

# V. Violation of the Human Rights of Women as a Result of Punitive Abortion Legislation

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## A. INTRODUCTION

The punitive and restrictive abortion legislation in El Salvador resulting from the legal and constitutional reform process in 1998 and 1999 constitutes a violation of the human rights of women under international human rights treaties recognized by the Salvadoran state as having both domestic and international legal effect.

This abortion legislation and its implementation, along with provisions of the Health Code,<sup>249</sup> Family Code<sup>250</sup> and Civil Code,<sup>251</sup> grant specific protection to the fetus. This creates a conflict between the rights granted to the fetus and the nationally and internationally recognized rights of women. The criminalization of abortion undermines the protection of women's rights by violating rights guaranteed by the Salvadoran Constitution and international conventions ratified by the country, including the right to life, liberty and security of person; the right to health; the right to physical integrity; and the right to privacy. This chapter looks at the domestic legislative framework for protecting women's rights and demonstrates that the criminalization of abortion and the implementation of the latest reforms violate the women's rights recognized in this legislative framework. It also highlights the internationally recognized rights that are violated by punitive abortion regulations, as well as the Salvadoran state's international responsibility to protect those rights. The chapter furthermore points out the Salvadoran government's failure to fulfill its commitments arising from two important conferences convened by the United Nations: The International Conference on Population and Development (ICPD), held in Cairo in 1994, and the Fourth World Conference on Women, held in Beijing in 1995.

This chapter makes clear that the Salvadoran state has violated provisions and principles contained in national and international human rights instruments by failing to incorporate the necessary and appropriate measures to guarantee all of its citizens, and particularly young, single and low-income women, the ability to exercise their reproductive rights in general, and their right to abortion in particular.

## B. NATIONAL LEGISLATION AND POLICIES FOR THE PROTECTION OF SALVADORAN WOMEN

Although the Penal Code and constitutional reforms were adopted to eliminate the possibility of access to a legal abortion, the Salvadoran state is still bound by the Constitution and national legislation to protect the fundamental rights of women.

### ***1. The Constitution***

The Constitution of El Salvador protects every person's right to life, liberty, security of person, social justice and the right "to be protected in the preservation and defense" of those rights.<sup>252</sup> It also establishes that all persons are equal before the law and that there can be no restrictions based on race, gender or religion.<sup>253</sup> It features provisions to protect the right to health and lists guarantees of a universal nature, such as the right of any person who has not been duly convicted to be presumed innocent. The anti-abortion legislation violates all of these rights and constitutional guarantees.

#### ***a. The right to life***

The Penal Code reforms relating to abortion deny Salvadoran women protection of their right to life; they are deprived of this fundamental right and are forced to put their lives in danger when, because of criminalization, abortions are practiced in unsafe conditions. The state violates women's rights by giving priority to the fetus and providing it with greater legal protection. In fact, the prohibition of abortion is the direct cause of one of the highest maternal morbidity and mortality rates in Latin America.<sup>254</sup>

#### ***b. The right to liberty, security of person and physical integrity***

The Constitution also guarantees the right to liberty, to security of person and to physical integrity of Salvadoran women citizens, through which reproductive autonomy is protected.<sup>255</sup> The right to individual freedom includes protecting people's autonomy to decide on matters concerning reproductive life, the exercise of which implies women's right to decide for themselves the number and spacing of their children. The state must therefore refrain from interfering in the decision-making of women, since their autonomy and freedom are at stake. Similarly, the state should increase this protection and guarantee respect for these rights in the private sphere so that women are not subjected to coercion by members of their communities or families when it comes to decisions about their own reproductive capacity.

The right to security of person and to the preservation of physical integrity implies women's right to be protected from any kind of interference with their

decisions that may affect or endanger their physical integrity. The criminalization of abortion in El Salvador represents a threat for many women, because it opens the way to an invasion of women's bodily integrity. At a basic level, forcing a woman to carry an unwanted pregnancy to term is a physical and psychological invasion, even apart from special circumstances such as those of a woman who has survived rape, or who knows that the pregnancy is putting her life in danger. The precarious conditions in which the majority of those seeking abortion are forced to obtain one, due to criminalization, are a violation of the security of person and physical integrity of a significant number of Salvadoran women. Furthermore, when a woman suffers complications due to an abortion carried out in dangerous conditions, and does not seek proper medical attention for fear of imminent mistreatment and denunciation at the hands of medical staff, her physical integrity is compromised, since criminalization creates a barrier to obtaining the postabortion care needed to guarantee that physical integrity.

***c. The right to equality before the law and nondiscrimination***

The Constitution also guarantees equality before the law and prohibits gender-based discrimination.<sup>256</sup> Abortion is a procedure that is required only by women. When access is denied to this procedure, the right to nondiscrimination on the basis of gender is violated, since its prohibition has an impact only on the female sex, preventing access to a medical procedure that, in many cases, is necessary to save a woman's life and health.

The economic disparity between women of different sectors of society gives rise to other types of discrimination. Young women with low incomes suffer this discrimination. Women with higher socioeconomic standing have the option of obtaining a costly abortion in safe conditions in El Salvador or abroad. Poorer women are forced to have clandestine abortions, often at the hands of untrained practitioners who, in many cases, exploit the women's vulnerability, knowing they will not be reported to the authorities even if there are complications due to their negligence or other factors.

The application of this punitive legislation, which affects only women, and particularly society's young, poor and most vulnerable women, clearly highlights the fact that multiple forms of discrimination may occur simultaneously, constituting a clear violation of the right to equality and to nondiscrimination.

***d. The right to health***

The Constitution of El Salvador guarantees the right to health by establishing the state's specific obligation to ensure the right to health of the inhabitants of El Salvador.<sup>257</sup> A woman is deprived of this right when she is forced to continue a

pregnancy that endangers her life and her physical and mental health, either because it is an unwanted pregnancy, which includes pregnancies as a result of rape, and/or because continuing the pregnancy would cause serious complications affecting the woman's life, physical health and mental health.

Furthermore, when a woman has an abortion that leads to complications, the threat of being reported to the authorities by hospital staff, and the possibility of being arrested, discourage her from seeking the necessary medical attention. This is the equivalent of denying women access to health care services, which can cost them their lives or cause irreparable damage to their health, thus violating their constitutionally recognized right to health.

It is important to add that criminalization entails an accompanying social stigma for women who have abortions. This affects Salvadoran women's mental health and well-being and undermines their right to health. This stigma also compromises the right to access health care services without discrimination or violence, in cases where women are reported to the authorities because medical staff suspect them of having induced an abortion, even when the women have suffered a miscarriage.

***e. The right to be presumed innocent***

Finally, the Constitution and the Penal Code of El Salvador also uphold the right of accused persons to be presumed innocent.<sup>258</sup> This right is violated in abortion cases, since many of the women charged with abortion are placed in preventive custody. The legal case records studied during this research show that preventive custody is applied to make sure the accused will appear in court when subpoenaed by the judge. However, in many cases the prosecutor requests immediate detention, even when a woman is in the hospital recovering from a badly performed abortion. This is not only cruel and humiliating treatment, it is a violation of the basic right to be presumed innocent, in addition to endangering the woman's life.

In liberal penal systems that protect civil rights, preventive custody should only be applied in very special circumstances. In fact, in developing this constitutional guarantee, the legislative intent behind the Salvadoran Penal Code indicates that detention (deprivation of freedom) is an exceptional measure that must be proportional to the severity of the crime. According to this reasoning, it should only apply "to the accused for whom it is presumed that there is a flight risk, or whose freedom will compromise a concrete step of the investigation." The criteria used to assess the danger or likelihood of flight on the part of the accused are any previous offenses and the person's family ties.<sup>259</sup> With regard to preventive custody in

cases where a woman is charged with having had an abortion, it is obvious that she is not a risk to other persons. She generally does not have a criminal record, and there is no concrete risk of flight, since, in almost all cases, the woman returns to her family context. Therefore, the use of preventive custody in abortion cases, combined with the long postponements characteristic of criminal trials in El Salvador, makes the application of this measure to women who have obtained abortions a violation of their right to be presumed innocent, a principle established as a constitutional guarantee and governing principle of the Salvadoran penal process.

## **2. The Health Code**

Section 3 of the Salvadoran Health Code, entitled Health of Mothers, Infants, Preschoolers and School Children,<sup>260</sup> grants women the right to health, but contains a contradiction. It establishes the state's binding obligation to promote, protect and improve the health of both mother and child, using all of the methods at its disposal. It also establishes that health care dispensaries must provide preventive and curative health care to women during pregnancy, and to children from the moment of conception to the time they finish school.<sup>261</sup> This regulation creates a conflict between women's right to health and the rights of the fetus. The wording of the penal and constitutional reform prioritizes the life of the unborn over the life of a living person whose life and health may be in danger.

Women's right to life and to health in these conditions are recognized in the Constitution. Furthermore, the Civil Code establishes that a human being's existence begins at birth.<sup>262</sup> Therefore, in case of conflict between protecting the life of the mother, and the fetus's supposed rights to life and health, the rights of the person as defined in the Civil Code should take precedence. In other words, the constitutionally recognized rights of women, whose life and health are put at risk, should come first.

The Civil Code also guarantees the confidentiality of the patient-doctor relationship as a duty of the medical profession in the interest of the public, of patient safety and of family honor.<sup>263</sup> According to the Health Code, a doctor may receive explicit information from a patient in the form of a confession, or the information may be gained implicitly as a result of the relationship between the two parties.<sup>264</sup> Disclosure of this professional secret is a serious offense,<sup>265</sup> which the Civil Code punishes with imprisonment and expulsion from professional practice.<sup>266</sup>

In cases involving abortion, many women arrive at the hospital in critical condition due to sepsis caused by poorly performed abortions. In such a moment of

fear and despair, a woman may confess to the attending physician that she has induced the abortion, which makes her vulnerable to the threat of being reported to the authorities.<sup>267</sup> There are also situations in which a doctor may assume that a woman has induced an abortion and turn her in based on subjective rather than objective factors. In all cases, when a doctor reports a woman to the prosecutor, both the professional confidentiality to which she is entitled under penal regulations and the Health Code, and her right to privacy protected by the Constitution, are violated.<sup>268</sup>

At the same time, women's loss of confidence in the health care system has led them to avoid seeking postabortion care, resorting to it only when their lives are in serious danger,<sup>269</sup> and at the risk of having their right to confidentiality violated. This is a violation of women's constitutionally recognized right to health, since criminalization is an obstacle to safe access to health care services on the part of women suffering from abortion-related complications.

### **3 National policies**

The government has created a set of policies that recognize abortion issues, acknowledge the need to strengthen reproductive health programs and indicate various courses of action to deal with the situation. These policies acknowledge the serious consequences of clandestine abortion and should therefore compel government action to revise its punitive legislation and make it compatible with internationally recognized principles for the protection of women's rights.

In terms of women's general and reproductive health, the National Women's Policy (PNM),<sup>270</sup> the National Health Plan (PNS)<sup>271</sup> and the National Reproductive Health Plan (PNSR)<sup>272</sup> have complementary objectives and programs that seek to address women's reproductive health. The Women's Policy specifically recognizes the need to deal with inequality between men and women when it comes to health care.<sup>273</sup> This means that particular attention should be given to unwanted pregnancies, because they are so common. There is a need for these governmental initiatives to incorporate strategies to better address real needs and challenges. In the context of these initiatives, the criminalization of abortion constitutes a real barrier to women's development, in addition to violating universal human rights principles. The PNSR acknowledges in writing the problem of unwanted pregnancies and abortion, recognizing that the high rate of unwanted pregnancies in El Salvador may contribute to the high incidence of abortions, which affects women's lives and health.<sup>274</sup> The PNSR recognizes the low level of control that women have over their own bodies and health, highlights the need to address this situation and expresses the concern that the incidence of abortion-

related complications may be one of the main causes of maternal mortality.<sup>275</sup>

In this respect, and with the aim of addressing the situation, one of PNSR's goals is to ensure that one hundred percent of hospitals that treat women with abortion-related complications have the human and material resources required to provide proper care.<sup>276</sup> Its strategies for action also include promoting services in institutions to care for women suffering from abortion-related complications.<sup>277</sup>

This acknowledgement of the problems linked to the medical complications of induced abortion, and the institutional response set out in government policies, demonstrate that the Salvadoran government is aware of the current abortion situation as well as the need to address this situation in its policies. Nevertheless, instead of providing a workable approach or a solution to the problem, the criminalization of abortion is an obstacle to the effective implementation of policies aimed at protecting the reproductive health of Salvadoran women.

## C. INTERNATIONAL HUMAN RIGHTS VIOLATED BY THE ABORTION LAW

### ***1. Incorporating international treaties***

In signing various international instruments for the protection of human rights, El Salvador has undertaken international obligations that force it to respect, protect and guarantee the rights of women, rights which have been recognized as universal, indivisible, interdependent and inalienable. The state provides protection to the women of El Salvador through national laws, as well as regional and international mechanisms that operate simultaneously, opening a series of agencies to interpret principles and detect violations of these rights. The Salvadoran Constitution states that international treaties are considered laws of the country once they come into effect according to the treaty provisions. The Constitution also states that, in case of conflict between national laws and the provisions of an international treaty, the latter will prevail.<sup>278</sup> With respect to the rights contained in the Constitution, it is clear that they can be interpreted, articulated and expanded according to the principles contained in international human rights treaties.

El Salvador has ratified most major treaties and conventions for the protection of human and, consequently, women's rights.<sup>279</sup> In this respect, as demonstrated in this section, punitive legislation restricting access to abortion violates international obligations establishing the protection of Salvadoran women's rights which have the status of national law.

## ***2. Internationally recognized human rights violated by the criminalization of abortion***

The criminalization of abortion in El Salvador violates a series of human rights recognized by various international treaties signed by El Salvador, and by international documents that reflect the general consensus with regard to these rights. Recognized rights include the right to life, to liberty and to physical integrity; the right to reproductive freedom and autonomy; the right to health, to reproductive health and family planning; and the right to privacy. Some of these rights are enshrined in the three most important international human rights instruments: the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (Civil and Political Rights Covenant) and the International Covenant on Economic, Social and Cultural Rights (Economic and Social Rights Covenant). These rights have also been recognized in more recent instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention), which has expanded the interpretation and implementation of existing categories of rights, extending them to new spheres of action and thus further reinforcing guarantees for the protection of the human rights of women and other vulnerable groups.

The Inter-American human rights system has similarly recognized these rights in various instruments, such as the American Convention on Human Rights (American Convention), the American Convention on Human Rights' Additional Protocol on Economic, Social and Cultural Rights (San Salvador Protocol) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará).

The following is a discussion of the various rights recognized in these international instruments, to show that the Salvadoran state violates these rights by denying Salvadoran women access to abortion. Special emphasis will be given to the observations and recommendations of the committees in charge of monitoring compliance with these treaties, as well as to the jurisprudence generated by the judicial or quasi-judicial bodies that have interpreted some of these rights. A few of these bodies have explicitly mentioned abortion and have discussed the criminalization of abortion as a violation of the human rights of women. These observations and recommendations of the committees support an interpretation of international treaties recognizing the right of every woman to end her pregnancy. Finally, this section will show how different United Nations world conferences attended by El Salvador recognize the international commitment to address reproductive rights from a human rights perspective, and to put specific measures

into practice to deal with the consequences of unsafe abortion. This commitment was undertaken by all parties signing the conference documents.

***a. The right to life, liberty and security of person***

The right to life, liberty and security of person is a guarantee found in international treaties. The Universal Declaration establishes that all individuals have “the right to life, liberty and the security of person.”<sup>280</sup>

***i. The right to life***

The right to life is the basic condition for the effective exercise of all other rights. It is recognized as such in provisions of various international treaties, including Article 6(1) of the Civil and Political Rights Covenant<sup>281</sup> and Article 4(1) of the American Convention.<sup>282</sup> Although it has traditionally been interpreted in a restrictive manner to guarantee the right to due process when persons are given the death sentence, the Human Rights Committee (HRC)<sup>283</sup> has stated that “[t]he expression ‘the right to life is inherent to human beings’ may not be understood restrictively, and the protection of this right demands that states adopt positive measures.”<sup>284</sup> Along these lines, the Inter-American Court of Human Rights<sup>285</sup> has expressed that the right to life imposes positive obligations on governments to prevent and avoid situations that put people’s lives at risk,<sup>286</sup> as in the case of women who die from the complications of clandestine abortions.

The HRC furthermore points out that, in the context of equality among men and women, guaranteeing the right to life implies the need to eliminate obstacles to women’s full enjoyment of their human rights, by adopting measures in key areas for their effective empowerment.<sup>287</sup> In its review of various Latin American states’ fulfillment of international obligations in relation to the Civil and Political Rights Covenant, the HRC similarly considered punitive abortion legislation to be a violation of women’s right to life and their right to be free from inhuman and degrading treatment. The HRC has issued recommendations, stating that Peru and Chile should take all necessary measures to keep women from losing their lives as a result of restrictive legislation in this area.<sup>288</sup>

In the case of Chile, the HRC formulated the following guideline: “The State Party has the duty to adopt the necessary measures to guarantee the right to life of all persons, including that of pregnant women who decide to terminate their pregnancies.”<sup>289</sup> In this respect, in order to guarantee women’s right to life, it is imperative that the punitive regulations that prevent them from doing so be eliminated.

The HRC has similarly established that states shall take the necessary measures to guarantee and increase people’s life expectancy and, with the aim of monitor-

ing governments' respect and protection for women's right to life, it has started requiring information from States Parties, on the specific measures being taken to prevent the clandestine abortions that claim the lives of thousands of women, with additional statistics on the specific incidence of this phenomenon among low-income women. This underscores the importance of documenting these cases by gathering information disaggregated not only by gender, but also by age, economic status, etc.<sup>290</sup>

Therefore, in the context of illegal abortion, this points to a recently articulated obligation on the part of governments to guarantee women's right to life and prevent situations that put their lives at risk. States are being required to take measures to eliminate barriers that make the exercise of women's rights impossible and to take measures to guarantee women's right to life, thereby reducing maternal morbidity and mortality rates caused directly by abortions practiced in unsafe conditions.

#### ***ii. The right to security of person and physical integrity***

The right to physical integrity has been recognized in the provisions of various international treaties linked to recognition of the right to personal privacy and safety. As set out in the Universal Declaration and the Civil and Political Rights Covenant, "all individuals are entitled to personal liberty and security of person."<sup>291</sup> This right is similarly established by the Economic and Social Rights Covenant<sup>292</sup> and the UN Declaration on the Elimination of Discrimination Against Women (Women's Declaration)<sup>293</sup> confirming its universal, and therefore fundamental, nature. These principles are elaborated on in provisions such as Article 5.1 of the American Convention, as well as the Convention of Belém do Pará,<sup>294</sup> according to which, respect for a person's integrity should be considered at three levels: "physical, mental and moral."<sup>295</sup>

These international instruments protect against the unauthorized invasion of women's bodies and are aimed at safeguarding their right to security of person and physical integrity. Under these treaties, states are obliged to protect this right, guaranteeing its respect by public and private health care providers. The international instruments also impose the obligation to guarantee the right to personal safety and integrity via the adoption of policies and measures that avoid situations that put physical integrity at risk.

In this respect, the absolute prohibition of abortion in El Salvador constitutes a violation of women's right to security of person and personal integrity. First, it constitutes an unauthorized invasion of women's bodies, by forcing them to carry unwanted pregnancies to term. This invasion of a woman's body can have devas-

tating effects on her physical and emotional integrity, particularly when a woman must continue a pregnancy that endangers her life or health, or when the pregnancy is a product of rape. Secondly, this right is violated by punitive legislation. In denying women the possibility of making autonomous decisions about their bodies, it generates mistrust toward health care institutions on the part of women. This in turn creates obstacles to health care access, endangering the physical integrity of thousands of women. In this respect, when the HRC has considered the issue of abortion in countries like Chile, which has legislation similar to that of El Salvador, it has concluded that: “[t]he legal duty imposed on health care staff to report cases of women who have submitted themselves to an abortion can inhibit women from seeking medical treatment, thus putting their lives in danger.”<sup>296</sup> Finally, the state violates these provisions by failing to adopt measures that guarantee proper and compassionate postabortion care for women that does not imply a further risk to their lives and health once they have obtained an abortion in dangerous conditions.

***b. The right to reproductive freedom and self-determination***

The principles of personal dignity and right to liberty are the foundation of women’s right to reproductive self-determination and the right to freely choose the number and spacing of their children, recognized in various international human rights instruments. The right to liberty is enshrined in Article 3 of the Universal Declaration, as well as in Article 7 of the American Convention. In specific terms, the Women’s Convention establishes, in Article 16(1)(e), women’s right “to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”

The exercise of this right is violated when women are denied all possibility of deciding the number of their children by interrupting an unwanted pregnancy. To ensure full enjoyment and exercise of this right, the state must create the necessary conditions for women to control their reproductive capacity.

In the context of El Salvador, where there is limited access to sexuality education and family planning information and services, access to safe abortion may be the only mechanism through which a woman can control the size of her family and thus exercise her right to reproductive autonomy. Therefore, as set out in the Women’s Convention, women’s reproductive autonomy is violated when there are obstacles to the means through which a woman can exercise the right to control her fertility.<sup>297</sup>

***c. The right to equality and nondiscrimination***

The right to equality and nondiscrimination is a fundamental principle recog-

nized by international law. International instruments such as the Universal Declaration,<sup>298</sup> the Civil and Political Rights Covenant,<sup>299</sup> the Economic and Social Rights Covenant<sup>300</sup> and the American Convention<sup>301</sup> specifically address the right to equality and nondiscrimination based on gender.

It is the Women's Convention that elaborates the notion of gender discrimination in the most comprehensive manner and establishes the obligation on the part of governments to guarantee equality before the law. By signing the Convention, states are obliged to take the necessary measures to put the principle of equality into practice at the national level and to eliminate legal grounds for discrimination. The Women's Convention requires all countries to "[r]epeal all national penal provisions which constitute discrimination against women."<sup>302</sup> It similarly defines "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."<sup>303</sup>

In order to be considered discriminatory, restrictive abortion laws would have to have the "effect" or "purpose" of preventing women from enjoying at least one of their fundamental human rights or liberties on an equal footing with men. Abortion legislation in El Salvador meets this threshold because it has the result of limiting women's access to a medical procedure that may be necessary for their health and, in some cases, of putting women's lives in danger. The Committee has emphasized that "laws that penalize certain medical interventions that exclusively affect women" constitute a barrier to receiving necessary medical care, thus compromising women's right to gender equality with respect to health care and violating the international obligation of governments to respect internationally recognized rights.<sup>304</sup>

Similarly, abortion laws are discriminatory in their objective, since they reveal a paternalistic attitude toward women's bodies and their reproductive rights. This attitude defines women solely in terms of their reproductive role, relegating them to the traditional role of mother, even against their will, leaving them out of society's various decision-making spheres. It implies a restriction of their participation in decision making outside the home with regard to political, economic, social, cultural and civil issues.<sup>305</sup> In El Salvador, the absolute prohibition of abortion as a denial of women's ability to make autonomous decisions about a vital area of their lives, such as their own reproduction, reflects a society that discriminates against women in all social spheres. This prohibition furthermore denies

Salvadorans the right to freedom of opinion and religion, limiting the exercise of these rights by the imposition in law of a Catholic view of abortion, despite the fact that many Salvadorans have other religious beliefs.

At another level, the examined case records from prosecutors' offices throughout El Salvador showed that abortion law is applied in a way that discriminates against low-income women. Article 2(2) of the Economic and Social Rights Covenant establishes: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Discrimination based on socioeconomic position violates the most fundamental principles of human rights law. In this respect, it is clear that the criminalization of abortion discriminates against women based on biological differences as well as socioeconomic status. This type of double and simultaneous discrimination affects their enjoyment of all other internationally recognized rights.

***d. The right to health, reproductive health and family planning***

The right to health, reproductive health and family planning is guaranteed by various international treaties such as the Universal Declaration,<sup>306</sup> the Economic and Social Rights Covenant,<sup>307</sup> the Women's Convention<sup>308</sup> and the San Salvador Protocol, which, adopting the WHO definition,<sup>309</sup> stipulates that "[e]veryone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being."<sup>310</sup>

The Universal Declaration recognizes people's right to achieve an adequate standard of health, among other things, in order to attain well-being.<sup>311</sup> Article 12 of the Economic and Social Rights Covenant<sup>312</sup> specifically protects the right to health. It recognizes "the right of everyone to the enjoyment of the highest attainable standards of physical and mental health"<sup>313</sup> and obliges governments to attain this standard and protect the populations that are in specific situations of greater vulnerability.<sup>314</sup> According to the Economic and Social Rights Covenant, states must create the conditions to ensure medical treatment and services for all in case of illness.<sup>315</sup>

Article 12(1) of the Women's Convention obliges states to adopt the proper measures to eliminate discrimination against women in relation to medical care. This is aimed at ensuring equal access to health care for men and women, including family planning services. The Women's Convention specifically protects rural women's access to adequate health services, including family planning information, counseling and services.<sup>316</sup>

Within the Inter-American system, the San Salvador Protocol<sup>317</sup> reflects an important development of the right to health. In addition to recognizing people's right to enjoy the highest possible standard of physical and mental health, it also obliges States Parties to recognize health as a "public good," and outlines a set of measures aimed at the states' fulfillment of this right.<sup>318</sup>

Not only are states obliged to adopt active measures to provide all women with access to reproductive health services,<sup>319</sup> including measures to promote safe motherhood, assistance with regard to HIV/AIDS and STIs, abortion and various contraceptive methods, but they are also responsible for eliminating legal barriers in the area of reproductive health. As mentioned above, the Committee has issued specific recommendations on this matter.<sup>320</sup>

Reproductive health is fundamental to women's well-being. When women cannot rely on safe, quality health care, as in El Salvador, they are exposed to the danger of clandestine abortions performed under dangerous conditions. This is a violation of women's internationally recognized right to health. It should also be taken into account that abortion is a medical procedure that affects only women. Since a pregnancy, wanted or unwanted, can endanger a woman's physical and mental health, abortion may be the only procedure able to guarantee her survival and well-being. In this respect, the regulations that penalize abortion in El Salvador are a serious violation of the right to health and the right to nondiscrimination with regard to health,<sup>321</sup> recognized by various international instruments signed by the Salvadoran state.

#### ***e. The right to privacy***

The right to privacy is protected in different international human rights instruments and treaties, such as the Universal Declaration<sup>322</sup> and the International Covenant on Civil and Political Rights.<sup>323</sup> The latter establishes that "no one shall be subjected to arbitrary or unlawful interference with his privacy. . . ." <sup>324</sup> Similarly, the American Convention protects the right to privacy, stipulating that all persons have the right to have their honor respected and their dignity recognized. It also stipulates the right of all persons to have their private and family life, their home and their correspondence protected from interference or arbitrary attacks that compromise their honor and reputation, as well as their right to legal protection from such attacks.<sup>325</sup> In its interpretation of this provision, the Inter-American Commission on Human Rights closely links the right to integrity and the right to privacy,<sup>326</sup> establishing that the protection of privacy harbors "the protection of a person's physical and moral integrity" and "guarantees

a space that no one may invade, a sphere of activity that is absolutely personal to each individual.”<sup>327</sup>

In the context of absolute criminalization of abortion, this right is violated insofar as women are denied the right to make decisions about their own bodies and reproductive capacity without the interference of third parties. This denial of the exercise of a right that so deeply affects the private lives of women, and the state’s interference in this decision — which in many cases has negative repercussions on women’s physical integrity — violates women’s right to privacy. It is worth highlighting the fact that the European Commission of Human Rights has repeatedly stated, in relation to abortion cases, that a person’s decisions involving his or her body, and reproductive capacity in particular, fall within the sphere of each individual’s private life.<sup>328</sup> The HRC has also established that a woman’s right to privacy is seriously compromised when states impose obstacles that limit women’s decision making abilities in relation to their reproductive functions.<sup>329</sup>

Along the same lines, the right to privacy covers patients’ right to confidentiality. As expressed by the HRC, when the state imposes legal obligations on doctors to report women who have induced an abortion,<sup>330</sup> the confidential relationship between doctor and patient, and in turn the right to privacy, is violated. The HRC has therefore recommended: “that the law be revised to establish exceptions to the general prohibition of all abortions and to protect the confidential nature of medical information.”<sup>331</sup> In this context, the fact that many of the abortion cases in El Salvador are reported by hospitals clearly reflects the violation of a woman’s right to be treated by a doctor who will consistently respect her confidentiality, in other words, her internationally protected right to privacy.

### ***f. The right to be presumed innocent***

Proceedings against women who resort to abortion violate their right to be presumed innocent when preventive custody is imposed. Furthermore, the Covenant on Civil and Political Rights establishes that preventive custody for persons with upcoming trials should not be the general rule.<sup>332</sup> The American Convention on Human Rights states: “[A]ll accused persons have the right to be presumed innocent until their guilt has been legally established. . . .”<sup>333</sup>

In El Salvador, legal practice shows that preventive custody is used quite frequently in abortion cases. This runs counter to the purposes for which this legal measure was conceived,<sup>334</sup> thus violating the human rights of women within the criminal process.

## ***3 International responsibility***

The responsibility of states is a basic principle of international law, according to which, states are legally responsible for violations of the international treaties they have signed. The international human rights treaties signed by El Salvador create the obligation to *respect, protect and guarantee* the exercise of the rights stated therein.

Punitive abortion legislation violates the duty to *respect* women's internationally recognized rights insofar as the state actively intervenes by interfering in a woman's decision about her reproductive capacity, thus compromising her right to autonomy and to privacy, and creating obstacles to the enjoyment of her human rights. In this respect, the Committee on the Elimination of Discrimination Against Women (the CEDAW Committee), which is responsible for monitoring the obligations undertaken by states under the Women's Convention, has interpreted the *obligation to respect* established human rights in the area of health as including the obligation to eliminate the barriers to accessing reproductive health care. Restrictive abortion legislation is such a barrier and runs counter to States Parties' obligations under the Women's Convention. The legislators' *intention* in adopting the law against abortion may not have been to discriminate against poor, young women with limited means. However, the *result* of the law's application is clearly discriminatory, and thus contrary to the spirit and provisions of the Women's Convention.

The state must in turn *protect* all its citizens, men and women, by taking the necessary measures to prevent the violation of their rights by third parties, i.e., by private and nongovernmental entities. It is clear that the rights of women who obtain abortions are being abused by persons who carry out the procedure in clandestine and dangerous conditions. Furthermore, women who self-induce abortions are victims of rights violations at the hands of medical and law enforcement personnel.

Upon ratifying international treaties, governments also obligate themselves to *guarantee* human rights by putting into practice the proper measures to ensure that all persons can exercise these rights. States are similarly required to take the appropriate measures to improve their citizens' capacity to exercise their rights. This means that, in the context of international human rights law, governments not only have the duty to respect the rights of citizens and protect those rights from violation by third parties, but they also have the duty to guarantee and ensure, by implementing positive measures, the exercise of these rights by all.

The obligation to *guarantee* imposes obligations relating both to state conduct and to outcome. According to obligations relating to state conduct, the State must undertake action and formulate policies aimed at achieving these rights. For

example, one of the Salvadoran government's obligations under international human rights law is to maintain a social order in which all citizens can enjoy their rights. Article 28 of the Universal Declaration provides that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."<sup>335</sup> This provision indicates that governments have the duty to identify and address the social and economic factors that may prevent certain sectors of society from exercising their rights. By criminalizing abortion and failing to implement policies that deal with this issue, the Salvadoran government is breaking its international obligation to guarantee a just social order.

The obligation to guarantee the exercise of a right also imposes upon governments obligations with respect to outcomes, which imply taking concrete measures to ensure the exercise of a right. For example, in the case of clandestine abortion, in which women's right to health and to life are seriously compromised, the State has the concrete duty to protect the health and lives of women by formulating and adopting specific laws and policies aimed at reducing the number of women's deaths from complications following clandestine abortions. This would represent an effective guarantee of women's right to life, to physical integrity and to health. By failing to eliminate the restrictive legislation, and failing to implement proactive policies to deal with the high maternal mortality rate caused by induced abortion, the government of El Salvador is failing to fulfill its obligation to guarantee Salvadoran women's right to life.

#### ***4 UN world conferences***

In addition to the international obligations arising from international treaties, member states have made other international commitments to protect and promote the human rights of women. A series of conferences throughout the 1990s recognized that reproductive rights are essential, both to strengthening the human rights of women and to promoting development. These more recent conferences drew on principles, such as the right of individuals to freely choose the number and spacing of their children, that were established at previous conferences, including the International Human Rights Conference in Teheran in 1968,<sup>336</sup> and the International Population Conference held in Mexico in 1984.<sup>337</sup> Commitments were established in defense of these rights — as reiterated in the Rio Agenda of the UN Conference on Environment and Development in 1992 — stating that governments must provide accessible health services to facilitate

the exercise of reproductive rights.<sup>338</sup> The 1993 World Conference on Human Rights enshrined the human rights of women and established in its Programme of Action “equality between men and women, women’s right to have access to proper health care and a broader range of family planning services, as well as equal access to education at all levels.”<sup>339</sup>

These principles reflect the battle waged by those who defend women’s capacity to control their fertility as fundamental to promoting women’s equality and participation in society. Although they are not binding on governments, the agreements reached at international conferences represent a consensus on the issues addressed,<sup>340</sup> and governments commit themselves to translating the principles discussed in the conferences into better living conditions for their citizens, men and women alike. As mentioned in a previous chapter, El Salvador recently participated in two key conferences for the development and interpretation of reproductive rights: the ICPD and the FWCW.

In the case of the ICPD, the Salvadoran delegation entered reservations with regard to the adopted Programme of Action. El Salvador wanted to specify that it did not acknowledge the obligation to act on the aspects of the agreed document about which it expressed reservations. However, as we shall demonstrate, the broad and generic nature of the reservations, the fact that they do not limit the government’s commitment to recognize and protect women’s reproductive rights, and the fact that the Salvadoran government has obligations deriving from the international treaties it has signed, nullify its reservations to the ICPD Programme of Action.

#### ***a. International Conference on Population and Development***

At the ICPD, 179 governments adopted by consensus a historical agreement that recognizes reproductive rights as an integral component of human rights. The ICPD Programme of Action establishes that reproductive rights “are based on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number and spacing of their children, and to have access to the information and means to do so. . . .”<sup>341</sup> The ICPD also articulated the obligation on the part of governments to respect these rights by guaranteeing the right of individuals to make reproductive decisions free from discrimination, in public and private health care institutions alike.<sup>342</sup>

In relation to abortion, the Programme of Action is significant in that it deals with the issue of unsafe abortion as a public health issue, rather than a moral, religious or cultural issue. In this respect, the Programme of Action recognized and

called upon the governments in attendance to take into account the consequences that unsafe abortions have on women's health. All governments and relevant international and nongovernmental organizations were urged to strengthen their commitment to women's health and address the problem of unsafe abortion as a public-health issue through more accessible and higher quality family planning services. It gave the highest priority to preventing unwanted pregnancies and urged that the utmost effort be made to render abortion unnecessary.<sup>343</sup> It also provided that governments must carry out postabortion care programs to handle and treat the consequences and complications arising from unsafe abortions and provide compassionate treatment and counseling to women who have obtained abortions, accompanied by counseling in family planning.<sup>344</sup>

Although the Salvadoran delegation gave its verbal consent and approval for the Programme of Action, it also entered its reservations with respect to the two points in the ICPD Programme of Action related to abortion.<sup>345</sup> However, given the vagueness of these reservations and, in some cases, the technical inaccuracies which render them inapplicable, the reservations do not invalidate the commitment to respect and protect the reproductive rights of women, which El Salvador acquired upon adoption of the Programme of Action. The first reservation referred to Principle 1 of the Programme of Action, the right to life. The delegation expressed that El Salvador, as a signatory to the American Convention, had to interpret the right to life to mean its protection from the moment of conception. This interpretation, however, is based on an incorrect understanding of the principles expressed in the ICPD Programme of Action, which does not advocate abortion as a family planning method. It should also be highlighted that the assertion that the Inter-American system protects life from the moment of conception in order to deny the possibility of legal abortion is inaccurate. The Inter-American Commission for Human Rights has explicitly stated that Article 1 of the American Declaration, which protects the right to life, should not be understood to protect fetal life and prohibit legal abortion.<sup>346</sup> The Salvadoran delegation also expressly indicated in its reservations that abortion should not be included as a service or method to regulate fertility. This reservation has no effect on El Salvador's obligations with regard to the principles expressed in the ICPD Programme of Action, insofar as abortion is in no way advocated as a family planning method. Therefore, the Salvadoran government is still committed to carrying out the mandate of the ICPD Programme of Action at the national level. Its reservations have no effect on the Programme of Action, particularly those that refer to postabortion care for women who have had abortions, and to provision of these services.

It is important to stress that, in 1999 during the Cairo+5 process to review fulfillment of the commitments contracted by governments at the ICPD, governments in general, and particularly a number of Latin American governments, once again recognized the problem of unsafe abortion by supporting some proposed wording changes in the Cairo+5 document on key measures.<sup>347</sup> This document establishes that “all governments [must] increase their commitment to women’s health, and address the health effects of abortions carried out in inadequate conditions as a serious public health problem.”<sup>348</sup> The document also indicates that “[i]n all cases, women must have access to quality services to treat abortion-related complications”<sup>349</sup> and stipulates that governments must “provide . . . humanitarian treatment and counseling to women who have resorted to abortion.”<sup>350</sup>

#### ***b. Fourth World Conference on Women***

The Beijing Platform for Action approved at the FWCW reaffirms and adopts the principles established at the ICPD with regard to the need to address women’s right to reproductive health and their right to control their own fertility and to make decisions about their reproduction without coercion, discrimination or violence.<sup>351</sup> The Platform for Action provides that “[i]n most countries, the lack of attention to women’s reproductive rights seriously limits their opportunities in public and private life, including opportunities for education and for the full exercise of their economic and political rights. Women’s ability to control their own fertility is a fundamental basis for the enjoyment of other rights.”<sup>352</sup>

The Platform for Action urges governments to recognize abortion as a public health problem and, consequently, to base their policies and programs on a commitment to women’s health.<sup>353</sup> It urges countries with legislation criminalizing abortion to consider revising it<sup>354</sup> and calls for studies to determine the reasons why women resort to unsafe abortions and the consequences of unsafe abortion.<sup>355</sup> The Platform for Action furthermore establishes that reproductive health programs must include counseling, particularly for women who have had an abortion, and asks governments to carry out investigations in this area to address the effects of abortion in a coherent manner.<sup>356</sup>

The Salvadoran delegation did not present formal reservations to the provisions of the Beijing Platform for Action.

Based on the preceding discussion of the conference documents, El Salvador’s punitive abortion legislation runs counter to the principles expressed in the ICPD Programme of Action and the FWCW Programme of Action. In fact, following

these conferences, instead of revising its punitive legislation in accordance with the Beijing Platform for Action, the Salvadoran government promoted even greater restrictions in abortion legislation. The fact that women continue to be reported and discriminated against when seeking public-health services following an abortion and the fact that they are not given compassionate treatment when they suffer abortion-related complications contradicts what has been established in these conferences. This demonstrates that the government of El Salvador has not only failed to fulfill its international commitments under several international treaties, but has also failed to fulfill international commitments undertaken at the various world conferences that have addressed the reproductive rights of women.

## Conclusion

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While the adoption of reproductive health policies in El Salvador is a step forward that may lead to greater respect and protection of women's rights, the criminalization of abortion continues to be an obstacle to Salvadoran women's full enjoyment of internationally recognized sexual and reproductive rights. Given that the circumstances differ for each woman who decides to terminate a pregnancy, the only person able to make that decision is the woman herself. The state must guarantee that a woman's decision to have an abortion does not put her life in danger.

Governments must respect and protect a woman's right to make decisions involving her reproductive life without risk to her life, physical integrity or health. A woman is entitled to exercise her reproductive rights under any circumstances: if she has been raped, if she risks her health by carrying a pregnancy to term, or if she decides to terminate the pregnancy for any number of other reasons. She also has the right not to be persecuted by the legal system or by the health care system if she needs to terminate her pregnancy. Furthermore, a woman has the right not to put her life and physical integrity in danger when undergoing an abortion. Governments must therefore oversee the protection of women's internationally recognized rights and adopt the measures agreed to at various international conferences to deal with the problem of unsafe abortion and eliminate situations where women must risk their lives and health to terminate a pregnancy.

In this report, we have shown the consequences of El Salvador's restrictive abortion legislation. Every year, thousands of Salvadoran women die or suffer serious health consequences owing to complications from abortions practiced in unsafe conditions. El Salvador's legislative reforms further exacerbate this situation, in violation of the fundamental rights of women recognized in international instruments for the protection of human rights and in world conferences that address the issue of unsafe abortion. In addition to this, Salvadoran women are subject to persecution on the part of the health care system, which is instructed to report women suspected of inducing abortion. They are further persecuted by the legal system, which aggravates the situation and contributes to the clandestine nature of abortion, translating into high morbidity and mortality rates for the

female population of El Salvador.

The current situation demonstrates the need to revise El Salvador's punitive legislation and to promote political and social programs tailored to address the magnitude of the problem. The seriousness of the situation can no longer be denied. It must be addressed in a legal context that reflects society's full respect for the human rights of women.

# Recommendations

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## TO THE VARIOUS INSTITUTIONS OF THE SALVADORAN STATE

### *General recommendations to the Salvadoran government*

- Develop legislative proposals and policies that explicitly recognize and promote women's reproductive rights as contained in the international human rights treaties and international conference documents subscribed to by El Salvador. Incorporate this legal and policy framework into various government spheres and policies, such as education, public health and social assistance, involving officials of different ranks from the executive, legislative and judicial branches of government, as well as civil society representatives, particularly from the women's movement.
- Promote specialized interdisciplinary commissions made up of professionals from the health sector, legislators and representatives of the women's movement, among others. The commissions should review Salvadoran laws and policies to detect discriminatory provisions, with special emphasis on the impact of restrictive laws in the area of reproductive rights, and recommend measures to deal with the problem of unsafe abortion.
- Initiate and promote extensive public debate on nationwide abortion, creating a forum for multiple perspectives and points of view from different sectors of society.
- Review laws and policies containing provisions that discriminate against women, and propose draft bills and policies that address the structural factors that serve as obstacles to the full enjoyment and exercise of economic and social rights on the part of Salvadoran women, particularly young, low-income women.

***To the Salvadoran Institute for Women's Development (ISDEMU):***

- Make unsafe abortion an agenda priority, and push for measures that address this issue.
- Promote public-awareness campaigns to encourage the understanding of abortion as a public-health problem that affects a large number of Salvadoran women, particularly young women with limited resources.
- Promote the defense and protection, by other government agencies and private actors, of the rights recognized in international treaties that protect women's rights, particularly their reproductive rights.
- Ensure fulfillment of the plans and actions foreseen in the National Policy on Women and the National Plan for Reproductive Health with regard to sexual and reproductive health, especially in terms of access to services and counseling for the adolescent population.
- As long as the criminalization of abortion continues in El Salvador, the ISDEMU should work with the Ministry of Health to promote treatment for incomplete abortion, as well as postabortion counseling for women who seek medical care and who have been prosecuted for terminating a pregnancy, to ensure that their rights are respected and that they are treated with dignity by health care staff and judicial officials.
- Carry out special community education activities on abortion-related issues within the context of human rights. These activities should include information on reproductive health, women's empowerment, counseling and access to family planning services.
- Design training courses for judicial branch officials and health care professionals on the content and application of international treaties on the human rights of women that include the issue of sexual and reproductive rights. Put into practice assistance and support programs for rape victims, to reduce the number of unwanted pregnancies as a result of sexual violence and incest. Information and access to free emergency contraception must therefore be included in care for female victims of sexual violence.

***To the Ministry of Health***

- Invite members of civil society — particularly women's groups that are familiar with the context of reproductive rights, violence against women and human rights of women — to work on and contribute to the formulation of national, regional and local policies and plans that affect women's sexual and reproductive health.
- Give priority to the implementation and evaluation of the activities contemplated in the National Plan for Reproductive Health. It is of the utmost importance to use indicators that show the quality of services provided to clients, particularly with regard to respect for their human rights.
- Address, document and track the problem of unsafe abortion and its severe impact on the maternal mortality and morbidity rate of Salvadoran women.
- Disseminate information on reproductive rights and increase access to reproductive health services through social communication media, taking into account the specific needs of more vulnerable groups.
- Give priority, in postabortion care services, to women suffering complications from abortions performed in dangerous conditions. These services should include free medical treatment and appropriate counseling on family planning methods. As part of this initiative, the public-health system should provide the necessary equipment and training to postabortion health care providers.
- Ensure the fulfillment of reproductive health plans and programs targeting adolescents and high-risk groups. In this context, it is of the utmost importance to initiate campaigns aimed at disseminating information on reproductive rights and family planning services, and to guarantee access to counseling in sexual and reproductive health.

***To the Attorney General's Office for the Protection of Human Rights***

- Study and address the need for reform of the Penal Code provisions on abortion provisions as a violation of the human rights of women.
- Follow up on abortion cases in the public prosecutors' offices of El Salvador, to ensure that the rights of women charged with abortion are not violated. This should include an examination of the discrimination suffered by women from the most vulnerable sectors of the population with respect to access to justice and the application of penal legislation, with recommendations on how to resolve this problem.
- Monitor the Salvadoran government's fulfillment of the international treaties and agreements signed by the country, which protect the human rights of women, analyzing the regulation of abortion from a human rights perspective.

***To the National Office of the Public Prosecutor***

- Ensure the effective application of substitutive measures to replace preventive custody in cases where women are charged with abortion, so that preventive custody does not apply in any such case.

**TO NONGOVERNMENTAL ORGANIZATIONS**

- NGOs working in the area of human rights and offering reproductive health services should join efforts to develop common strategies and campaigns on the decriminalization of abortion and the promotion of reproductive rights. Specifically, NGOs should work toward fostering public debate on abortion in the context of women's human rights and the need to respect their reproductive autonomy.
- Human rights NGOs should design strategies to promote and disseminate the international framework for the protection of women's reproductive rights. They should document and investigate cases in which these rights are abused. In this respect, they should monitor abortion cases initiated by the Office of the Public Prosecutor to ensure that women's rights are not violated and ensure that substitutive measures are used instead of preventive custody when a woman is charged with having self-induced an abortion.

- NGOs should demand that the state reaffirm its international commitments and sign CEDAW's Optional Protocol to signal that women's human rights are recognized and considered a priority. NGOs should also examine viability of presenting reproductive rights violation cases before international human rights protection systems such as the Inter-American system.
- The organizations that provide reproductive health services should advocate the creation of coalitions with medical associations or their members to initiate discussion and campaigns on decriminalization. In this respect, they could seek the support of local professional groups and foster discussion among groups of health care providers, medical associations, etc., to address the issue of unsafe abortion and the importance of decriminalizing abortion.

#### TO ASSOCIATIONS OF HEALTH PROFESSIONALS

- Create forums where doctors, specifically gynecologists who support women's reproductive rights, can speak out publicly on abortion as a public health problem that affects a specific sector of the female population, without incurring repercussions or reprimands from their professional association.
- Encourage dialogue on abortion legislation reform. In this respect, a joint working group of the International Federation of Gynecologists and Obstetricians (FIGO) and the WHO has recommended that gynecology and obstetrics associations in various countries promote and participate in the dialogue on punitive abortion legislation, contributing above all with scientific studies on special cases, such as when a woman's life is endangered by pregnancy.
- Respect the right to privacy of women who need postabortion care, by maintaining professional secrecy in the doctor-patient relationship.
- Assist in revising provisions in codes of medical ethics and in the Health Code that violate women's rights.

## TO THE MEDIA

- Promote the human rights of women by opening forums for discussion on sexual and reproductive rights, paying special attention to the impact of criminal abortion laws on Salvadoran women and providing impartial information. For example, there could be periodic discussion on the issue including persons who are in favor of and those against the decriminalization of abortion.
- Take measures to change the gender stereotypes present in the media, which constitute obstacles to the advancement of women and girls, as set forth in the recommendations of the Beijing Platform for Action.
- Support campaigns to fight discrimination against women and girls by actively condemning abuses of their rights, and change the sensationalistic style of stories about women who have had abortions.

## TO DONOR AGENCIES AND INTERNATIONAL ORGANIZATIONS IN EL SALVADOR

- Provide support to specific projects that address abortion as a public health problem, on the basis that its criminalization is a violation of women's reproductive rights. International donors should provide particular support to the work of NGOs involved in advocacy and political action on the issue of abortion and should support women's groups to make it possible to document and report cases in which their rights are violated.
- Support the plans of the Ministry of Public Health and Social Assistance and the Ministry of Education aimed at instituting sexuality education and access to reproductive health programs that promote reproductive rights.
- Support projects proposed by NGOs and/or the state that involve studying the issue of abortion from a public health perspective, and its impact on maternal morbidity and mortality. Similarly, priority must be given to research linking violence, unwanted pregnancies, miscarriages and induced abortions from a human rights perspective, particularly research aimed at women's empowerment and respect for women's reproductive self-determination.

## TO THE PROTECTION AND MONITORING BODIES OF UNIVERSAL AND REGIONAL HUMAN RIGHTS SYSTEMS

- The Human Rights Committee, the Committee on the Elimination of Discrimination Against Women and other bodies that monitor the human rights treaties signed by El Salvador should closely scrutinize Salvadoran legislation on abortion and that impacting sexual and reproductive rights in general, in order to eliminate regulations that violate the fundamental rights of women.
- The protection bodies of the Inter-American Human Rights System must demand that the Salvadoran government respect, protect and guarantee the rights contained in regional treaties, particularly the American Convention on Human Rights and the Convention of Belém do Pará. We recommend that, in its annual report, the Inter-American Commission on Human Rights speak out on this subject and issue recommendations to the Salvadoran Government. It is also recommended that the Commission devote special attention to the situation of women's health in its follow-up report to the Human Rights Report on the Status of Women in the Americas, published in 1998.
- Regional and international human rights protection bodies must demand that the Salvadoran state respect, protect and guarantee the civil, political, economic and social rights that in turn guarantee the highest level of sexual and reproductive health for women, as well as greater power of decision over reproduction free from discrimination, coercion and violence, in fulfillment of the commitments undertaken by the Government of El Salvador at the Cairo and Beijing conferences, and the international obligations it accepted in ratifying international conventions for the protection of human rights. These bodies must clearly state, in recommendations and communications, that the criminalization of abortion in El Salvador, along with all other legal provisions that discriminate against Salvadoran women, constitute a violation of women's human rights.

## Notes

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<sup>1</sup> See Center for Reproductive Law and Policy (CRLP), *Abortion Laws Around the World: Recent Changes and Recommendations for Action 1* (2000) [hereinafter *Recent Changes and Recommendations*]; The Alan Guttmacher Institute (AGI), *A Global Review of Laws on Induced Abortion, 1985–1997*, 24:2 *International Family Planning Perspectives* 56–63 (Jun. 1998).

<sup>2</sup> CRLP, *The Impact of Legislation on Abortion*, in *Thoughts on Abortion 2* (1999) [hereinafter *The Impact of Legislation*].

<sup>3</sup> *Recent Changes and Recommendations*, *supra* note 1, at 2.

<sup>4</sup> A clear example of the lack of information, and of the way demographic studies avoid tackling the issue directly for fear of compromising the confidentiality of women surveyed, is the fact that, for example, the National Family Health Survey carried out by the Salvadoran Demographic Association does not ask questions about abortion, making it impossible to count on statistics that provide an understanding of the magnitude of the problem. Interview with José Mario Cáceres, Salvadoran Demographic Association (Aug. 17, 1999) (on file with CRLP archives) [hereinafter *Cáceres Interview*].

<sup>5</sup> CRLP, *A First Look at Induced Abortions*, in *Thoughts on Abortion 1* (1999).

<sup>6</sup> Stanley K. Henshaw et al., AGI, *The Incidence of Abortion Worldwide*, 25 *International Family Planning Perspectives* S32 (Jan. 1999).

<sup>7</sup> CRLP, *Abortion as a Public Health Issue*, in *Thoughts on Abortion 1* (1999) [hereinafter *Abortion as a Public Health Issue*].

<sup>8</sup> *Id.*

<sup>9</sup> The maternal mortality rate is 300 deaths per one hundred thousand women. Bolivia (with 370 per one hundred thousand) and Haiti (with 600 per one hundred thousand) only have higher rates. World Bank, *World Development Indicators 1999 98–100* [hereinafter *Development Indicators*].

<sup>10</sup> The classification “planned birth” is used when a woman wants to be pregnant. Wanted but unplanned births occur when a woman wants to be pregnant, but wanted to wait longer before having a baby. Unplanned and unwanted births occur when the woman is pregnant even though she does not want to be. See Asociación Demográfica Salvadoreña [Salvadoran Demographic Association], Centers for Disease Control and Prevention (CDC),

Encuesta Nacional de la Salud Familiar: 1998 [National Family Planning Survey: 1998] 5 (1999) [hereinafter National Family Planning Survey].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, at 9.

<sup>13</sup> For the purposes of this publication, the term “right-wing Catholic groups” is used to identify groups that call themselves “pro-life,” and have been called “right-wing Catholic groups” by other organizations.

<sup>14</sup> Zona Occidental: Santa Ana; Sonsonate and Ahuachapán (subregional offices); Zona Central: San Salvador; Mejicanos, Nueva San Salvador, San Marcos, Apopa, Chalatenango, Soyapango; Zona Paracentral: San Vicente; Sensuntepeque, Zacatecoluca, Cojutepeque; Zona Oriental: San Miguel (Regional Office); La Unión, Usulután, San Francisco Gotera.

<sup>15</sup> Fourteen public prosecutor’s offices were visited in person, in order to examine case records and interview the prosecutors responsible for the cases. It was impossible to examine case records only in the Zona Occidental, but the prosecutor in charge provided a report with the data needed for this research; in the Zona Oriental, it was impossible to visit the subregional offices of La Unión and San Francisco de Gotera, but interviews were carried out by telephone.

<sup>16</sup> During the period of this study, there were three women in jail for performing abortions on themselves. Although it would have been useful to interview them for this research, none of the women wished to be interviewed. Nor was it possible to hear testimony from women who had had abortions. A female doctor who runs sessions and workshops for women offered the opportunity to interview a number of women who were victims of sexual violence, in order to get their perspective on abortion. Their views on abortion have been inserted into the text where relevant.

<sup>17</sup> Development Indicators, *supra* note 9, at 120.

<sup>18</sup> United Nations Population Fund (UNFPA), *The State of World Population 1999* 72 (1999) [hereinafter *State of World Population*].

<sup>19</sup> Ana Murcia et al., *El Salvador: Transition and Participation*, 3 *Social Watch* 130 (1999) [hereinafter *Transition and Participation*]. According to the UNFPA, the PPP per capita GDP (1995) in El Salvador is US \$2,860. This figure compares with the GDPs of Nicaragua and Honduras, the two poorest countries in Central America, with per capita GDPs of US \$1,820 and US \$2,260 respectively. Mexico (US \$8,110), Panama (US \$6,890), Costa Rica (US \$6,510), Belize (US \$4,080) and Guatemala (US \$ 4,060) have the highest PPP per capita GDPs. *See State of World Population*, *supra* note 18, at 72.

<sup>20</sup> Central Intelligence Agency (CIA), *The World Fact Book: El Salvador* (1999).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> James Dunkerley, *The Long War – Dictatorship and Revolution in El Salvador* 7 (1985).

<sup>24</sup> Hugh Byrne, *El Salvador’s Civil War: A Study of Revolution* 23 (1996).

<sup>25</sup> *Id.*

<sup>26</sup> United Nations, *Acuerdos de El Salvador: En el camino de la paz* [The El Salvador Accords: the Road to Peace] ii (1993) [hereinafter *El Salvador Accords*].

<sup>27</sup> *Id.*, at iii. See also Atilio Montalvo, *Los acuerdos de paz un año después* [The Peace Accords One Year Later] 1 (1993) [hereinafter *Peace Accords One Year Later*].

<sup>28</sup> José Miguel Cruz, *¿Por qué no votan los salvadoreños?* [Why Don't Salvadorans Vote?], LIII:595–596 *Estudios Centroamericanos* 470 (May/Jun. 1998).

<sup>29</sup> *Peace Accords One Year Later*, *supra* note 27 at 1.

<sup>30</sup> *El Salvador Accords*, *supra* note 26, at iii.

<sup>31</sup> In 1997 citizen participation in the elections was 19% lower than in 1994. Similarly, according to the findings of a study carried out in 1998 by the Academic Institute of Public Opinion of the José Simeón Cañas Central American (UCA), a “significant part of the population is not convinced that elections are of any use,” and “half of Salvadorans have little or no interest in the 1999 electoral process.” Six out of every ten Salvadorans declared that voting was a waste of time because the country never changed, and almost half of the population (47.2%) predicted that the elections would not be fair. See United Nations Development Programme (UNDP), *El Salvador: Estado de la Nación en Desarrollo Humano 1999* [El Salvador: State of the Nation in Terms of Human Development 1999] 8 (1999) [hereinafter *State of the Nation*].

<sup>32</sup> See *id.* The gap between the political class and the rest of society has widened because the former has not been able to act as an intermediary in bringing the people's demands to the government bodies responsible for action. See also Centro de Información, Documentación y Apoyo a la Investigación (CIDAI) [Center for Information, Documentation and Investigatory Support], *El Salvador en 1998: Política, economía y sociedad* [El Salvador in 1998: Politics, Economy and Society], LIV:603 *Estudios Centroamericanos* 69-70 (Jan. 1999).

<sup>33</sup> See generally Interview with Sofía Villalta, Gynecologist (Aug. 17 and 31, 1999) (on file with the CRLP archives); Interview with Zoila Innocenti, Sociology Professor, Universidad Centroamericana José Simeón Cañas (Aug. 30, 1999) (on file with the CRLP archives) [hereinafter *Innocenti Interview*]; Interview with Fressia Cerna, Programme Officer, United Nations Population Fund (Aug. 7, 1999) (on file with the CRLP archives) [hereinafter *Cerna Interview*]; Interview with María Elena Rodríguez, President, Association of Women Doctors of El Salvador (Sep. 7, 1999) (on file with the CRLP archives) [hereinafter *Rodríguez Interview*].

<sup>34</sup> Lisa North, *El Salvador: The Historical Roots of the Civil War*, 8 *Studies in Political Economy* 75 (Summer 1992).

<sup>35</sup> Instituto Universitario de Opinión Pública [Academic Institute of Public Opinion], *La religión para los salvadoreños in 1995* [What Religion Means to Salvadorans in 1995], L:563 *Estudios Centroamericanos* 859 (Sept. 1995). An

example of this change of position on the part of the Church was provided by one of the women interviewed for this research, who stated that the predecessors of the present Archbishop had a “rational” position toward family planning, since they were willing to teach the use of various modern contraception methods. The Salvadoran Church currently rejects this position completely. *See also* Innocenti Interview, *supra* note 33.

<sup>36</sup> Innocenti Interview, *supra* note 33.

<sup>37</sup> Since the signing of the Peace Accords, the country’s successive governments have tried to make greater economic and social participation fit in with a market economy. The government’s goals have been to modernize the public sector, to create favorable conditions for the private sector and export growth, to reduce poverty, to invest in human capital and to strengthen management of the country’s environment and natural resources.

<sup>38</sup> *See* State of the Nation, *supra* note 31, at 43–66. According to the Inter-American Development Bank (IDB), one of the direct results of stable economic growth has been to better job opportunities and incomes for the urban population. However, the same does not apply for the rural population, which is now separated from the urban population by even wider economic disparity than before. The IDB similarly warns that poverty is a consequence of sociocultural marginalization and that “there is much to be done to change deep-rooted mechanisms of exclusion and create real and effective conditions for the eradication of structural poverty in [Salvadoran] society.” *See* Inter-American Development Bank (IDB), El Salvador National Reconstruction Program 6 (1999) [hereinafter National Reconstruction Program].

<sup>39</sup> *Id.*, at 5.

<sup>40</sup> According to the World Bank, in 1997 “48.3% of households were poor, 28.7% were relatively poor and 19.6% were absolutely poor.” The Ministry of Economics calculates that it would take 18 to 20 years to eradicate extreme poverty in El Salvador and 35 years to double the per capita income of US \$115.74. *See* North American Congress on Latin America (NACLA), *A Painful Peace: El Salvador After the Accords* (1995); State of the Nation, *supra* note 31, at 20; *Transition and Participation*, *supra* note 19, at 130.

<sup>41</sup> State of the Nation, *supra* note 31, at 37.

<sup>42</sup> According to UNDP, the “uncertainty of unemployment affects eight out of every ten Salvadorans, three out of every 10 employed Salvadorans, and the uncertainty of temporary work affects almost seven out of 10 rural workers and almost three out of every 10 urban workers.” *See Transition and Participation*, *supra* note 19, at 130–131. *See also* State of the Nation, *supra* note 31, at 12.

<sup>43</sup> State of the Nation, *supra* note 31, at 37–38.

<sup>44</sup> *Id.*, at 6. *See also Transition and Participation*, *supra* note 19, at 130.

<sup>45</sup> The rapid expansion of these sectors has not been a cause of concern, unlike the lack of homogeneity in the growth process, particularly in agriculture, the sector in which the majority of the poorer population is concentrated. *See* State

of the Nation, *supra* note 31, at 45-46.

<sup>46</sup> *Id.*, at 51-52.

<sup>47</sup> *Id.*, at 4-5.

<sup>48</sup> *Id.*, at 5.

<sup>49</sup> *Id.*, at 5, 66.

<sup>50</sup> In 1997, there was a shortage of 571,470 homes, affecting about two and a half million Salvadorans. This shortage decreased by barely 4% between 1992 and 1997. This indicates that it will take 56 years to reduce the shortage by one tenth. *Id.*, at 12, 32.

<sup>51</sup> At the national level, only 65.8% of homes have access to water from pipes or common wells. A significant portion of the Salvadoran population lives in areas where there are no basic services. *See* National Reconstruction Program, *supra* note 38, at 33.

<sup>52</sup> Pan-American Health Organization (PAHO), Health in the Americas: El Salvador Vol. II 255 (1998) [hereinafter Health in the Americas].

<sup>53</sup> *Id.*, at 256.

<sup>54</sup> National Family Planning Survey, *supra* note 10, at 20.

<sup>55</sup> Health in the Americas, *supra* note 52, at 256.

<sup>56</sup> *Id.*, at 257.

<sup>57</sup> Owing to poverty, the population tends to resort to self-medication. In a 1997 survey, 42% stated that they had medicated themselves, and 49.2% said they had consulted a pharmacist, a healer or a nurse. 67% of the people surveyed belonged to the sectors of the population living in extreme or relative poverty, and women represented 55% of the sample. *See* State of the Nation, *supra* note 31, at 31.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Development Indicators, *supra* note 9, at 90.

<sup>61</sup> State of the Nation, *supra* note 31, at 3.

<sup>62</sup> UNDP estimates that, in 1997, 20% of the population did not even have one year of schooling, 21% had between one and three years of schooling, 24% had four to six, and only 8% of Salvadorans had 13 years of schooling or more. There was a strong correlation between the place of residence and income and the number of years of schooling obtained by Salvadoran men and women. *See* State of the Nation, *supra* note 31, at 3, 21-22.

<sup>63</sup> *Id.*, at 22.

<sup>64</sup> *Id.*, at 4.

<sup>65</sup> *Transition and Participation*, *supra* note 19, at 130.

<sup>66</sup> A study carried out by the Universidad Centroamericana José Simeón Cañas (UCA) and the Pan-American Health Organization (PAHO) defines the culture of violence as "a system of standards, values or attitudes that allow, enable or even stimulate the use of violence to resolve any type of conflict or relationship with another person." This study indicates that 60% of Salvadorans agree that it is all

right to kill in defense of one's family, and 42% think it is all right to kill in defense of one's property. *See* State of the Nation, *supra* note 31, at 14.

<sup>67</sup> Some studies show that “[t]he transition toward a postwar era with its ‘short-ages and limitations’ has helped generate circumstances that feed into the ongoing existence of a culture of violence.” They indicate that additional factors include “neoliberal individualism, sociopathic behavior, weak state institutions, uncontrolled weapon circulation, alcohol and drug abuse, and poverty,” which fuel and propagate said culture. *See* *La cultura de la violencia* [*The Culture of Violence*], LII Estudios Centroamericanos 943–945 (Oct. 1997) [hereinafter *Culture of Violence*].

<sup>68</sup> In fact, in a survey carried out in 1996, 40% of respondents expressed that, based on their perception of a lack of citizen safety and justice, it was better to ignore the law when they disagreed with it. *See* State of the Nation, *supra* note 31, at 14, *quoting* the survey conducted by the Universidad Centroamericana José Simeón Cañas. In another survey conducted in 1998, 37% of respondents expressed the opinion that, given the government's ineffectiveness, individuals had the right to take justice into their own hands. *See id.*

<sup>69</sup> Centro de Información, Documentación y Apoyo a la Investigación [Center for Information, Documentation and Investigatory Support], *El Salvador en 1998: Política, economía y sociedad* [*El Salvador in 1998: Politics, Economy and Society*], LIV Estudios Centroamericanos 85 (Jan. 1999).

<sup>70</sup> Citizens have sought the protection of private agencies, and have armed themselves, causing an expansion of the firearms trade. *See* *Culture of Violence*, *supra* note 67, at 938.

<sup>71</sup> National Reconstruction Program, *supra* note 38, at 8.

<sup>72</sup> *Id.*

<sup>73</sup> Cristina Garaízabal and Norma Vázquez, *El dolor invisible: Una experiencia de grupos de auto-apoyo con mujeres salvadoreñas* [*Invisible Pain: An Experience with a Salvadoran Women's Self-Help Group*] 25 (1994).

<sup>74</sup> *Id.*, at 27.

<sup>75</sup> *Id.*, at 85.

<sup>76</sup> State of World Population, *supra* note 18, at 72.

<sup>77</sup> Naomi Nett and Ann D. Levine, *Where Women Stand* 489 (1997) [hereinafter *Where Women Stand*].

<sup>78</sup> National Reconstruction Program, *supra* note 38, at 9.

<sup>79</sup> State of the Nation, *supra* note 31, at 6. This disparity between men and women's wages exists despite the fact that El Salvador has signed the Convention on the Elimination of Discrimination Against Women, of which Article 11(1)(d) stipulates that the “State parties shall adopt all appropriate measures to eliminate discrimination against women in the area of employment in order to guarantee women's rights in equal conditions with men, particularly in terms of equal remuneration, including payments, and equal treatment with respect to assessing

the quality of work.”

<sup>80</sup> *Id.*, at 53.

<sup>81</sup> *Where Women Stand*, *supra* note 77, at 496.

<sup>82</sup> *Id.*, at 485.

<sup>83</sup> Telephone interview with Carlos García, Salvadoran Embassy, in New York, USA (Jan. 11, 2000) (on file with CRLP archives).

<sup>84</sup> *State of the Nation*, *supra* note 31, at 8.

<sup>85</sup> CEMUJER, *La actualización de los acuerdos de paz in el próximo milenio. Un reto para la construcción de la democracia genérica in El Salvador* [Updating the Peace Accords in the New Millenium. A challenge for generic democracy in El Salvador] 60 (1999) (unpublished report of the meeting organized by CEMUJER on file with CRLP archives).

<sup>86</sup> *Id.*, at 60–61.

<sup>87</sup> *Transition and Participation*, *supra* note 19, at 130.

<sup>88</sup> *Ley Contra la Violencia Intrafamiliar* [Law Against Domestic Violence], Decree No. 902, Nov. 28, 1996.

<sup>89</sup> Article 200 of the Penal Code stipulates: “Persons who use violence against their spouse or the person with whom they live as husband and wife, or against their children with said person under their parental authority, against a minor or disabled ward under their tutorship, guardianship or influence, via acts that do not carry a lighter sentence in the Penal Code, shall be sentenced to six months to a year in prison. In these cases, the Law Against Domestic violence shall apply.” See *Pen. Code*, revised edition 1998.

<sup>90</sup> *Id.*, art. 3.

<sup>91</sup> *Id.*, art. 7.

<sup>92</sup> ISDEMU was created by Legislative Decree No. 644 of February 1996. The Plan to fight violence sets three strategic objectives and a series of actions to deal with the problem of domestic violence and sexual assault against women. Thanks to this initiative and others, the issue of violence against women had gained visibility in *See El Salvador. Instituto Salvadoreño para el Desarrollo de la Mujer* [Salvadoran Institute for Women’s Development], *Política Nacional de la Mujer* [National Women’s Policy] 39 (1997).

<sup>93</sup> *State of the Nation*, *supra* note 31, at 27.

<sup>94</sup> *Development Indicators*, *supra* note 9, at 98.

<sup>95</sup> *Id.*

<sup>96</sup> *Asociación Demográfica Salvadoreña (ADS)* [Salvadoran Demographic Association], *35 Aniversario. Mayo 1962-1997* [35<sup>TH</sup> Anniversary. May 1962-1997] 1 (1997) (unpublished report on file with CRLP archives). The ADS is a private organization that was founded in 1962; it is devoted to raising public awareness about responsible fatherhood and motherhood, and to designing and implementing programs that provide sexual and reproductive health services, as well as family planning.

<sup>97</sup> *Asociación Demográfica Salvadoreña (ADS) et al.*, [Salvadoran

Demographic Association], Encuesta Nacional de Salud Familiar (FESAL-93) [National Family Health Survey] 80 (1994).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*, arts. 73, 74.

<sup>100</sup> National Family Planning Survey, *supra* note 10, at 6.

<sup>101</sup> Other methods are injectables (8.9%) and oral methods (8.1%). *See Id.*, at 6, 7.

<sup>102</sup> *Id.*, at 8.

<sup>103</sup> State of the Population, *supra* note 18, at 27.

<sup>104</sup> National Family Planning Survey, *supra* note 10, at 6-9.

<sup>105</sup> *Id.*, at 9 and tables 2.4, 2.5, 3.2.

<sup>106</sup> Procuraduría para la Defensa de los Derechos Humanos de El Salvador [Office of the Public Prosecutor for the Defense of Human Rights in El Salvador], Derechos humanos de exigencia individual: Derechos de la mujer [Human Rights at the Individual Level: The Rights of Women] subsection 5.3.

<sup>107</sup> In the study, when women were asked if both members of the couple participate in family planning, only 36.7% answered yes. However, when men were asked the same question, 70.6% said that both members of the couple decided. At the same time, 50.9% of women said they were the ones who made the decisions in that area, compared to 9% of men who said women decided about the use of contraceptive methods. *See* Ministerio de Salud Pública y Asistencia Social (MSPAS) et al., [Ministry of Public Health and Social Assistance], Análisis de situación de salud según condiciones de vida con enfoque de género, Municipio de Guazapa, San Salvador, El Salvador, Informe final [Analysis of the Health Situation According to Living Conditions from a Gender Perspective, Municipality of Guazapa, San Salvador, El Salvador] 36 (1995).

<sup>108</sup> Several persons interviewed for this report expressed this opinion. A female judge said something along these lines when she observed that, when women get pregnant, they feel obligated to accept their fate because “men are the ones who decide” and they have to have as many children as necessary. *See* Interview with Nora Montoya (Aug. 18, 1999) (notes on file with CRLP archives).

<sup>109</sup> Ministerio de Salud Pública y Asistencia Social (MSPAS) [Ministry of Public Health and Social Assistance], Normas de atención in salud para las y los adolescentes [Health Care Standards for Adolescent Girls and Boys], Ministerial Resolution No. 374, 1998, at 7.

<sup>110</sup> *Id.*, at 6.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*, at 7.

<sup>113</sup> This percentage is 71% in rural areas, compared to 82.5% in urban areas. *See* National Family Planning Survey, *supra* note 10, at 12.

<sup>114</sup> *Id.*, at 14.

<sup>115</sup> *Id.*, chart 5.5.

<sup>116</sup> *Id.*, at 14.

<sup>117</sup> *Id.*, chart 5.5.

<sup>118</sup> *Id.*, chart 5.5.

<sup>119</sup> Ministerio de Salud Pública y Asistencia Social (MSPAS) [Ministry of Public Health and Social Assistance], Plan nacional de prevención y control de ETS-VIH/SIDA 1999-2000 [National Plan for STI-HIV/AIDS Prevention and Control 1999-2000] 10 (1999).

<sup>120</sup> *Id.*

<sup>121</sup> See *Abortion as a Public Health Issue*, *supra* note 7.

<sup>122</sup> For example, the ADS, which has been in charge of the FESAL since 1975, a survey aimed at studying levels and trends with regard to fertility and contraceptive use in El Salvador, does not ask respondents about abortion. According to José Mario Cáceres, of the ADS, this is due to “ethical and political” considerations; the ADS may also be reluctant to ask this type of question only to be forced to violate the confidentiality they owe to the women surveyed. See Cáceres Interview, *supra* note 4.

<sup>123</sup> In 1998, the MSPAS recorded 7,436 national hospital admissions due to abortion. In the first half of 1999, the Ministry had already counted 3,766. See Ministerio de Salud Pública y Asistencia Social (MSPAS) [Ministry of Public Health and Social Assistance], Cuadro de hospitalización, abortos y muertes maternas [Hospital Admissions, Abortions and Maternal Deaths] (Jan. 1998-Jun. 1999) (on file with CRLP archives).

<sup>124</sup> Ministerio de Salud Pública y Asistencia Social (MSPAS) [Ministry of Public Health and Social Assistance], Dirección de la Atención a la Persona [Office of Primary Health Care], Cuadro de abortos y mortalidad materna [Abortions and Maternal Mortality] (Jan.-Dec. 1998) (on file with CRLP archives).

<sup>125</sup> Ministerio de Salud Pública y Asistencia Social (MSPAS) [Ministry of Public Health and Social Assistance], Cuadro de hospitalización, abortos y muertes maternas [Hospital Admissions, Abortions and Maternal Deaths] (Jan.-Jun. 1999) (on file with CRLP archives).

<sup>126</sup> Dr. Raúl Arguello Escolán, Hospital Nacional de Maternidad [National Maternity Hospital], Cuadro de casos de abortos atendidos in el Hospital Nacional de Maternidad [Abortion Cases Treated at the National Maternity Hospital] (Aug. 1999) (on file with CRLP archives).

<sup>127</sup> Some hospitals use the categories of septic abortion, miscarriage and induced abortion. Others, such as the National Maternity Hospital, use four categories: incomplete abortion, failed abortion, septic abortion and molar abortion. In other words, there is no consistent way of recording data, and this classification does not reflect the magnitude of induced abortion, nor does it make it possible to gain an understanding of that situation. See *Id.*

<sup>128</sup> Ministerio de Salud Pública y Asistencia Social (MSPAS) [Ministry of Public Health and Social Assistance], Plan Nacional de Salud

Reproductiva [National Reproductive Health Plan] 39 (1999) [hereinafter Reproductive Health Plan].

<sup>129</sup> *Id.*, at 45.

<sup>130</sup> In fact, Article 169 of the 1973 Penal Code established the cases in which abortion was not punishable: (1) Unintentional abortion caused by the woman herself, or her attempt to cause her own abortion; (2) Abortion carried out as an option with the purpose of saving the life of the mother, failing any other means of doing so, and with the consent of the mother and an existing medical report. If the woman is a minor, incapacitated or unable to give consent, the consent of her spouse, legal representative of close family member will be required; or (4) Abortion practiced as an option with the woman's consent, with the purpose of avoiding a severe foreseeable deformity in the product of conception. *See* 1973 Pen. Code.

<sup>131</sup> The new Penal Code repealed the previous one. For consensual and self-induced abortion, the sentence is now two to eight years in prison; the sentences for abortion without consent is four to ten years in prison; the sentence for aggravated abortion is six to twelve years, with the accused barred from practicing his or her profession for the same period; and the sentence for inducement to abortion or assistance obtaining an abortion is two to four years in prison. *See* Pen. Code, art. 133–136.

<sup>132</sup> *Id.*, art. 133–137.

<sup>133</sup> Before the reforms, the Political Constitution established the right to life in Article 2, in the following terms: All persons have the right to life, to physical and moral integrity, to liberty, to security of person, to work, to property and ownership, and to be protected through the preservation and defense of said rights." El. Sal. Const., art. 2.

<sup>134</sup> *Id.*, art. 1.

<sup>135</sup> At this conference, the wife of the Salvadoran President, Elizabeth de Calderón Sol, declared that her country's government intended to help families in the aim of protecting life from the moment of conception. Discurso de la Primera Dama de El Salvador in la Conferencia Mundial sobre la Población y el Desarrollo [First Lady of El Salvador, Speech at the International Conference on Population and Development] (1994) (on file with CRLP archives).

<sup>136</sup> Representative of El Salvador, Statement at the International Conference on Population and Development (1994) (on file with CRLP archives). *See Programme of Action of the International Conference on Population and Development (ICPD)*, U.N. Doc. A/CONF.171/13/Rev.I, U.N. Sales No. 95.XVIII.18(1995), Cairo, Egypt, Sept. 5-13, 1994 [hereinafter *ICPD Programme of Action*]; *Oral Statements and Reservations on the Programme of Action in Programme of Action of the International Conference on Population and Development (ICPD)*, U.N. Doc. A/CONF.171/13/Rev.I, U.N. Sales No. 95.XVIII.18(1995), Cairo, Egypt, Sept. 5-13, 1994 [hereinafter *Oral Statements and Reservations on ICPD Programme of Action*].

<sup>137</sup> See *The Beijing Declaration and Platform for Action, Fourth World Conference on Women*, U.N. Doc. DPI/1766/Wom (1996), Beijing, China Sept. 4-15, 1995 [hereinafter *Beijing Declaration and Platform for Action*]; *Reservations and Interpretive Statements on the Beijing Declaration and Platform of Action in The Beijing Declaration and Platform for Action, Fourth World Conference on Women*, U.N. Doc. DPI/1766/Wom (1996), Beijing, China September 4-15, 1995, at 186.

<sup>138</sup> One of the first proposals consisted in having the Legislative Assembly initiate an investigation of abortion clinics and the doctors and nurses practicing abortions, using the argument that “some people who call themselves professionals, yet by their actions testify to the savagery and cannibalism of the most absurd practice that is inconsistent with life and contradicts life, ABORTION; an act that runs counter to the most sacred principle for all human beings, LIFE ITSELF,” according to the statements of ARENA deputy Gerardo Suvillaga. File No. 1578-11-92, Legislative Assembly of El Salvador, 1992.

<sup>139</sup> File No. 2184-6-93, Legislative Assembly of El Salvador, 1993. Apparently, this proposal was never fully discussed by the Assembly, since a Christian Social Union deputy presented it once again in September 1999, and it is still being discussed. File No. 2321-9-99, Legislative Assembly of El Salvador, 1999.

<sup>140</sup> This campaign was basically a failure. Although some arrests were made, they were considered illegal because police officials were “not authorized to work undercover, an exception that is made in drug cases, established in Article 63 of the Drug-Related Activities Act.” See Edward Gutiérrez, *Fracasan 3 operaciones encubiertas [Three Undercover Operations Fail]*, La Prensa Gráfica, May 26, 1997. Only in September 1999 was Penal Code reform approved to specifically allow the police to carry out clandestine operations. The Crimes Against Minors and Women Division has examined the new legislation and drawn the conclusion that the use of an undercover agent would be unlikely. See Interview with Suzanne de Tablas, Director of the Crimes Against Minors and Women Division of the Office of the Public Prosecutor of the Republic of El Salvador (Oct. 7, 1999) (notes on file with CRLP archives) [hereinafter Tablas Interview I].

<sup>141</sup> He stated that his government was “an absolute protector of life . . . we must not legalize situations that abuse human dignity and the human body.” Susana Joma, *Rechazo general al aborto [General Repudiation of Abortion]*, El Diario de Hoy, Apr. 22, 1997 [hereinafter *Repudiation of Abortion*].

<sup>142</sup> The Minister declared: “It must be absolutely clear that we will not allow abortion in our hospitals. As doctors we were trained to save lives, not to kill babies.” Tania Moreno, *Salud se pronuncia contra el aborto [Health Speaks Out Against Abortion]*, La Prensa Gráfica, Apr. 24, 1997.

<sup>143</sup> See *Id.*

<sup>144</sup> This deduction is based on the analysis of over 50 newspaper articles compiled during this period. See compilation of newspaper articles (on file with CRLP archives).

<sup>145</sup> *Editorial Contra el aborto [Editorial Against Abortion]*, La Prensa Gráfica, Apr. 18,

1997.

<sup>146</sup> José Vicente Coto, *El derecho a vivir [The Right to Live]*, La Prensa Gráfica, Apr. 6, 1997.

<sup>147</sup> See La Prensa Gráfica, May 15, 1997.

<sup>148</sup> Roberto Turcios, *El aborto in la Asamblea [Abortion in the Assembly]*, La Prensa Gráfica, Apr. 29, 1997 [hereinafter *Abortion in the Assembly*].

<sup>149</sup> Paid advertisements by the Say Yes to Life Foundation, published in La Prensa Gráfica on Apr. 2, 14, and 16, 1997. The information in these announcements does not correspond with study findings that show that safe abortions are not harmful to women's health. See generally the Web page of the National Abortion and Reproductive Rights Action League (NARAL), at <<http://www/naral.org/choice/health/intro.html>>.

<sup>150</sup> The same letter warned that "if the right to life is not respected, no other right is safe and laws become meaningless." Quoting Pope John Paul II, the Episcopal Conference also reminded readers that, if there is no respect for the life of the unborn, and for human and religious values, "society enters a process of social disintegration." Open Letter, Conferencia Episcopal de El Salvador [Episcopal Conference of El Salvador], *Si no se respeta la vida, ningún otro derecho está a salvo [If There is No Respect for Life, No Other Right is Safe]* (Jan. 5, 1997).

<sup>151</sup> Iván Escobar, *La legalización del aborto es un problema de todos: Iglesia Católica [The Legalization of Abortion Concerns Everyone, Says the Catholic Church]*, Co Latino, Apr. 21, 1997.

<sup>152</sup> Jaime García, *Arzobispo pide detener el aborto [Archbishop Asks for a Stop to Abortion]*, El Diario de Hoy, January 13, 1997.

<sup>153</sup> For more information on other religious perspectives on abortion, see (CRLP), *The Ethical and Religious Perspective on Abortion*, in *Thoughts on Abortion* (1999).

<sup>154</sup> Several demonstrators carried signs that read: "Yes to Life, No to Abortion;" "Only God Can Decide Who Lives." According to the Say Yes to Life Foundation, the reason behind these demonstrations was to show legislators and the rest of the world that "all Salvadorans say yes to life, and we do not agree with murdering a baby in its mother's womb." Francisco Mejía, *Jóvenes dicen 'Sí a la vida!' [Young People Say 'Yes to Life']*, El Diario de Hoy, Apr. 25, 1997.

<sup>155</sup> In a document presented to the Legislative Assembly, the Comité Defendamos la Vida (Let's Defend Life Committee) stated that, "it has been biologically, genetically and scientifically proven that there is human life from the moment of conception. A human being's genetic code remains unchanged from that very instant until the day he or she dies. Therefore, from the moment of conception, we are dealing with a living, individual, unique and unrepeatable person." See *Repudiation of Abortion*, *supra* note 141. Similarly, Julia Regina de Cardenal, Vice President of the Say Yes to Life Foundation, stated in an interview that "there is no such thing as therapeutic abortion, because technology and medicine are so advanced that women no longer run risks during pregnancy. Doctors have to think about both of their patients: the mother and the fetus. Doctors have to do everything in their

power to bring the pregnancy to term and save both patients. Interview with Julia Regina de Cardenal, Vice President, Say Yes to Life Foundation (Aug. 23, 1999) (on file with CRLP archives). It should be pointed out that the idea that life begins at the moment of conception has not been proven scientifically. This question cannot be answered with a law or scientific principle, as highlighted by various prominent scientists. "The only 'consensus' that can be said to exist among scientists with regard to the moment at which life begins is that science alone is unable to answer that question." Although science can tell us when certain biological attributes can be detected, it cannot tell us which biological attributes establish a human being's existence. "[W]hether or not human life begins at the moment of conception is not a medical or scientific problem, it is a philosophical and religious problem that 'depends on how one defines personhood and being.'" See Brief of Amici Curiae 167 Distinguished Scientists and Physicians (Including 11 Nobel Laureates), at 4-6, *William L. Webster et al. vs. Reproductive Health Services et al.*, U.S. S. Ct., (1988) (No. SS-605).

<sup>156</sup> See Sandra Moreno, *No hay sobrepoblación [There is No Overpopulation]*, *El Diario de Hoy*, Apr. 27, 1997.

<sup>157</sup> See *The Impact of Legislation*, *supra* note 2. This indicates that in countries where abortion has been legalized and where there is widespread access to family planning methods, the number of abortions decreases.

<sup>158</sup> Julia Regina de Cardenal, *El aborto es un horrible crimen [Abortion is a Horrible Crime]*, *El Diario de Hoy*, Apr. 18, 1997.

<sup>159</sup> In a telephone interview about this type of advertisement, Mrs. de Cardenal stated that her organization does what the advertisement says: "Women with unexpected pregnancies are given the proper assistance" and "they leave here happy, loving their children. We tell them about the risks of abortion; this is a center to help women. We are against deceiving women, which is what feminists do. We have to help them in the proper way." Telephone interview with Julia Regina de Cardenal, Vice President, Say Yes to Life Foundation (Sept. 6, 1999) (on file with CRLP archives).

<sup>160</sup> In the Episcopal Conference of El Salvador's open letter, *If Life is not Respected, No Other Right is Safe*, this proposal is criticized at length.

<sup>161</sup> The proposed texts were: (1) Inducement to abortion: Whosoever induces a woman to practice an abortion in order to avoid paternal or other types of responsibility, shall be sentenced to four to eight years in prison if the act is consummated; (2) Abortion caused by domestic violence: Whosoever causes an abortion as the result of domestic violence shall be sentenced to four to eight years in prison. *Propuesta de las Organizaciones de Mujeres ante los Ultimos Acontecimientos [Proposal Put Forth by Women's Organizations in Light of Recent Events]* (1997) (unpublished document on file with CRLP archives).

<sup>162</sup> *Aborto divide a diputados [Abortion Divides Deputies]*, *El Diario de Hoy*, Apr. 25, 1997.

<sup>163</sup> Interview with Lorena Peña, FMLN Deputy (Sept. 9, 1999) (on file with

CRLP archives) [hereinafter Peña Interview].

<sup>164</sup> He declared that abortion “practiced by ‘abortionists’ with degrees, or trained technicians, using the best instruments, is a cruel, bloody method that causes the child’s death and undeniably harms 100% of women — by producing psychological trauma — causing organ damage in 25% of cases and often resulting in the woman’s death.” Debate in the Legislative Assembly of El Salvador on Abortion Legislation in the Penal Code (Apr. 25, 1999) (transcription on file with CRLP archives) [hereinafter Abortion Debate].

<sup>165</sup> For general information on the various studies that confirm the safety of abortion for women’s health when practiced in the proper conditions, see NARAL’s Web page at <<http://www.naral.org/choice/health/intro.html>>.

<sup>166</sup> Abortion Debate, *supra* note 164.

<sup>167</sup> The following is the text of the approved penal code articles: (1) *Consensual and self-induced abortion Article 133* – Whosoever induces an abortion with the woman’s consent, or a woman who induces her own abortion or consents to have another person perform an abortion on her, shall be sentenced to two to eight years in prison; (2) *Abortion without consent – Article 134* – Whosoever induces an abortion, without the pregnant woman’s consent, shall be sentenced to four to ten years in prison. Whosoever performs an abortion, having obtained the woman’s consent through violence or deception, shall receive the same sentence. (3) *Aggravated abortion - Article 135* – Any doctor, pharmacist or person who carries out activities related to said professions, who performs an abortion, shall be sentenced to six to twelve years in prison. They shall also be suspended from practicing their profession for the same period; (4) *Encouragement or assistance to obtain an abortion – Article 136* – Whosoever encourages a woman to have an abortion, or provides economic or other means for her to obtain an abortion, shall be sentenced to two to five years in prison. If the person who assists or encourages a woman to obtain an abortion is the person who performs the abortion, the sentence shall be increased by one third of the maximum penalty indicated in the previous subsection; and (5) *Unintentional abortion – Article 137* – Whosoever wrongfully provokes an abortion shall be sentenced to six months to two years in prison. Neither unintentional abortion caused by the pregnant woman, nor the attempt to cause her own abortion, is punishable.

<sup>168</sup> See *Abortion in the Assembly*, *supra* note 148.

<sup>169</sup> Legislative Decree No. 541 of February 3, 1999 ratified the Constitutional Reform Agreement of April 30, 1997, in which subparagraph 2 was added to Article 1 of the Political Constitution.

<sup>170</sup> For example, the La Prensa Gráfica newspaper published an article explaining what an abortion is, talking about the causes for abortion, the types of abortion and their consequences. It erroneously stated that an abortion can cause breast cancer, while the real issue is that abortion procedures carried out in unhygienic conditions with inadequate techniques by unqualified persons are what present a real risk for women. See *Médicos cuestionan restricciones al aborto [Doctors Question Abortion Restrictions]*, La Prensa Gráfica, Feb. 4, 1999 [hereinafter *Doctors Question*

*Restrictions*]. For general information on the various studies that confirm the safety of abortion for women's health when practiced in the proper conditions, see NARAL's Web page at <<http://www.naral.org/choice/health/intro.html>>.

<sup>171</sup> See *Con la vida entre las manos [Life in One's Hands]*, El Diario de Hoy, Mar. 24, 1998.

<sup>172</sup> Roberto Alas and Blanca Abarca, *Un error despenalizar el aborto: UTE [UTE Says Decriminalizing Abortion is a Mistake]*, La Prensa Gráfica, Feb. 1, 1999.

<sup>173</sup> Luis Láinez, *Piden ratificación de reforma constitucional contra el aborto [Call for Ratification of Constitutional Reform on Abortion]*, El Diario de Hoy, Feb. 2, 1999.

<sup>174</sup> *Doctors Question Restrictions*, *supra* note 170.

<sup>175</sup> Debate in the General Assembly of El Salvador on the Reform of Article 1 of the Constitution (Feb. 3, 1999) (transcription on file with CRLP archives) [hereinafter Reform of Article 1 Debate].

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Interview with Marta Valladares, FMLN Deputy (Oct. 7, 1999) (on file with CRLP archives).

<sup>180</sup> Reform of Article 1 Debate, *supra* note 175.

<sup>181</sup> *Id.*

<sup>182</sup> *Penalización del aborto satisface a Sáenz Lacalle [Criminalization of Abortion Satisfies Sáenz Lacalle]*, La Prensa Gráfica, May 5, 1997.

<sup>183</sup> Interview with Suzanne de Tablas, Head of the Crimes Against Minors and Women Division of the Office of the Public Prosecutor of the Republic of El Salvador (Aug. 16, Aug. 23 and Sept. 20, 1999) (on file with the CRLP archives).

<sup>184</sup> Interview with Prosecuting Attorney from San Salvador (Aug. 16, 1999) (on file with CRLP archives) [hereinafter San Salvador Interview]; Interview with Prosecuting Attorney from Apopa (Sept. 3, 1999) (on file with the CRLP archives) [hereinafter Apopa Interview].

<sup>185</sup> Interview with the Director, San Salvador Maternity Hospital (Aug. 17, 1999) (on file with CRLP archives); Interview with members of the Gynecology and Obstetrics Society (Aug. 26, 1999) (on file with the CRLP archives); Interview with Director and Doctors, ISSS May 1<sup>st</sup> Hospital (Aug. 30, 1999) (on file with the CRLP archives); Interview with a female doctor, Institute of Forensic Medicine (Sept. 7, 1999) (on file with the CRLP archives); Rodríguez Interview, *supra* note 33.

<sup>186</sup> Interview with Ricardo Burgos, Director, National Maternity Hospital (Aug. 26, 1999) (on file with CRLP archives) [hereinafter Burgos Interview]. One of the gynecologists interviewed stated that there are many severe illnesses that cause a woman's death unless her pregnancy is interrupted. Interview with Henry Agreda, President, Gynecology and Obstetrics Society of El Salvador (Aug. 30, 1999) (on file with CRLP archives).

<sup>187</sup> Burgos Interview, *supra* note 186. This was also the opinion of the prosecutor

in charge of the Crimes Against Minors and Women Division of the Prosecutor's Office of Zacatecoluca, who said that the lack of accusations does not mean that there are no abortion cases in the hospitals or that doctors are simply not reporting abortion cases. However, when it is a question of crimes such as rape or domestic violence, the Prosecutor's Office is informed immediately. Interview with a Zacatecoluca Prosecutor (Oct. 6, 1999) (on file with CRLP archives).

<sup>188</sup> Letter from Vernon Madrigal Castro, Gynecology and Obstetrics Society of El Salvador (unpublished letter on file with CRLP archives).

<sup>189</sup> Interview with María III (Aug. 31, 1999) (on files with CRLP archives).

<sup>190</sup> Interview with María I (Aug. 31, 1999) (on file with CRLP archives).

<sup>191</sup> Interview with Ruth Manzano, Pan-American Health Organization (Aug. 27, 1999) (on file with the CRLP archives).

<sup>192</sup> Burgos Interview, *supra* note 186.

<sup>193</sup> Peña Interview, *supra* note 163.

<sup>194</sup> Rodríguez Interview, *supra* note 33; Interview with Elisabeth Zelaya, USC Deputy (Sept. 8, 1999) (on file with CRLP archives). Furthermore, the Catholic Church and the Say Yes to Life Foundation are closely connected to El Salvador's dominant sectors. The Archbishop of San Salvador gives considerable support to this foundation, and receives in return the support of conservative NGOs. *See also* Innocenti Interview, *supra* note 33.

<sup>195</sup> Interviews with Morena Herrera, *Las Dignas* (Oct. 15, 1999) (on file with CRLP archives) [hereinafter Herrera Interview]; Interview with Azucena Quinteros, MAM (Oct. 15, 1999) (on file with CRLP archives) [hereinafter Quinteros Interview].

<sup>196</sup> Ms. Herrera stated that Article 136 of the Penal Code on encouragement or assistance in obtaining an abortion is very ambiguous, because the simple fact of giving an opinion and talking about the issue could be taken as a form of encouragement of abortion, and even lead to a penal sentence. This makes it far more difficult to address the issue. *See* Herrera Interview, *supra* note 195.

<sup>197</sup> She added that the women's movement devotes itself more to issues like violence, women's political participation, nonsexist education and women's economic development, hardly addressing issues such as sexuality, abortion and identity. *See* Quinteros Interview, *supra* note 195.

<sup>198</sup> Cerna Interview, *supra* note 33. *See also* Innocenti Interview, *supra* note 33. Ms. Innocenti was of the opinion that, with such a religious population, education and lobbying strategies should be designed with that characteristic in mind. Ms. Cerna expressed that it is also up to women's groups to make their opinions and perspectives felt more strongly.

<sup>199</sup> Herrera Interview, *supra* note 195.

<sup>200</sup> Peña Interview, *supra* note 163.

<sup>201</sup> Interview with Margarita Velado, Legal Advisor during the FMLN's First Presidency (Sept. 8, 1999) (on file with CRLP archives).

<sup>202</sup> Legislative Decree No. 904, Dec. 4, 1996.

<sup>203</sup> State of the Nation, *supra* note 31, at 92.

<sup>204</sup> Other objectives of the reform include: providing more protection to victims; to have all of the persons involved in a case or trial present at all times; that the trial be verbal, transparent and more expeditious; and that the verdict be given to the accused upon completion of the parties' arguments. Campaña de Educación Legal Popular [Campaign for Popular Legal Education], CEMUJER-UTE, Elementos básicos de la nueva reforma penal: Código Procesal Penal [Elements of the New Penal Reform: Code of Penal Procedure] 3 (1997).

<sup>205</sup> Pen. Code, revised edition 1998, art. 83. For a simplified description of the Salvadoran penal process, see *Exposición de Motivos del Código Procesal Penal* [Exposition of the Grounds of the Code of Penal Procedure], in Pen. Code (1999) [hereinafter *Exposition of the Grounds of the Code of Penal Procedure*]. See also *id.*

<sup>206</sup> Pen. Code, revised edition 1998, art. 55.

<sup>207</sup> *Id.*, art. 54.

<sup>208</sup> Opportunity criteria are set out in Article 20 of the Code of Penal Procedure, which indicates that in public suits, the prosecutor may request from the judge that penal prosecution not apply to one or various of the acts charged, for one or all participants in the acts, or that one or some of the possible legal qualifications be limited in certain cases, such as: when an act does not affect the public interest, by its insignificance, by the tiny contribution of the participant, or because of the participant's minimal guilt; or when the accused has done everything in his or her power to prevent the act from taking place, or has made a decisive contribution to clarifying the participation of other suspects in the same act or in a more serious act.

<sup>209</sup> The public part of the trial is a verbal hearing in which witnesses are examined, evidence is introduced and the prosecutor and defense attorneys present their closing statements.

<sup>210</sup> Pen. Code, revised edition 1998, art. 55-A.

<sup>211</sup> Pen. Code, art. 32.

<sup>212</sup> *Id.*, art. 33.

<sup>213</sup> *Id.*, art. 36.

<sup>214</sup> *Id.*, art. 35.

<sup>215</sup> *Id.*, arts.133–137.

<sup>216</sup> This category also includes women involved in penal proceedings for the crime of unintentional abortion, but the prosecutors have not yet determined whether to conduct a trial, even though the case is being investigated as an abortion.

<sup>217</sup> Some prosecutors initiate homicide investigations, and others initiate abortion investigations based on the fetus's estimated number of weeks of gestation. For the purpose of this study, only the cases registered as abortion trials have been taken into account.

<sup>218</sup> The majority of the women (29) have been tried for consensual and self-

induced abortion, four women have been involved in the proceedings for unintentional-abortion, and the rest are pending charges, since the prosecutor's office is not sure of the circumstances of the act or lacks information. The cases of unintentional abortion were included because, even though this type of abortion is not punishable, women are subjected to penal proceedings.

<sup>219</sup> The most frequent ages were 18 (seven women), 19 (five) and 20 (six).

<sup>220</sup> One was 34, the other 39, and the other 40.

<sup>221</sup> See Pen. Code, art. 17.

<sup>222</sup> Encyda Argueta, *El Salvador: El precio del aborto [El Salvador: The Price of Abortion]*, in Servicio de Noticias de la Mujer [Women's News Service] 2 (1999).

<sup>223</sup> San Salvador Interview, *supra* note 184; Burgos Interview, *supra* note 186.

<sup>224</sup> Cytotec is used for ulcers. Its application in gynecology is to induce labor in patients strictly when necessary. Apparently the general public found out about this and women began inserting Cytotec vaginally to provoke abortions. Potassium permanganate, which is also believed to be an abortifacient, burns the skin around the vagina. Women think the bleeding produced is the result of abortion, when in fact it is a burn that does not affect the pregnancy in any way. Burgos Interview, *supra* note 186.

<sup>225</sup> Article 232 of the Code of Penal Procedure indicates that the following persons "[s]hall be under the obligation to report public offenses: . . . 2. Doctors, pharmacists, nurses and other persons that practice health-related professions, who gain knowledge of such acts during the provision of their professional services, unless the knowledge obtained is covered by professional secrecy."

<sup>226</sup> According to the explanation provided by one interviewee, the government's Secretariat of the Family sent a circular letter to hospitals warning them that they are under the obligation to report abortion cases. San Salvador Interview, *supra* note 184; Burgos Interview, *supra* note 186.

<sup>227</sup> Interview with Prosecutors in San Vicente, San Miguel, Usulután, Santa Ana and Sensuntepeque (Oct. 5, 6, 11 and 12 1999) (on file with CRLP archives).

<sup>228</sup> Interview with a Prosecutor from Cojutepeque (Oct. 5, 1999) (on file with CRLP archives).

<sup>229</sup> Article 87, subsection 3 of the Code of Penal Procedure stipulates that the accused is entitled to "be assisted and defended by a lawyer of his or her choosing, or by public defense counsel."

<sup>230</sup> This was not done in cases where the cause of the abortion was being determined, or where it was not possible to prove that an abortion had taken place, or in which the designation of public defense counsel was not required.

<sup>231</sup> Telephone interview with a Prosecutor from San Vicente (Sept. 20, 1999) (on file with CRLP archives) [hereinafter San Vicente Telephone Interview].

<sup>232</sup> Article 87 of the Code of Penal Procedure establishes that the accused has the right to abstain from making a statement and has the right not to be subjected to means that compromise his or her dignity. In this respect, the physical examina-

tions to which women are subjected could be considered means that compromise their dignity, making it possible for women and their defense lawyers to object to the examinations.

<sup>233</sup> Even though prosecutors act in coordination with hospitals, they say that doctors often “get in the way” of their work. Prosecutors state that doctors first provide “assistance to the women, and only afterwards, if there are no obvious signs, do they examine them to see what may have caused the abortion.” For this reason, prosecutors complain that doctors destroy evidence. Interview with Prosecutor from Soyapango (Aug. 20, 1999) (on file with CRLP archives); Interview with Prosecutor from Mejicanos (Aug. 24, 1999) (on file with CRLP archives); San Vicente Telephone Interview, *supra* note 231.

<sup>234</sup> Interview with Linda de Montalva, Doctor, Institute of Forensic Medicine (Oct. 7, 1999) (on file with CRLP archives) [hereinafter de Montalva Interview].

<sup>235</sup> Interview with a Public Defense Lawyer (Oct. 13, 1999) (on file with CRLP archives). The short committal is regulated in Article 379 of the Code of Penal Procedure.

<sup>236</sup> In this respect, the Penal Code takes into account mitigating circumstances such as the person’s emotional state, which may lead to committing an offense, the fact that the person seeks to attenuate the harmful effects of the offense, and finally circumstances that the judge may weigh in a particular case, such as a woman’s economic, social and cultural context. These circumstances can be used to attenuate penal liability. See Pen. Code, art. 29.

<sup>237</sup> The lawyer also expressed that it is irresponsible to address the issue of abortion unilaterally, saying that there should be a government- or NGO-sponsored system to support women in this situation, particularly for cases in which women become pregnant as a consequence of rape. Such a system should also provide information on the woman’s position before the law and help her to overcome her trauma, at her own pace. Interview with Private Defense Lawyer (Oct. 8, 1999) (on file with CRLP archives).

<sup>238</sup> She stated that the Salvadoran justice system does not protect women, and that the state only seems to protect life before birth, and not afterwards. She asked, “what is the use of making a 17 year-old girl have a baby if the state is not going to take care of it after it is born?” *Id.*

<sup>239</sup> Pen. Code, art. 27, No. 3.

<sup>240</sup> Pen. Code, revised edition 1998, arts. 292, 293.

<sup>241</sup> Substitutive measures are contemplated in Article 295 of the Code of Penal Procedure. Generally speaking, when such measures are ordered, the woman is placed under house arrest, under the care or surveillance of a judge; she must appear periodically before the judge or in court and may not leave the country. The Penitentiary Surveillance Judge watches over the fulfillment of substitutive measures; if there are any violations thereof, the judge revokes the measures and imposes preventive custody.

<sup>242</sup> Willingness to cooperate may mean, for example, that if a woman obtained an

abortion at a clandestine clinic, she would have to give the name of the person who practiced the abortion, or at least say where the clinic is located. Substitutive measures also apply more frequently when the accused is a single mother and head of the household, who has no one else to take care of her other children. Interviews with Prosecutor in San Salvador (Aug. 16 and 18, 1999) (on file with the CRLP archives); Interview with Prosecutor in Apopa (Sept. 6, 1999) (on file with the CRLP archives).

<sup>243</sup> Pen. Code, revised edition 1998, art. 295.

<sup>244</sup> See section Dvii. of Chapter IV, which explains the use of provisional stays of proceedings to end criminal trials in El Salvador. pen code, revised edition 1998, at Chapter IV.

<sup>245</sup> Article 308 of the Code of Penal Procedure establishes the cases in which a definitive stay of proceedings can be ordered. Article 309 regulates provisional stays of proceedings.

<sup>246</sup> *Id.*, art. 249.

<sup>247</sup> In the Subregion of Nueva San Salvador, three fetuses in different stages of decomposition were found in a single week. One female prosecutor stated that “for every abandoned fetus or newborn, there is a woman with many problems that have led her to do such a thing, and who has no one to turn to; the law does not give her alternatives.” Interview with Prosecutor from Soyapango (Aug. 27, 1999) (on file with CRLP archives); Interview with Prosecutor Chalatenango (Sept. 1, 1999) (on file with CRLP archives); Apopa Interview, *supra* note 184.

<sup>248</sup> *Id.*

<sup>249</sup> See section B.2 of this chapter, which illustrates the conflict created in the Health Code between women’s health and protection of the fetus from the moment of conception. See also Health Code, revised edition 1988, art. 48.

<sup>250</sup> Article 244 of the Family Code grants rights to minors “from the moment of conception,” which generates doubt with regard to the scope of this provision, especially when the rights of a fetus conflict with the rights of the mother. See Fam. Code, revised edition 1988, art. 244.

<sup>251</sup> Article 72 of the Civil Code establishes that “the existence of all persons begins at birth, i.e., upon complete separation from the mother.” However, Article 73 establishes protection of the unborn child. This also creates a contradiction because, if a person’s legal existence begins at birth, the question arises of what kind of legal protection should be given to the fetus, which does not legally exist as a person, but which has been given rights under the law — rights that conflict with the rights of an existing person such as the pregnant woman, in a case where said woman wishes to have an abortion. See Civ. Code, 1999.

<sup>252</sup> El Sal. Const., arts. 1-2.

<sup>253</sup> *Id.*, art. 3.

<sup>254</sup> In 1997, the maternal mortality rate was estimated at 300 per one hundred thousand live births. Development Indicators, *supra* note 9, at 98.

<sup>255</sup> El Sal. Const., art. 2.

<sup>256</sup> Article 3 of the Constitution establishes that: “All persons are equal before the law. The enjoyment of civil rights shall not be restricted on the bases of nationality, race, gender or religious differences. No hereditary jobs or privileges are recognized.” *Id.*, art. 3.

<sup>257</sup> *Id.*, art. 1; *see also* art. 65.

<sup>258</sup> *Id.*, art. 12; *see also* Pen. Code, revised edition 1998, art. 4.

<sup>259</sup> *Exposition of the Grounds of the Code of Penal Procedure*, *supra* note 205, at 330.

<sup>260</sup> Health Code, revised edition 1988, art. 48.

<sup>261</sup> *Id.*

<sup>262</sup> Civ. Code, *supra* note 251, art. 72.

<sup>263</sup> *Id.*, art. 37.

<sup>264</sup> *Id.*, art. 38.

<sup>265</sup> *Id.*, art. 284, Subsection 2.

<sup>266</sup> Pen. Code, art. 187.

<sup>267</sup> de Montalva Interview, *supra* note 234.

<sup>268</sup> Although doctors are obligated to report the crime of induced abortion, Article 232 of the Code of Penal Procedure creates an exception which applies to doctors in relation to abortion when they acquire information under professional secrecy. In fact, the Penal Code establishes the following: “*Obligation to Report. Exception – Article 232, Subsection 2:* Shall be obligated to report public offenses: Doctors, pharmacists, nurses and other persons who practice health-related professions, who gain knowledge of such acts during the provision of their professional services, unless the knowledge obtained is covered by professional secrecy.” *See* Pen. Code, revised edition 1998, art. 232.

<sup>269</sup> The director of the National Maternity Hospital recognized in an interview that doctors knew that, following the abortion legislation reform, women would start to go to the hospital only when their lives were in serious danger. The same source declared that, in his opinion, there has been a loss of trust in the doctor-patient relationship. Burgos Interview, *supra* note 186.

<sup>270</sup> Instituto Salvadoreño para el Desarrollo de la Mujer (ISDEMU) [Salvadoran Institute for Women’s Development], Política Nacional de la Mujer [National Women’s Policy] (1997).

<sup>271</sup> Ministerio de Salud Pública y Asistencia Social (MSPAS) [Ministry of Public Health and Social Assistance], Plan Nacional de Salud Pública [National Public Health Plan].

<sup>272</sup> Reproductive Health Plan, *supra* note 128.

<sup>273</sup> Ministerio de Salud Pública y Asistencia Social (MSPAS) [Ministry of Public Health and Social Assistance], Normas de Planificación Familiar [Family Planning Regulations], Ministerial Resolution No. 536, July 1999, at 8.

<sup>274</sup> Reproductive Health Plan, *supra* note 128, at 15.

<sup>275</sup> *Id.*, at 15, 19

<sup>276</sup> *Id.*, at 39

<sup>277</sup> *Id.*, at 45.

<sup>278</sup> El Sal. Const., art. 144. Since the provisions of international treaties have the status of law, only the Political Constitution is above international treaties, without affecting or compromising the respect for the international commitments that arise from signing a treaty.

<sup>279</sup> El Salvador has signed and ratified, among other treaties: the International Covenant on Economic, Social and Cultural Rights (November 30, 1979), the International Covenant on Civil and Political Rights (November 30, 1979), the Convention on the Rights of the Child (July 10, 1990), the American Convention on Human Rights, the Additional Protocol of the American Convention on Human Rights in the area of Economic, Social and Cultural Rights “San Salvador Protocol” (June 6, 1995), The Inter-American Convention to Prevent and Punish Torture (December 5, 1994), The Convention on the Elimination of all Forms of Discrimination Against Women (June 2, 1981), and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belém do Pará” (August 23, 1995). *Multilateral Treaties Deposited with the Secretary General: Status as of December 31, 1995*, at 95, 111, 112, 198, ST/LEG/SER.E14 (1995).

<sup>280</sup> *Id.*, art. 3.

<sup>281</sup> Article 6(1) of the International Convention on Civil and Political Rights indicates that “[E]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life.” International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200A (XXI), UN GAOR, 21<sup>st</sup> Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1996), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter Civil and Political Rights Covenant].

<sup>282</sup> Article 4(1) of the American Convention on Human Rights establishes that “[a]ll persons are entitled to respect for their life. . . .” American Convention on Human Rights, *signed* November 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/SER.A/16, doc. 21, rev. 6, art. 4(1) [hereinafter American Convention].

<sup>283</sup> The Committee on Human Rights created in Articles 28 to 45 of the Civil and Political Rights Covenant is in charge of monitoring the state parties’ fulfillment of the obligations contained in said treaty, and, in this capacity, issues recommendations and evaluates the periodic reports submitted by the states. Article 40(4) establishes the Committee’s authority to issue recommendations, which it has been exercising since 1981. The Optional Protocol to the Civil and Political Rights Covenant furthermore establishes the possibility for individuals from a signing country to present individual petitions to the Commission. *See* Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1996, G.A. Res. 2200A(XXI), UNGAOR, 21<sup>st</sup> Sess., Supp. No. 16, at 59, UN Doc. A/6316, 999 U.N.T.S. 302 (*entered in force* Mar. 23, 1976).

<sup>284</sup> United Nations Human Rights Committee, The Right to Life: General Comment no. 6, UN Doc. CCPR/C/21/Rev. 1, July 30, 1982, ¶ 5.

<sup>285</sup> The Inter-American Court of Human Rights (ICHR) is one of the bodies of

the Inter-American system for the protection of human rights. It examines individual petitions that have first been presented to the Commission, which uses a process to determine whether the case should be brought before the Court. *See* American Convention, *supra* note 282, arts. 52-73.

<sup>286</sup> *Godínez Cruz v. Honduras*, Inter-Am.C.H.R., OEA/Ser.L/V/III.21, doc. 14 (1989), ¶185.

<sup>287</sup> Concluding Observations of the 65<sup>th</sup> session of the Human Rights Committee: Chile, U.N. Doc. CCPR/C/79/Add.104, March 30, 1999, ¶ 3 [hereinafter U.N. Doc. CCPR/C/79/Add.104].

<sup>288</sup> Upon revising the report on Peru in 1996, the Committee on Human Rights expressed its concern over the fact that abortions performed in unsafe conditions were the first cause of maternal mortality in that country. It therefore recommended that Peru take the necessary measures to keep women from losing their lives as a result of restrictive legislation in that area. Concluding observations of the 58<sup>th</sup> session of the Human Rights Committee: Peru, U.N. Doc. CCPR/C/79/add.72, November 18, 1996, ¶ 15. *See also* U.N. Doc. CCPR/C/79/Add.104, *supra* note 287, at ¶15.

<sup>289</sup> UN Doc. CCPR/C/79/Add.104, *supra* note 287, at ¶15.

<sup>290</sup> *Id.*

<sup>291</sup> Civil and Political Rights Covenant et al., *supra* note 281, art. 91. *See also* Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), art. 3, UN Doc. A/810, (1948) (*adopted* Oct. 1948 by El Salvador) [hereinafter Universal Declaration]; American Convention, *supra* note 282, art. 7.1.

<sup>292</sup> The preamble of the International Covenant on Economic, Social and Cultural Rights recognizes that human rights “derive from the inherent dignity of the human person.” International Covenant on Economic, Social and Cultural, *adopted* Dec. 16, 1966, G.A.Res. 2200A (XXI), UNGAOR, 21<sup>st</sup> Sess., Supp. No. 16, at 49, UN Doc. A/6316 (1996), 999 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter Economic and Social Rights Covenant].

<sup>293</sup> The preamble of the Declaration on the Elimination of Discrimination Against Women reaffirms its faith in “the dignity and worth of the human person and in the equal rights of men and women.” *See* Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263(XXII) (1967).

<sup>294</sup> Article 1 of the Belém do Pará Convention defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.” Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belém do Pará”, *adopted* June 9, 1994, G.A. O.A.S., 24<sup>th</sup> Session, reprinted in 33ILM 1534, (*entered into force* March 5, 1995) [hereinafter Belém do Pará Convention].

<sup>295</sup> *Id.*, art. 4.

<sup>296</sup> UN Doc. CCPR/C/79/Add.104, *supra* note 287, at ¶15.

<sup>297</sup> United Nations Committee on the Elimination of Discrimination Against

Women (CEDAW), Women and Health: General Comment No. 24, CEDAW/C/1999/I/WG.II/WP.2/Rev.1, February 22, 1999, ¶17 [hereinafter CEDAW/C/1999/I/WG.II/WP.2/Rev.1] .

<sup>298</sup> Universal Declaration, *supra* note 291, art. 2 (1).

<sup>299</sup> Civil and Political Rights Covenant, *supra* note 281, art. 3.

<sup>300</sup> Economic and Social Rights Covenant, *supra* note 292, art. 3.

<sup>301</sup> American Convention, *supra* note 282, art. 1.

<sup>302</sup> Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, G.A. Res. 34/180, UN GAOR, 34<sup>th</sup> Sess., Supp. No. 46, at 193, UN Doc. A/34/46, 1249 U.N. T.S. 13 (*entered into force* Sept. 3, 1981), art. 2(g), [hereinafter Women's Convention].

<sup>303</sup> *Id.*, art. 1.

<sup>304</sup> CEDAW/C/1999/I/WG.II/WP.2/Rev.1, *supra* note 297, ¶14.

<sup>305</sup> For more in-depth analysis, *see* Rebecca Cook, *Gender, Health and Human Rights*, 1:4 Health and Human Rights (1995); Rebecca Cook, *Human Rights and Reproductive Self-Determination*, 44:4 American University Law Review, 975-1016 (1995).

<sup>306</sup> Universal Declaration, *supra* note 291, art. 25 (1).

<sup>307</sup> Economic and Social Rights Covenant, *supra* note 292, art. 12 (1).

<sup>308</sup> Women's Convention, *supra* note 302, art. 12 (1).

<sup>309</sup> The World Health Organization defines health as a state of overall physical, mental and social well-being, not only as the absence of illness. *See* World Health Organization (WHO), About WHO, *available at* <<http://www.who.int/aboutwho/in/definition.html>> (last visited Jun. 13, 2000). Based on the concept of health developed by WHO, the Programme of Action and the Platform for Action define reproductive health as the ability to enjoy a satisfying sexual life without the risk of procreation, and the freedom to decide whether or not to procreate, when to procreate and how often. *See ICPD Programme of Action*, *supra* note 136, ¶ 7.2 and *Beijing Declaration and Platform for Action*, *supra* note 137, ¶ 94, 97.

<sup>310</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," *adopted* Nov. 17, 1988, G.A. O.A.S., 18<sup>th</sup> Sess., O.A.S.T.S. No. 69, art. 10 (*entered into force* Nov. 16, 1999) art. 10 [hereinafter San Salvador Protocol].

<sup>311</sup> Universal Declaration, *supra* note 291, art. 25 (1).

<sup>312</sup> Economic and Social Rights Covenant, *supra* note 292, art. 12.

<sup>313</sup> *Id.*, art. 12(1).

<sup>314</sup> *Id.*, ¶ 2.

<sup>315</sup> *Id.*, ¶2(a)-(d).

<sup>316</sup> Women's Convention, *supra* note 302, art. 14(2)(b).

<sup>317</sup> The San Salvador Protocol was signed in San Salvador during the Eighteenth Ordinary Session of the OAS General Assembly, November 17, 1988. *See* Organization of American States (OAS), Sistema Interamericano de

Información Jurídica [Inter-American System of Legal Information], available at <<http://www.oas.org/in/prog/juridico/spanish/firmas/a-52.html>> visited Aug. 12, 2000.

<sup>318</sup> San Salvador Protocol, *supra* note 310, art. 10. Such measures are: a) primary health care, that is, essential health care made available to all individuals and families in the community; b) extension of the benefits of health services to all individuals subject to the State's jurisdiction; c) universal immunization against the principal infectious diseases; d) prevention and treatment of endemic, occupational and other diseases; e) education of the population on the prevention and treatment of health problems; and f) satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

<sup>319</sup> The Committee on the Elimination of Discrimination Against Women (CEDAW) has addressed governments' obligation with regard to reproductive health in its recommendation on women and health, declaring that the "States Parties should carry out a broad national strategy to promote women's health throughout their life cycle. This would include . . . universal access by all women to a full variety of quality, accessible health care services, including sexual and genetic health services." CEDAW/C/1999/I/WG.II/WP.2/Rev.1, *supra* note 297, ¶ 29.

<sup>320</sup> *Id.*, ¶14.

<sup>321</sup> Women's Convention, *supra* note 302, art. 12(1).

<sup>322</sup> Universal Declaration, *supra* note 291, art. 12.

<sup>323</sup> Civil and Political Rights Covenant, *supra* note 281, art. 17.

<sup>324</sup> *Id.*

<sup>325</sup> American Convention, *supra* note 282, art. 11.

<sup>326</sup> See *Martín de Mejía v. Perú*, Inter-Am.C.H.R., OEA/Ser.L/V/II.91, doc.7 rev. (1995), ¶ 91.

<sup>327</sup> *Case X and Y v. Argentina*, Inter-Am.C.H.R., OEA/Ser.L/II.95, doc.7 rev., (1996), ¶ 91.

<sup>328</sup> See *Bruggeman and Sheuten v. German Federal Republic*, App. No. 6959/75, Eur. Comm'n H.R. Dec. & Rep. 244 (Jul. 12, 1997); *Paton v. Great Britain*, App. No. 8416/78, Eur. Comm'n H.R. Dec. & Rep. 408, ¶27 (May 13, 1980).

<sup>329</sup> United Nations Human Rights Commission, Equal Rights for Men and Women (Article 3): General Comment No. 28, U.N. Doc CCPR/C/21/Rev.1/Add.10, March 29, 2000, ¶ 20.

<sup>330</sup> *Id.*

<sup>331</sup> U.N. Doc. CCPR/C/79/Add.104, *supra* note 287, at ¶15.

<sup>332</sup> Article 9(3) of the Civil and Political Rights Covenant provides: "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceed-

ings, and, should occasion arise, for execution of the judgement,” Civil and Political Rights Covenant, *supra* note 281, art. 9(3).

<sup>333</sup> American Convention, *supra* note 282, art. 8(2).

<sup>334</sup> The purpose of preventive custody is to prevent the accused from endangering society or the victim of the crime, or from escaping and hindering the investigative work of the judge. This measure is tied to criteria used by judges to assess danger. It is based on the danger presented by the accused, owing to his or her characteristics, or to the nature of the offense. That is why persons with criminal records are denied liberty according to these criteria and/or because of the crime committed. Preventive custody should be the exception according to the Salvadoran legal system, since it avails itself of a protected legal asset, i.e., people’s liberty. See *Exposition of the Grounds for the Code of Penal Procedure*, *supra* note 205.

<sup>335</sup> Universal Declaration, *supra* note 291, art. 28.

<sup>336</sup> Paragraph 16 of the document states that: “[p]arents have a basic human right to determine freely and responsibly the number and spacing of their children,” *Proclamation of Teheran, International Conference on Human Rights*, U.N. Doc A/CONF. 32/41 (1968), Teheran, Iran, May 13, 1968.

<sup>337</sup> *Recommendations to Continue Carrying out the World Population Action Plan of the International Conference on Population*, U.N. Doc. E/CONF.76/19, Mexico City, Mexico, August 6-14, 1984, Recommendation 30.

<sup>338</sup> Women’s Convention, *supra* note 302, art. 10(h). See also *United Nations Conference on Environment and Development, United Nations Programme of Action from Rio*, U.N. Doc. DPI/1344, U.N. Sales No.E.93/I/11 (1994), Rio de Janeiro, Brazil, June 3-19, 1992, ¶ 3.8(j).

<sup>339</sup> *Vienna Declaration and Programme of Action, World Conference on Human Rights*, U.N. Doc. A/CONF.157/23 (1993), Vienna, Austria, June 14-25, 1993, ¶ 41.

<sup>340</sup> For example, the wording of commitments taken on by the states parties that have participated in these conferences is very similar to Article 16(1)(e) of the Women’s Convention, which is binding and obligates the 165 countries that have ratified the treaty, including El Salvador, to guarantee the reproductive rights of all women.

<sup>341</sup> *ICPD Programme of Action*, *supra* note 136, Principle 8, ¶ 7.3.

<sup>342</sup> *Id.*, ¶ 7.3.

<sup>343</sup> *Id.*, ¶ 7.24, 8.25.

<sup>344</sup> *Id.*

<sup>345</sup> *Oral Statements and Reservations on ICPD Programme of Action*, *supra* note 136.

<sup>346</sup> This makes it unlikely that this article of American Convention will be interpreted in the future to condemn countries in which abortion is legalized. See *Baby Boy Case*, Inter-Am.C.H.R., 25/OEA/Ser.L/V/II.54, doc.9 rev.1, (1981).

<sup>347</sup> A proposal introduced by Brazil included language that recommended revising laws that “contain punitive measures against women who have suffered illegal abortions.” Owing to a compromise solution with a minority of conservative delegations, the proposal was not approved. Nevertheless, the lengthy debate on the

provision on abortion in hazardous conditions was encouraging, because a large number of Latin American countries supported the proposal and showed a real interest in approaching the subject from another perspective, despite the fact that they still have highly restrictive abortion laws that impose penal sanctions on women who suffer illegal abortions. These countries included Bolivia, Chile, Colombia, the Dominican Republic, Mexico, Paraguay, Peru, Uruguay and Venezuela.

<sup>348</sup> *Key Action for the Further Implementation of the Programme of Action of the International Conference on Population and Development*, UN GAOR, 21st Special Sess., ¶ 63(i), UN Doc. A/S. 21/5/Add. 1, New York, United States of America, July 1, 1999.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*, ¶ 63(ii).

<sup>351</sup> *Beijing Declaration and Platform for Action*, *supra* note 137, ¶ 95.

<sup>352</sup> *Id.*, ¶ 97.

<sup>353</sup> *Id.*, ¶ 106(j), (k).

<sup>354</sup> *Id.*, ¶ 106(k).

<sup>355</sup> *Id.*, ¶ 106(l).

<sup>356</sup> *Id.*, ¶ 109, 106(j), (k).