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**Mandates of the Working Group on the issue of discrimination against women in law and in practice; the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the rights of persons with disabilities and the Special Rapporteur on violence against women, its causes and consequences**

To Honorable Madame Justice Ministra Cármen Lúcia, concerning petition number ADI/ADPF 5581

**Ref: Denial of abortion services and the prohibition of torture and cruel, inhuman and degrading treatment**

This submission is made on behalf of independent special procedures mandate holders of the Human Rights Council :

- Special Rapporteur on torture and cruel, inhuman and degrading treatment or punishment, Mr. Juan Mendez
- Special Rapporteur on violence against women, its causes and consequences, Ms. Dubravka Simonovic
- Working Group on discrimination against women in law and practice, Ms. Alda Facio, Chair, Ms. Emna Aouij, Ms. Kamala Chandrakirana, Ms. Frances Raday, Ms. Eleonora Zielinska
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Dainius Puras
- Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar

They are making this submission as third party intervenors, independent from the plaintiffs and defendants in this case.

This brief is provided by mandate holders listed above on a voluntary basis for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied of, the privileges and immunities of the United Nations, its officials, and experts on missions, including the individuals listed above, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

It explains human rights obligations related to provision of abortion services, as articulated by international human rights mechanisms. It has a particular focus on the circumstances in which denial of abortion services may constitute torture and / or cruel, inhuman or degrading treatment. Emphasizing the absolute prohibition of torture and other forms of cruel, inhuman

or degrading treatment, the submission explains the definition of torture and the elements which must be satisfied in order for an action to rise to the level of torture. The issue of denial of abortion services is then analysed with attention to these elements of the definition, drawing from the jurisprudence of international human rights mechanisms. The denial of post-abortion care is also examined under the definition of torture.

The submission concludes by reiterating the human rights obligations which States have in relation to abortion services, including in the context of the Zika epidemic. This submission aims to assist the Court by detailing the circumstances in which denial of abortion services may amount to torture and/or cruel, inhuman and degrading treatment. Specifically, the mental suffering that women and girls may face when they wish to terminate their pregnancy, including in the context of Zika, but do not have legal access to service, can be severe, and can meet the threshold of torture and/or cruel, inhuman and degrading treatment. This can be further exacerbated for certain women and girls in a particularly vulnerable situation, including as a result of their age, disability status, or circumstances under which they became pregnant.

The special procedures mandate holders party to this intervention submit to the court that a human rights compliant response to the Zika epidemic will take account of the risk of torture and / or cruel, inhuman and degrading treatment for women and girls in the context of denial of abortion services and call for measures to mitigate such risk, in line with State obligations to prevent torture and cruel, inhuman and degrading treatment in all settings and circumstances.

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## Introduction

This submission is respectfully made in relation to petition [number] concerning the Brazilian Government's response to Zika. It sets forth state obligations under the United Nations system of human rights concerning abortion, which is permitted in Brazil only in order to save the life of the woman, or in cases of rape. The need to ensure human rights obligations related to sexual and reproductive health and rights are upheld, including in relation to abortion and post-abortion care, has been illuminated by the emergency of the Zika epidemic, though these obligations apply even outside the context of public health emergencies.

This submission is made by the following Special Procedures mandate holders of the United Nations Human Rights Council:

- Special Rapporteur on torture and cruel, inhuman and degrading treatment or punishment, Mr. Juan Mendez (mandate established in 1985 by resolution 1985/33 of the United Nations Commission on Human Rights)
- Special Rapporteur on violence against women, its causes and consequences, Ms. Dubravka Simonovic (mandate established in 1994 by resolution 1994/45 of the United Nations Commission on Human Rights)
- Working Group on discrimination against women in law and practice, Ms. Alda Facio, Chair, Ms. Emna Aouij, Ms. Kamala Chandrakirana, Ms. Frances Raday, Ms. Eleonora Zielinska (mandate established in 2010 by resolution 15/23 of the United Nations Human Rights Council)
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Dainius Puras (mandate established in 2002 by resolution 2002/31 of the United Nations Commission on Human Rights)
- Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar (mandate established in 2014 by resolution 26/20 of the United Nations Human Rights Council)

They are making this submission as third party intervenors, independent from the plaintiffs and defendants in this case.

This brief is provided by mandate holders listed above on a voluntary basis for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied of, the privileges and immunities of the United Nations, its officials, and experts on missions, including the individuals listed above, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

The issues of women's<sup>1</sup> human rights and access to abortion have been addressed in numerous ways by the international human rights mechanisms of the United Nations. International human rights bodies and mechanisms have characterized laws criminalizing abortion as discriminatory and a barrier to women's access to health care.<sup>2</sup> They have

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<sup>1</sup> Throughout this submission, references to women's human rights should be understood to also apply to girls.

<sup>2</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation 24 (1999) on women and health, para. 11; Committee on Economic, Social and Cultural Rights, General Comment 22 (2016) on the right to sexual and reproductive health, para. 28; Working Group on discrimination against women in law and in practice, A/HRC/32/44 (2016), paras. 79-83, Statement on International Safe Abortion Day: 28 September 2016 (27 September 2016); Special Rapporteur on the right to the highest attainable standard of physical and mental health, A/66/254 (2011 ) para. 21. See also Joint Statement of UN human rights experts, the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special

recommended that States remove all punitive provisions for women who have undergone abortion. These bodies have also requested that States permit abortion in certain cases, including the physical and mental health of the woman, rape, and incest. Treaty body jurisprudence has clearly indicated that denying women access to abortion in certain circumstances can result in violations of the rights to health,<sup>3</sup> and privacy.<sup>4</sup> They have also raised concern about the enjoyment of the right to life for women who are denied safe abortion services, and may put their lives at risk as a result.<sup>5</sup> The Committee on Economic, Social and Cultural Rights has indicated that States are obligated to “take measures to prevent unsafe abortions and to provide post-abortion care and counselling for those in need” as a core obligation under the right to sexual and reproductive health, as a component of the right to health,<sup>6</sup> otherwise understood as the minimum levels of satisfaction of the right which must be achieved. The Committee on the Rights of Persons with Disabilities has also stressed that “[a]ll women with disabilities must be able to exercise their legal capacity by taking their own decisions, with support when desired with regard to medical and/or therapeutic treatment, including decisions on: retaining their fertility, reproductive autonomy, [and] their right to choose the number and spacing of children ...”<sup>7</sup>

The Zika epidemic, and its particular impact on pregnant women and their future babies, has put the spotlight on issues related to sexual and reproductive health and rights. With some countries urging women to postpone pregnancy early in this public health emergency, certain stakeholders, including the High Commissioner for Human Rights, have expressed concern that such advice “ignores the reality that many women and girls simply cannot exercise control over whether or when or under what circumstances they become pregnant, especially in an environment where sexual violence is so common.”<sup>8</sup> The petition before the Court includes submissions from multiple experts on the importance of upholding sexual and reproductive health and rights in the context of Zika response. In light of this, the focus of this submission is particularly on those circumstances where the suffering inflicted by the denial of abortion services may rise to the level of torture or cruel, inhuman and degrading treatment.

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Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples’ Rights on the 2030 Agenda for Sustainable Development (24 September 2015).

<sup>3</sup> Committee on the Elimination of Discrimination Against Women, *L.C. v. Peru*, CEDAW/C/50/D/22/2009, para. 8.15 (finding a violation of the right to health in a case concerning the denial of abortion to a girl who became pregnant as a result of rape, and who required termination of the pregnancy to preserve her health after sustaining injuries from a suicide attempt).

<sup>4</sup> Human Rights Committee, *K.L. v. Peru*, CCPR/C/85/D/1153/2003, para. 6.4 (finding a violation of the right to privacy concerning the denial of legal abortion services to girl who had a pregnancy with a fatal fetal impairment); *V.D.A. v. Argentina*, CCPR/C/101/D/1608/2007, para. 9.3 (finding a violation of the right to privacy in a case where an intellectually disabled girl became pregnant as a result of rape and was denied an abortion).

<sup>5</sup> Committee on Economic, Social and Cultural Rights, General Comment 22 (2016) on the right to sexual and reproductive health, para. 10.

<sup>6</sup> Committee on Economic, Social and Cultural Rights, General Comment 22 (2016) on the right to sexual and reproductive health, para. 49(e).

<sup>7</sup> Committee on the Rights of Persons with Disabilities, General Comment 3 (2016) on women and girls with disabilities, para. 44.

<sup>8</sup> United Nations High Commissioner for Human Rights, Upholding women’s human rights essential to Zika response (5 February 2016).

## **The Prohibition of Torture is a Non-Derogable Right**

Human rights mechanisms have repeatedly emphasized the absolute and non-derogable nature of the prohibition of torture, which is also accepted as constituting a peremptory norm of customary international law or *jus cogens*.<sup>9</sup> The International Covenant on Civil and Political Rights allows no derogation from Article 7 prohibiting torture and other forms of cruel, inhuman or degrading treatment. Similarly, Article 2 of the Convention Against Torture provides that no exception may be invoked as a justification of torture.

The Human Rights Committee has further clarified that even if a “particular conduct or action is legal under domestic law,” such as laws criminalizing abortion, this does not immunize the State from an infringement of the prohibition of torture and other forms of cruel, inhuman and degrading treatment.<sup>10</sup>

## **Definition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

The international prohibition on torture is provided for in two main instruments: the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Brazil ratified in 1989 and 1992 respectively. Article 7 of the International Covenant on Civil and Political Rights states “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The Convention Against Torture provides the definition of torture or cruel, inhuman or degrading treatment:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>11</sup>

The Committee Against Torture has explained that “[s]ince the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or

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<sup>9</sup> Committee Against Torture, General Comment 2 (2008) on the implementation of Article 2 by States Parties, para. 1; Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment, A/HRC/28/68, para. 23.

<sup>10</sup> Human Rights Committee, *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016), para. 7.4.

<sup>11</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1.

de facto permission.”<sup>12</sup> Thus, a State’s failure to stop torture and other forms of cruel, inhuman or degrading treatment acts a form of de facto consent, and human rights mechanisms have emphasized that that the actions of non-State actors also fall within the prohibition of torture and other forms of cruel, inhuman or degrading treatment.

In addition to applying to the actions of non-State actors, the prohibition of torture and other forms of cruel, inhuman and degrading treatment also applies across diverse settings, including health-care settings. In this regard, the Committee Against Torture has explained that States obligations to prohibit, prevent and redress torture and ill-treatment is not limited to detention settings but “all contexts of custody or control, for example, in prisons, *hospitals*, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions.”<sup>13</sup> The Special Rapporteur on torture and other cruel, inhuman and degrading treatment has also pointed out that “while the prohibition of torture may have originally applied primarily in the context of interrogation, punishment or intimidation of a detainee, the international community has begun to recognize that torture may also occur in other contexts, [such as health-care settings].”<sup>14</sup> Health-care settings have been identified as a context of particular risk for women and girls.<sup>15</sup>

With regard to cruel, inhuman and degrading treatment, the Special Rapporteur on torture has asserted that acts which do not meet the requirements of intent or purpose to qualify as torture may still qualify as cruel, inhuman or degrading treatment.<sup>16</sup> He specifically notes that “[a]cts aimed at humiliating the victim constitute degrading treatment or punishment even where severe pain has not been inflicted.”<sup>17</sup> In assessing cruel, inhuman and degrading treatment, the Special Rapporteur draws special attention to the powerlessness of the victim, indicating that this is “the decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment.”<sup>18</sup> The Special Rapporteur has asserted that the concept of powerless is relevant in medical settings, where patients are “reliant on health-care workers who provide them services.” This concept was further elaborated in relation to the gender-related aspects of torture and other forms of cruel, inhuman and degrading treatment :

The element of powerlessness also allows the specific status of the victim to be taken into consideration, such as sex, age and physical and mental health, in some cases also religion, which might render a specific person powerless in a given context. A society’s indifference to or even support for the subordinate status of women, together with the existence of discriminatory laws and a pattern of State failure to punish perpetrators and

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<sup>12</sup> Committee Against Torture, General Comment 2 (2008) on the implementation of Article 2 by States Parties, para. 18.

<sup>13</sup> Committee Against Torture, General Comment 2 (2008) on the implementation of Article 2 by States Parties, para. 15 (emphasis added).

<sup>14</sup> Special Rapporteur on torture and other cruel, inhuman and degrading treatment, A/HRC/22/53 (2013), para. 15.

<sup>15</sup> Special Rapporteur on torture and other cruel, inhuman and degrading treatment, A/HRC/22/53 (2013), para. 46.

<sup>16</sup> Special Rapporteur on torture and other cruel, inhuman and degrading treatment, E/CN.4/2006/6 (2005), para. 35.

<sup>17</sup> Special Rapporteur on torture and other cruel, inhuman and degrading treatment, E/CN.4/2006/6 (2005), para. 35.

<sup>18</sup> Special Rapporteur on torture and other cruel, inhuman and degrading treatment, E/CN.4/2006/6 (2005), para. 39.

protect victims, create the conditions under which women may be subjected to systematic physical and mental suffering, despite their apparent freedom to resist.<sup>19</sup>

The Committee against Torture has explained the indivisible, interrelated and interdependent relationship between the obligation to prevent torture and the obligation to prevent cruel, inhuman, or degrading treatment or punishment (ill-treatment) because conditions which foster ill-treatment often also facilitate torture, and the measures needed to prevent both overlap.<sup>20</sup>

## **Torture and Cruel, Inhuman and Degrading Treatment in the Context of Abortion**

The below analysis explains how denial of abortion services can rise to the level of torture and/or cruel, inhuman and degrading treatment. It focuses first on interpreting the intent and purpose elements of the definition of torture. It then explains how the requirement of consent or acquiescence of a public official may be met. It concludes with examining the factors which have been considered in determining whether the pain and suffering of a woman or girl denied abortion services meets the threshold of torture.

### ***Intent and Purpose includes discriminatory conduct***

The intent and purpose elements of torture and other forms of cruel, inhuman and degrading treatment are closely linked. The Special Rapporteur on torture has explained that intent can be implied where a specific purpose can be established.<sup>21</sup> Article 1 of the Convention Against Torture illustrates a list of actions that fulfill the purpose aspect of torture, including: extraction of a confession; obtaining information from a victim or a third person; punishment, intimidation and coercion; and *discrimination*. The Committee on the Elimination of Discrimination Against Women has explained that “it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women.”<sup>22</sup> The Working Group on discrimination against women in law and in practice has provided additional specificity to this aspect of discrimination against women, explaining that “[e]quality in reproductive health requires access, without discrimination, to affordable, quality contraception; maternal health care, including during childbirth and the post-partum period; *access to safe termination of pregnancy*; access to effective screening and early treatment for breast and cervical cancer; and special attention to the high rate of HIV infections among young women and treatment to prevent mother-to-infant transmission.”(emphasis added).

Since lack of access to safe abortion services, as a result of criminal or other highly restrictive laws, constitutes discrimination against women, it can be considered that this satisfies both the purpose and intent elements. Indeed, according to the Special Rapporteur on torture and

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<sup>19</sup> Special Rapporteur on torture and other cruel, inhuman and degrading treatment, A/HRC/7/3 (2008) para. 29.

<sup>20</sup> Committee Against Torture, General Comment 2 (2008) on the implementation of Article 2 by States Parties, para. 3.

<sup>21</sup> Special Rapporteur on torture and other cruel, inhuman and degrading treatment, A/HRC/7/3 (2008) para. 30.

<sup>22</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation 24 (1999) on women and health, para. 11. See also Working Group on discrimination against women in law and in practice, UN Doc. A/HRC/32/44 : “Denying women access to services which only they require and failing to address their specific health and safety, including their reproductive and sexual health needs, are inherently discriminatory and prevent women from exercising control over their own bodies and lives.” (para. 28).

other forms of cruel, inhuman and degrading treatment, “the purpose and intent elements of the definition of torture are always fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex, gender identity, real or perceived sexual orientation or non-adherence to social norms around gender and sexuality.”<sup>23</sup> He has also recognized that discrimination against women and girls “often underpins their torture and ill-treatment in health-care settings” and that “[t]his is particularly true when seeking treatments such as abortion that may contravene socialized gender roles and expectations.”<sup>24</sup>

More generally, he has observed that “discrimination plays a prominent role in an analysis of reproductive rights violations as forms of torture or ill-treatment because sex and gender bias commonly underlie such violations.”<sup>25</sup> The Committee against Torture also named gender as a key factor in understanding why and how women are at risk of torture and other ill treatment, explaining that “[b]oth men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles.”<sup>26</sup> In relation to socially determined gender roles, the Committee on the Elimination of Discrimination Against Women has found that denial of abortion, and medically necessary spinal surgery to avoid paralysis, constituted a violation of article 5 of the Convention, which requires States to address “stereotypes roles for men and women,” perpetuated a stereotype of women as mothers, by privileging the “protection of the fetus ... over the health of the [woman].”<sup>27</sup>

### ***Public Official***

The prohibition on torture applies to health-care workers who are government employees, at public hospitals, as well as to health-care workers at both private hospitals.<sup>28</sup> The Committee on the Elimination of Discrimination Against Women has also affirmed State responsibility for the actions of private actors, in the context of health-care settings, emphasizing the State’s “due diligence obligation to take measures to ensure that the activities of private actors in regard to health policies and practices are appropriate.”<sup>29</sup>

The UN Special Rapporteur on Torture has acknowledged reports of health providers withholding care “that intentionally or negligently inflict[s] severe pain or suffering for no legitimate medical purpose” and found that “[t]he withholding of medical care that causes severe suffering for no justifiable reason can be considered cruel, inhuman or degrading treatment or punishment, and if there is State involvement and specific intent, it is torture.”<sup>30</sup>

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<sup>23</sup> Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment, A/HRC/31/57 (2016), para. 8.

<sup>24</sup> Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment, A/HRC/31/57 (2016), para. 42.

<sup>25</sup> Special Rapporteur on torture and other cruel, inhuman and degrading treatment, A/HRC/22/53 (2013), para. 37.

<sup>26</sup> Committee Against Torture, General Comment 2 (2008) on the implementation of Article 2 by States Parties, para. 22.

<sup>27</sup> Committee on the Elimination of Discrimination Against Women, *L.C. v. Peru*, CEDAW/C/50/D/22/2009, para. 8.15.

<sup>28</sup> Special Rapporteur on torture and other cruel, inhuman and degrading treatment, A/HRC/22/53 (2013), para. 24.

<sup>29</sup> Committee on the Elimination of Discrimination Against Women, *Alyne da Silva Pimental v. Brazil*, CEDAW/C/49/D/17/2008, para. 7.5.

<sup>30</sup> Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment, A/HRC/22/53, para. 39.

## *Severe pain or suffering*

In certain circumstances, denials of abortion can cause severe pain or suffering for the woman, adolescent or girl, which meet the threshold of torture or cruel, inhuman or degrading treatment. This pain can be physical or mental, and in certain cases is foreseeable.<sup>31</sup> The Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment has pointed out that “[i]nternational human rights law increasingly recognizes that abuse and mistreatment of women seeking reproductive health services cause tremendous and lasting physical and emotional suffering, which is inflicted on the basis of gender.”<sup>32</sup>

In some cases, the denial of a legal abortion can endanger the physical well-being of the woman, adolescent or girl.<sup>33</sup> Denial of safe abortion services has a direct link to women and girls turning to clandestine abortions that risk their lives and physical as well as mental health.<sup>34</sup> The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has observed that “[c]riminal laws penalizing and restricting induced abortion ... consistently generate poor physical health outcomes, resulting in deaths that could have been prevented, morbidity and ill-health.”<sup>35</sup>

Denial of access to abortion, seeking a clandestine abortion or carrying an unwanted pregnancy to term can also have severe, and potentially permanent psychological impacts.<sup>36</sup> As the Special Rapporteur on the right to the highest standard of physical and mental health stated, “[t]he intense stigmatization of both the abortion procedure and women who seek such procedures can have deleterious effects on women’s mental health.”<sup>37</sup> In localities where abortion is criminalized, “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.”<sup>38</sup> Moreover, “[t]he denial of safe abortions and subjecting women and girls to humiliating and judgmental

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<sup>31</sup> Human Rights Committee, *K.L. v. Peru*, CCPR/C/85/D/1153/2003, para. 6.3.

<sup>32</sup> Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment, A/HRC/31/57 (2016), para. 42.

<sup>33</sup> Committee on the Elimination of Discrimination Against Women, *L.C. v. Peru*, CEDAW/C/50/D/22/2009, (where girl was denied spinal surgery in order to prevent permanent paralysis because she was pregnant and such surgery would result in the termination of pregnancy).

<sup>34</sup> Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment, A/HRC/31/57 (2016), para. 43; Committee on Economic, Social and Cultural Rights, General Comment 22 (2016) on the right to sexual and reproductive health, para. 10.

<sup>35</sup> Special Rapporteur on the right to the highest attainable standard of physical and mental health, A/66/254 (2011) para. 21. He further explained that “[t]he rate of unsafe abortions and the ratio of unsafe to safe abortions both directly correlate to the degree to which abortion laws are restrictive and/or punitive. Unsafe abortions are estimated to account for nearly 13 per cent of all maternal deaths globally. A further 5 million women and girls suffer short- and long-term injuries due to unsafe abortions, including haemorrhage; sepsis; trauma to the vagina, uterus and abdominal organs; cervical tearing; peritonitis; reproductive tract infections; pelvic inflammatory disease and chronic pelvic pain; shock and infertility.” (para. 25).

<sup>36</sup> Committee on the Elimination of Discrimination Against Women, *L.C. v. Peru*, CEDAW/C/50/D/22/2009; Human Rights Committee, *K.L. v. Peru*, CCPR/C/85/D/1153/2003; Human Rights Committee, *V.D.A. v. Argentina*, CCPR/C/101/D/1608/2007.

<sup>37</sup> Special Rapporteur on the right to the highest attainable standard of physical and mental health, A/66/254 (2011) para. 36.

<sup>38</sup> Special Rapporteur on the right to the highest attainable standard of physical and mental health, A/66/254 (2011) para. 36.

attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill-treatment.”<sup>39</sup>

Women seeking abortion care are particularly susceptible to severe suffering because of their vulnerability, which factors in to their “powerlessness,” one of the aspects to be considered in determining cruel, inhuman and degrading treatment. The Special Rapporteur on torture noted that “health-care providers tend to exercise considerable authority over clients, placing women in a position of powerlessness, while the lack of legal and policy frameworks that effectively enable women to assert their right to access reproductive health services enhances their vulnerability to torture and ill-treatment.”<sup>40</sup> In addition, the Committee Against Torture has expressed that women are particularly vulnerable in situations relating to their reproductive decisions.<sup>41</sup>

International human rights jurisprudence points to multiple other variables which may be considered in determining whether a woman or girl has experienced severe pain or suffering. The recent case of *Mellet v. Ireland* (summary in annex) includes the most comprehensive listing of considerations which exacerbated the suffering of the woman concerned. These included the discontinuation of medical care and health insurance from the Irish health care system, being forced to choose between continuing an non-viable pregnancy and travelling to another country with family support and at her own cost, having to travel back to Ireland before she recovered, being subjected to shame and stigma associated with abortion in Ireland, having the remains of her stillborn baby delivered to her unexpectedly at her home, the refusal of the State to provide post-abortion and bereavement care, and the refusal of health professionals to convey accurate information about her medical options. The Committee considered that these elements taken together resulted in a violation of the prohibition of torture and other forms of cruel, inhuman and degrading treatment.<sup>42</sup>

Human rights mechanisms have also regularly found violations of the prohibition of torture and other forms of cruel, inhuman and degrading treatment when abortion services have been denied in cases of rape and incest.<sup>43</sup> The Committee Against Torture has observed that for survivors of rape or incest, beyond the initial trauma of the event, a pregnancy resulting from the act “entails constant exposure to the violation committed against her and causes serious traumatic stress and a risk of long-lasting psychological problems such as anxiety and depression.”<sup>44</sup> In these cases, “the women concerned are constantly reminded of the violation committed against them, which causes serious traumatic stress and carries a risk of long-lasting psychological problems.”<sup>45</sup> The Committee on the Elimination of Discrimination Against Women also explicitly acknowledged the mental suffering of a girl who was raped, became pregnant as a result and subsequently attempted suicide, sustaining severe injuries

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<sup>39</sup> Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment, A/HRC/31/57 (2016), para. 44.

<sup>40</sup> Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment, A/HRC/31/57 (2016), para. 42.

<sup>41</sup> Committee Against Torture, General Comment No. 2 on implementation of article 2 by States parties, para. 22.

<sup>42</sup> Human Rights Committee, *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016), paras. 7.4-7.6.

<sup>43</sup> A/54/38/Rev. 1, CAT/C/BOL/CO/2, CAT/C/PRY/CO/4-6, CAT/C/SLE/CO/1, CAT/C/POL/CO/5-6, CAT/C/PER/CO/5-6, CAT/C/KEN/CO/2, CAT/C/NIC/CO/1, CAT/C/POL/CO/5-6, CAT/C/PER/CO/4.

<sup>44</sup> CAT/C/NIC/CO/1.

<sup>45</sup> CAT/C/PRY/CO/4-6.

eventually resulting in paralysis, in determining a violation of the Convention related to denial of abortion services.<sup>46</sup>

International jurisprudence has shown that the denial of abortion in certain cases of fatal fetal impairment can amount to torture or CIDT. In the decision of the Human Rights Committee *K.L. v. Peru*, in which an adolescent with an anencephalic fetus was forced to carry the child to term, the Committee held that K.L. had endured severe mental suffering in giving birth to her daughter knowing that she would die imminently.<sup>47</sup> Similarly, in *Mellet v. Ireland*, the Committee found a violation of the prohibition of torture and other forms of cruel, inhuman and degrading treatment where the woman concerned was denied an abortion after an ultrasound revealed that her fetus had fatal anomalies, which would result either in stillbirth or death shortly after birth.<sup>48</sup>

The age and/or disability status of a woman, adolescent, or girl seeking a therapeutic abortion can make her more vulnerable to physical and mental suffering. The findings of the Human Rights Committee in *VDA v. Argentina* and Committee on the Elimination of Discrimination Against Women in *L.C. v. Peru* indicated that the age of the girl at the time of the pregnancy as well as their status as survivors of sexual assault made them more vulnerable to the intense mental suffering they experienced as a result of their pregnancies.<sup>49</sup> *VDA v. Argentina* further expressed that the violation of the prohibition of torture in the case “was made especially serious by the victim’s status as a young girl with a disability.”<sup>50</sup> Both cases called on the State to prevent similar violations of the respective treaties in the future, and Committee on the Elimination of Discrimination Against Women further specified that the State “[r]eview its laws with a view to establish a mechanism for effective access to therapeutic abortion under conditions that protect women’s physical and mental health.”<sup>51</sup>

## **Torture and Cruel, Inhuman and Degrading Treatment in the Context of Post-Abortion Care**

In situations of criminalization of abortion, access to post-abortion care is often also obstructed, exposing women and girls to further health risks and acute suffering. Provision of post-abortion care is considered part of the core obligations of States Parties to the Covenant on Economic, Social and Cultural Rights, in relation to the realization of the right to sexual and reproductive health, as a component of the right to the highest attainable standard of health.<sup>52</sup> All States also committed ensuring the provision of post-abortion care in the Beijing Platform for Action.<sup>53</sup>

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<sup>46</sup> Committee on the Elimination of Discrimination Against Women, *L.C. v. Peru*, CEDAW/C/50/D/22/2009, para. 8.15.

<sup>47</sup> Human Rights Committee, *K.L. v. Peru*, CCPR/C/85/D/1153/2003, para. 6.5.

<sup>48</sup> Human Rights Committee, *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016), para. 7.6.

<sup>49</sup> Committee on the Elimination of Discrimination Against Women, *L.C. v. Peru*, CEDAW/C/50/D/22/2009, para. 8.15; Human Rights Committee, *V.D.A. v. Argentina*, CCPR/C/101/D/1608/2007, para. 9.2.

<sup>50</sup> Human Rights Committee, *V.D.A. v. Argentina*, CCPR/C/101/D/1608/2007, para. 9.2.

<sup>51</sup> Committee on the Elimination of Discrimination Against Women, *L.C. v. Peru*, CEDAW/C/50/D/22/2009, para. 9(b)(i).

<sup>52</sup> Committee on Economic, Social and Cultural Rights, General Comment 22 (2016) on the right to sexual and reproductive health, para. 49(e).

<sup>53</sup> Beijing Declaration and Platform For Action, 1995, para. 106 (k).

The Committee Against Torture has expressed particular concern about the practice of denying care to women who have suffered complications from illegal abortions, conditioning the provision of life-saving post-abortion care on obtaining confessions from women about having undergone illegal abortions, and obliging physicians to bring information on women resorting to post-abortion health services to the attention of the authorities.<sup>54</sup>

Beyond the physical suffering<sup>55</sup> and mental health risks<sup>56</sup> associated with a lack of post-abortion care, women who are denied post-abortion care can also face intense shame and stigmatization<sup>57</sup> as well as fear of criminal reprisals.<sup>58</sup>

## Conclusion

The petition before the Supreme Court details the numerous ways in which an inadequate response to the Zika epidemic can, and has already, compromised human rights, including the sexual and reproductive health rights of women and girls. As highlighted at the beginning of this submission, human rights mechanisms have regularly insisted on human rights obligations related to abortion services, including the need to decriminalize abortion and to ensure legal access on certain grounds.

This submission aims to assist the Court by detailing the circumstances in which denial of abortion services may amount to torture and/or cruel, inhuman and degrading treatment. Specifically, the mental suffering that women and girls may face when they wish to terminate their pregnancy, including in the context of Zika, but do not have legal access to service, can be severe, and as explained above, can meet the threshold of torture and/or cruel, inhuman and degrading treatment. This can be further exacerbated for certain women and girls in a particularly vulnerable situation, including as a result of their age, disability status, or the circumstances of their pregnancy.

The special procedures mandate holders party to this intervention submit to the court that a human rights compliant response to the Zika epidemic will take account of the risk of torture and / or cruel, inhuman and degrading treatment for women and girls in the context of denial of abortion services and call for measures to mitigate such risk, in line with State obligations to prevent torture and cruel, inhuman and degrading treatment in all settings and circumstances, and to uphold all human rights, including the obligation to eliminate all forms of discrimination against women, and respect, protect and fulfil the right to health.

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<sup>54</sup> CAT/C/NIC/CO/1, CAT/C/PER/CO/5-6, CAT/C/PRY/CO/4-6, CAT/C/CR/32/5, CAT/C/PHL/CO/3.

<sup>55</sup> Special Rapporteur on the right to the highest attainable standard of physical and mental health, A/66/254 (2011), para. 31.

<sup>56</sup> Human Rights Committee, *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016), paras. 7.4-7.6.

<sup>57</sup> Human Rights Committee, *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016), para. 7.4.

<sup>58</sup> Special Rapporteur on the right to the highest attainable standard of physical and mental health, A/66/254 (2011) para. 36; CAT/PER/CO/5-6.