seeking health care for treatment of unsafe abortions. In one particularly egregious case, Ana,<sup>14</sup> who sought care in a hospital after an unsafe abortion, was arrested and handcuffed to her hospital bed for three months because she did not have money to make bail.

Although the conviction rates are low in comparison with the high numbers of illegal abortions taking place annually in Brazil, qualitative research reveals that when women do go through the criminal justice system in Brazil, their treatment is unforgiving, inhuman, cruel and sometimes amounts to torture. Women who are arrested or prosecuted are disproportionately of low socio-economic status, living in poor urban areas, have low literacy rates and use the public health system. The majority are black and young. All women had children and none had criminal records.

For some women there was an excessive delay between the introduction of a case into the criminal system and its conclusion. In one case it took the judge three years to issue a ruling. In some cases the bail amount is set by the judge and may be on a sliding scale depending on the woman's assumed socio-economic status (based on where she lives). In order to be released women must have legal defense to present a petition on their behalf. Finding representation can be very challenging.

In one Rio de Janeiro hospital, the head of obstetrics called the police after a woman who had induced an abortion with the help of a friend arrived at the hospital. The woman who had the abortion was imprisoned, and the physician was a witness for the prosecution.<sup>15</sup> This woman had six children, was unemployed and poor. As a condition for the suspension of the woman's case, the public prosecutor ordered that she was prohibited from going to bars or staying out later than 10 p.m. She also was obligated to enroll in a family planning program and was prohibited from traveling outside Rio de Janeiro state without the judge's authorization. The entire judicial process took six years from the time the investigations started until the judge made a final decision to conclude the case.

This study also found a concerning upward trend in arrests of women in Rio de Janeiro state from 2007-2011. In some cases, women were arrested while they were in the hospital recovering from unsafe abortion. Research also showed that women are criminalized more often when they self-induced an abortion at home and then seek health care in public health facilities than when they use clandestine clinics, making health-care providers complicit in the violations of women's rights.

### **Police records**

The Institute of Religious Studies/ISER, with Ipas support, conducted research of Brazil's public security system's police archives in Rio de Janeiro state.<sup>16</sup> From 2007 to 2011, there were 351 police reports related to abortion registered. Of these, 334 were against women who had either self-induced an abortion or had obtained one illegally from a provider. The remaining 17 cases were the result of clinic raids in which health-care staff—including doctors, nurses, receptionists and others—were charged with criminal activity related to abortion. Police records showed that in 122 cases the abortion took place in a woman's

home; 105 took place in a hospital or clinic; and the remaining 107 took place in other locations.

A profile of women investigated and charged for illegal abortions shows that a disproportionate percentage were disadvantaged in some way—55 percent were non-white women, more than half had finished only primary school, and only 8 percent graduated from high school. Seventy-eight percent of the women were single. The impact of criminalization on young women is even more dramatic: 29 percent of women in Rio de Janeiro state are under the age of 24, yet 45 percent of the women charged as criminals for an illegal abortion were under 24. Most of the young women prosecuted were between the ages of 18 and 23. Eighty-four (20.2 percent) of the cases investigated were handled by the juvenile system.<sup>17</sup>

### **Judicial records**

The study investigated the number of women charged for abortion in the state of Rio de Janeiro and how they were treated.<sup>18</sup> Records from the criminal justice system available at the state Tribunal of Rio de Janeiro from 2007 to 2010 were found and reviewed.

Because obtaining access to the physical records was challenging, relevant information on the number and location of judicial cases on abortion were obtained through review of available records and interviews with two judges, one public defendant, one public prosecutor and a notary official from the Justice Tribunal of Rio de Janeiro state.<sup>19</sup> The final stage of the research involved the legal analysis of eight judicial cases.

The review of judicial records found 128 cases of women prosecuted for illegal abortions.<sup>20</sup> Of these cases, only 3 cases (2.3%) had sentences based on evidence rather than on technical or procedural grounds. Only one of these three women was acquitted. A second woman was convicted and in the third case the judge sent the woman to trial by jury.

Thirty-eight cases (29.7%) were dismissed and the remaining 87 (68%) are still pending as of 2013, meaning these women may still face criminal charges. This legal limbo has obvious negative effects on women's lives; in addition to the toll it takes on their personal and family lives, it may also affect their professional lives. Women may also need to comply with certain reporting requirements, including prohibitions on travel out of state without a judge's authorization, for example.

In-depth qualitative analysis of eight judicial proceedings show that the majority of cases entered the criminal justice system when women were reported by public servants (health-care providers and/or military police agents working in these services) when they found evidence of illegal abortions. Military police who work in the public health system and receive complaints from providers can investigate if women had committed a crime before seeking care or while the women are under emergency care. In one case, a woman was arrested and charged following a confession to a police officer pretending to be a social worker.

### **Police invasion of women's right to privacy in Mato Grosso do Sul**

In Mato Grosso do Sul, Brazil, on April 13, 2007, police raided a private clinic and confiscated the medical records of more than 9,600 female patients, violating the women's right to privacy and confidentiality in health care.<sup>21</sup> Dr. Neide Mota Machado, the clinic owner, and some of her health-care provider staff were prosecuted for illegal abortion based on TV interviews and on the basis of seized clinic documents and medical equipment.

In December 2009, Dr. Mota Machado was found dead in her car in Campo Grande. A police investigation concluded that she had committed suicide. On April 8, 2010, four health-care providers who worked at the clinic were found guilty and sentenced by jury. A clinic psychologist was condemned to six-and-a-half years of imprisonment. The three nursing auxiliaries received prison sentences ranging from four to seven years. They were accused of participating in 25 abortions at the clinic.<sup>22</sup>

Interviews conducted by Ipas described the women's fear and shame and the resulting negative reactions from their families, work colleagues, and close friends. Some women have not shared the details of their case with anyone (Galli et al. 2010). The clinic raid was widely publicized in the media, but women's voices have been noticeably absent from the debate. As a result of the intense and discriminatory investigations,<sup>23</sup> many women today seeking abortion-related care fear stigmatization, criminal investigation and disclosure of their private medical histories to their families, coworkers, or the public at large.

The Mato Grosso case was followed by other similar cases. Police raids on clandestine abortion clinics in different states have led to the arrest and prosecution of women and doctors. In August 2009, for example, the police raided four clinics in the city of Rio de Janeiro. These events are little known in Brazil outside the states where they took place.<sup>24</sup>

### **Argentina<sup>25</sup>**

In Argentina, **abortion providers were more often the targets of enforcement** of the anti-abortion laws than women undergoing the procedure. According to data from 2002-2008, 80 percent of convictions in Argentina were against health-care professionals, mostly midwives and nurses. The study also showed that there were far more arrests than convictions. From 1996-2008, there were 234 convictions for the crime of abortion at the national level.

Articles 85 to 88 of the National Criminal Code criminalize abortion; penalties are differentiated based on the actor and whether the woman consented to the abortion, among other factors. Punishments range from prison terms of one to ten years.

### **Methodology**

An information request was sent to the Ministry of Prosecution, the Supreme Court and courts of appeal, the Ministry of Justice and the Ministry of Public Defense and Penitentiary Services. Data analyzed included a 1990-2008 report examining judicial records on abortion criminalization produced by the Centro de Estudios de Estado y Sociedad (CEDES). The research was primarily quantitative and found few women prosecuted for abortion and almost no convictions. The Ipas study updated CEDES's research and looked at the country's



four most populous jurisdictions. In addition to judicial and penal records, the major national newspapers published from 2006 to 2012 were also reviewed.<sup>26</sup>

## Results

Research from the CEDES report covering **1990 to 2008 identified 417 cases of women or providers found guilty for the crime of illegal abortion**. Judicial records do not indicate whether those individuals went to jail, paid a fine or were given probation. However, simply being convicted of crime means that all now have criminal records.

The jurisdictions with the most convictions in this earlier period were Buenos Aires province, with 23 percent of the total number in the country; Santa Fe province, 22 percent; Córdoba province, 7 percent; and the city of Buenos Aires, 5 percent.<sup>27</sup> These are the four most populous jurisdictions in Argentina.

2009-2011 data from the province of Buenos Aires (excluding Buenos Aires city proper) revealed 343 judicial proceedings, with none ending in convictions. Despite its significantly smaller population, Buenos Aires city had a higher number of proceedings than Buenos Aires province as a whole for this time period. In Buenos Aires city, data from 2006-2012 showed that 445 judicial investigations were registered. Fourteen cases, (3 percent) went to trial and, of these, two cases ended with convictions. In the province of Cordoba, there were 18 investigations from 2006 to 2011 but no convictions.

Based on national-level data from 2002-2008, more than 80 percent of the convictions were against midwives. In Buenos Aires province, midwives represented 37 percent of the total number of convictions in the country; in the city of Buenos Aires, 4 percent; in Santa Fe province 20 percent; and in Cordoba, 11 percent.

## The risks for providers

The 1966 legal case *Natividad Frias* established that a criminal complaint presented by a health-care provider against a woman for an illegal abortion violated her confidentiality rights and her right against self-incrimination.<sup>28</sup> In 2010, the National Supreme Court of Justice reaffirmed this principle, which may explain the small number of cases of women investigated and convicted for abortion in comparison with the number of cases of providers investigated, prosecuted and convicted.

The case of Analia B.,<sup>29</sup> a 34-year-old doctor and mother of two who worked at a health center in a marginal Buenos Aires neighborhood, is emblematic of abortion providers' experience and the risks they take in Argentina. In February 2011, Evelyn, a pregnant 12-year-old neighborhood girl, sought an abortion. The girl, accompanied by her boyfriend, went to the local health center. Analia prescribed misoprostol, a medical drug recommended by the World Health Organization for pregnancy termination, and advised Evelyn on its proper use.

Misoprostol is legal in Argentina but it is only authorized for distribution as a treatment for gastric ulcers. Analia knew at that time that prescribing misoprostol for an abortion was illegal in Argentina. However, given that Evelyn had made it clear that she intended to have an abortion at all costs, and, concerned about abortion-related maternal mortality among

adolescents in Argentina, Analia decided to prescribe the drug. She explained that doing so was consonant with her ethical and professional responsibilities to provide information to her patients and to offer an alternative to unsafe abortion. She added that dispensing this type of medical counsel was standard practice at the clinic (personal communication, January 24, 2013).

Evelyn purchased the misoprostol and used it on her own to induce an abortion. When Evelyn's parents learned about her actions they pressed charges against Analia.

In May 2011, Analia was formally charged with performing an illegal abortion. Her public defender provided little clarity or information on the proceedings, which forced Analia to find a more competent lawyer on her own. It was not until almost a year later, in February 2012, that she finally appeared before a judge. After being criminally prosecuted for more than a year, in July 2012, the Judiciary closed the case against Analia. The prosecution did not appeal the decision.

Analia describes the year-long waiting period for the judicial process to close as a time of much anxiety for herself and her family. "There was a lot of tension, a lot of anguish...especially for my parents. My children were young and didn't understand the situation but they saw that I was sad, that I was in bad shape...I didn't want to leave the house the day of my hearing...I couldn't tell my extended family what was happening, I couldn't tell them what it is that I do."

Reflecting on this situation, Analia explained that what happened to her was unfair: "It's unjust that I had to endure this whole situation when all I did was help another person. You can't interpret this as a crime...We need to be clear that pregnancy takes place in women's bodies and that it is us women that have the power to decide whether or not to continue a pregnancy."

When asked if she would do the same thing again, Analia simply replied, yes.

## Human Rights Obligations

Maintaining restrictive abortion laws that criminalize women clearly goes against the human rights protections of global and regional treaties signed by Argentina, Bolivia and Brazil and a growing body of international law and guidance.

All three countries have signed major global human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Inter-American Convention to Punish, Prevent and Eradicate Violence Against Women; the International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

### UN Special Rapporteur Report on the Consequences of Abortion Criminalization

Anand Grover, the Special Rapporteur on the Right to Health for the United Nations Human Rights Council, reported to the United Nations General Assembly on August 3, 2011, “the overarching **threat of being investigated, prosecuted and punished within the criminal justice system has significant negative impacts** on the emotional health and well-being of both those who seek abortions and those who do not.”

Moreover, his report stated, women “are entitled to have access to quality health services for the management of complications, including those arising from unsafe abortions and miscarriages. Such **care must be unconditional even where the threat of criminal punishment is present, and it should not be contingent on a woman’s cooperation in any subsequent criminal prosecution, or used as evidence** in any proceeding against her or the abortion providers. Laws must not require healthcare personnel to report women for abortion-related care to law enforcement or judicial authorities.”

Among his conclusions: “**Decriminalize abortion, including related laws, such as those concerning abetment of abortion.**”

At the regional level, Argentina, Bolivia and Brazil have ratified the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Convention of Belém do Pará, and the American Convention on Human Rights, all of which require signatories to fulfill their obligations to protect women’s human rights to health, equality and non-discrimination, and the right to life.<sup>30</sup>

According to both international and regional authorities, criminalizing abortion violates women’s human rights. Such laws infringe on women’s dignity and autonomy, lead to poor

health outcomes and result in death. **The Committee on the Elimination of Discrimination against Women (CEDAW Committee) stated in General Comment 24 that “legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.”** International Human Rights authorities state that States must overturn criminal and restrictive abortion-related laws in order to uphold the right to health and that laws criminalizing abortion should not punish women who have abortions.

Particularly relevant to this report, governments also violate the human rights of women seeking abortion and abortion providers in ways that are specific to the enforcement of criminal abortion laws. While few of the many illegal abortions in Argentina, Bolivia and Brazil result in arrest or prosecution, enforcement of the law when it occurs is discriminatory, targeting the most vulnerable women in society, and violates women’s rights to dignity, freedom from torture, privacy and confidentiality. Other human rights, such as the rights relevant to criminal proceedings and the right to information, may also be violated.

### **Right to equality and non-discrimination**

Everyone has a right to equal access to the highest attainable standard of health care<sup>31</sup> and to equality before the law and before the courts and tribunals.<sup>32</sup> This report highlights the multiple ways in which women are discriminated against because of criminal abortion laws. The CEDAW Committee has deemed discriminatory the criminalization of health-care services that only women need.<sup>33</sup>

### **Right to privacy and confidentiality**

Confidentiality is a key aspect of the right to privacy according to medical ethics and human rights standards on reproductive health care.<sup>34</sup> Health-care providers have a duty to protect medical information against unwanted disclosure and to ensure that women who do authorize release of confidential information do so freely (World Health Organization 2012). International human rights authorities have called on governments to “Require all health services to be consistent with the human rights of women, including the rights to ...confidentiality...<sup>35</sup> and to take effective measures to ensure medical confidentiality and privacy.”<sup>36</sup>

The laws of Argentina, Bolivia and Brazil *do not* explicitly require providers to report illegal abortion as is the case, for example, in Peru.<sup>37</sup> Yet confidentiality was breached in all three countries when health-care providers reported women who were hospitalized for medical care to law enforcement authorities. Confessions obtained while women received care in public hospitals or when misoprostol was found during a gynecological exam also violated women’s right to privacy and confidentiality. These breaches of privacy were made worse when women in Bolivia and Brazil were jailed for the crime of having terminated a pregnancy. The case of police raids of clinic records in Mato Grosso do Sul, Brazil, described earlier in this report, was also a particularly egregious intrusion on women’s rights to basic privacy and confidentiality in health-care facilities.

## **Right to be free from torture or other inhuman or degrading treatment**

Enforcement of criminal abortion laws often violates the prohibition of torture and ill-treatment, under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Governments also violate the Torture Convention when they allow health-care providers to deny care to women for complications of unsafe abortion in order to elicit a confession or for the purposes of criminal punishment.<sup>38</sup>

The findings from Bolivia and Brazil in which women were arrested while in the hospital receiving medical care or were handcuffed to their hospital beds are clear examples of violations of the right to be free from torture and degrading treatment.

## **Conclusion**

Women who are prosecuted for illegal abortions in Bolivia, Brazil and Argentina face bias and neglect in the criminal justice system. Enforcement of the law is selective and discriminatory, with the highest burden and risk of prosecution falling on the generally poorer women who use the public health systems. These marginalized women are stripped of their rights to due process and judicial guarantees and protection. They face arbitrary preventive arrest, high fines, stigma and public condemnation, simply because they need a basic health service.

Their treatment raises significant legal, ethical, public health and human rights concerns. This view is supported by legal experts, human rights experts and medical professionals, all of whom recognize that criminalizing abortion does not result in fewer abortions but does have significant negative medical, social and penal consequences.

Punitive abortion laws are meant as scare tactics, stigmatizing a safe and common medical procedure, and seeking to prevent women from having abortions. They take away women's reproductive autonomy and force them to seek illegal and unsafe services.

Policymakers should understand that abortion will always be necessary: An estimated 33 million contraceptive users worldwide experience accidental pregnancy annually while using contraception (World Health Organization 2012). Unwanted pregnancy and abortion is a normal experience for women during their reproductive years, and yet it is one of the rare medical procedures that is criminalized. Most egregiously, criminal abortion laws discriminate against women since only women can become pregnant.

## Recommendations

- At a minimum, governments should take immediate action to **ensure that any woman or health-care provider investigated or criminally charged for abortion receives full procedural protections** in accordance with the right to judicial due process.
- Governments should ensure that adequate, effective procedures are in place to **give all women of reproductive age access to abortion where permitted by law and to postabortion care** without discrimination.
- Governments should protect the **right to privacy and confidentiality for women seeking postabortion care**. They should develop guidelines and policies to guide health-care providers on the importance of preserving patient confidentiality and safeguarding medical records. In addition, in the interests of women's health and safety, **policies should protect them from arrest or prosecution** when they are in health facilities.
- In order to fully protect and uphold women's rights, governments must **remove criminal penalties on abortion, educate the judiciary and the health sector on sexual and reproductive rights, and eliminate all barriers** to access to safe and legal abortions.
- Laws that govern areas such as medical malpractice, fraud, health services, the medical professions and assault can and should be used to **appropriately penalize individuals who provide abortion without adequate skill**. Abortion need not be criminalized to ensure that when a woman seeks to end a pregnancy, the procedure is performed in a safe manner.

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## Endnotes

<sup>1</sup> Argentina in 1927, Bolivia in 1972, Brazil 1940, Chile in 1874 (amended for more restrictions in 1989), Colombia in 1980, Ecuador in 1971, Paraguay in 1997, Peru in 1924 (amended in 1991), Uruguay in 1933, Venezuela in 1964

<sup>2</sup> <http://news.bbc.co.uk/2/hi/americas/7740996.stm>

<sup>3</sup> <http://www.npr.org/templates/story/story.php?storyId=150312812>

<sup>4</sup> See <http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/TCIDT.pdf>

<sup>5</sup> *Criminalization of Abortion: Analysis from Public Security System media data in the state of Rio de Janeiro* 2012 Institute of Religious Studies ISER (final research report, unpublished) and *Women criminalized for abortion in Rio de Janeiro: Diagnosis from actors from Justice System*, Research Group Human Rights, Judiciary and Society of the State University of Rio de Janeiro and Ipas (final research report, not published) 2012.

<sup>6</sup> *Women criminalized for abortion in Rio de Janeiro: Diagnosis from actors from Justice System*, Research Group Human Rights, Judiciary and Society of the State University of Rio de Janeiro and Ipas (final research report, not published) and Ipas submission to the Special Rapporteur on Torture, November 21 2012.

<sup>7</sup> A case is archived when no judicial action has been taken for a long period of time.

<sup>8</sup> Bolivian Penal Code: Article 265.

<sup>9</sup> There are representatives of the Public Prosecutor Office in the 9 Departments.

<sup>10</sup> Considered the information provided from February 2008, in consideration of the maximum duration of the criminal proceedings.

<sup>11</sup> The numbers from La Paz includes data from the cities of El Alto and La Paz, which are under the jurisdiction of the La Paz Court Justice Departmental.

<sup>12</sup> Not her real name

<sup>13</sup> The prosecutor placed Helena in preventative detention stating that she had neither permanent housing nor a job and was at a risk of influencing witnesses or participants to falsely report what had taken place. In fact, at the time of her arrest Helena had both housing and a job.

<sup>14</sup> Not her real name

<sup>15</sup> Getulio Vargas Foundation University qualitative research of judicial case in the criminal court (unpublished).

<sup>16</sup> Research conducted by Ana Paula Sciammarella

<sup>17</sup> See Cunha JR, Noronha R. and Vestena CA. 2011. In: *Challenges to constitution democracy and State in XXI century*. Martins de Carvalho F and Vieira JR. Federal University of Rio de Janeiro, Rio de Janeiro. Research findings are available in the article "Women incriminated for abortion in the Justice Tribunal of Rio de Janeiro state: characters, discourses and arguments." [http://pesquisaconstitucional.files.wordpress.com/2010/06/desafios-da-constituicao\\_versao\\_eletronica.pdf](http://pesquisaconstitucional.files.wordpress.com/2010/06/desafios-da-constituicao_versao_eletronica.pdf)

<sup>18</sup> Research conducted by The Study Group of the State University of Rio de Janeiro (UERJ), with Ipas support

<sup>19</sup> The interview guide included general questions on cases of women charged for abortion, followed by queries on what was the more common judicial case related to abortion entered in the justice system; what happen to these women and, if they are convicted, what was the most common sentence or legal measure applied; and if they could talk about recent cases they have known.

<sup>20</sup> Previous Ipas research in five states in Brazil found that women who have abortions suffer ill treatment, prejudiced attitudes and moral judgments from health-care providers and hospital staff. See: <http://www.ipas.org/en/Resources/Ipas%20Publications/Advocacy-for-access-to-safe-legal-abortion--Similarities-in-the-impact-of-abortions-illegal.aspx>

<sup>21</sup> Ipas Brasil, Processos judiciais envolvendo abortamento: Negacao dos direitos reprodutivos das mulheres em Mato Grosso do Sul (2008), available at [http://www.aads.org.br/arquivos/RelatorioMS\\_FINAL.pdf](http://www.aads.org.br/arquivos/RelatorioMS_FINAL.pdf)

<sup>22</sup> Tribunal de Justiça de Mato Grosso do Sul, *Júri: ex-funcionárias de clínica de aborto são condenadas*, DIREITO2 (Apr. 9, 2010), <http://www.direito2.com.br/tjms/2010/abr/9/juri-ex-funcionarias-de-clinica-de-aborto-sao-condenadas>.

<sup>23</sup> Nilcéa Freire, *Fúria Judicial Contra as Mulheres*, IPAS (Apr. 24, 2008), <http://www.ipas.org.br/noticias2008.html#9800>.

<sup>24</sup> See Ronaldo Braga, *Operação da Polícia Civil fecha duas clínicas de aborto em Botafogo*, O GLOBO (Aug. 13, 2009), <http://oglobo.globo.com/rio/mat/2009/08/13/operacao-da-policia-civil-fecha-duas-clinicas-de-aborto-em-botafogo-757384655.asp>; Laurindo Ernesto, *Polícia descobre clínica de aborto em Botafogo*, O DIA (Aug. 13, 2009), [http://odia.terra.com.br/porta/rio/html/2009/8/policia\\_descobre\\_clinica\\_de\\_aborto\\_em\\_botafogo\\_29277.html](http://odia.terra.com.br/porta/rio/html/2009/8/policia_descobre_clinica_de_aborto_em_botafogo_29277.html); *Polícia fecha duas clínicas de aborto em Botafogo*, GLOBO.COM (Aug. 13, 2009), <http://g1.globo.com/Noticias/Rio/0,,MUL1265484-5606,00.html>.

<sup>25</sup> Research conducted by the Asociación por los Derechos Civiles (ADC)

<sup>26</sup> This included analysis of online archives of the most important newspapers in the focus jurisdictions of the City of Buenos Aires and the provinces of Buenos Aires, Santa Fe and Córdoba.

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<sup>27</sup> Buenos Aires Province (15 million people) city of Buenos Aires (3 million) Cordoba Province (3 million) and Santa Fe Province (3 million)

<sup>28</sup> Natividad Frias, Cámara Nacional de Apelaciones en lo Criminal y Correccional de Capital Federal, en Pleno

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<sup>29</sup> Not her real name

<sup>30</sup> For a good overview of abortion as an international human right, see Christina Zampas and Jaime M. Gher, Abortion as a Human Right—International and Regional Standards, 8 *Human Rights Law Review* 249 (2008).

<sup>31</sup> Article 12, ICESCR

<sup>32</sup> ICCPR, Articles 14 and 26

<sup>33</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation 24: Women and Health (20th Session 1999), para. 31(c); The UN Special Rapporteur on the independence of judges and lawyers named the criminalization of abortion as an example of criminal legal provisions that are discriminatory against women, further stating that: “Judges must be in a position to challenge gender stereotyping and discrimination when they encounter it in the form of wrongful charging of suspects, charges being brought without any supporting evidence of wrongdoing and merely on the basis of hearsay, or mischarging of a particular form of conduct (like charging abortion as infanticide).” (United Nations General Assembly. 10 August 2011. Interim report of the Special Rapporteur on the independence of judges and lawyers. A/66/289).

<sup>34</sup> Human Rights Committee. General comment no. 28: equality of rights between men and women (article 3). United Nations 2000; Committee on the Elimination of Discrimination against Women. General recommendation no. 24: Women and health (article 12). United Nations, 1999; Committee on Economic Social and Cultural Rights. General comment no. 14: The right to the highest attainable standard of health (article 12) United Nations, 2000.

<sup>35</sup> CEDAW General Recommendation 24, para 31(e)

<sup>36</sup> Commission on Human Rights, Report of the Special Rapporteur Paul Hunt, E/CN.4/2004/49, 16 February 2004. Available at: [http://www.ifhhro.org/images/stories/ifhhro/documents\\_UN\\_special\\_rapporteur/3\\_4\\_5.pdf](http://www.ifhhro.org/images/stories/ifhhro/documents_UN_special_rapporteur/3_4_5.pdf)

<sup>37</sup> See Promsex’s report on the medical requirement to report in Peru, <http://www.promsex.org/documentacion/documentos/acceso-al-aborto-legal/92-medicos-en-conflicto-entre-la-cura-y-la-denuncia-articulo-30/download>

<sup>38</sup> Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment to the Human Rights Council. 1 February 2013, Human Rights Council, 22 Session, A/HRC/22/53.



