



## El Salvador's total abortion ban and its harmful impact on women

In April 2016, the Center for Reproductive Rights provided supplementary information on El Salvador for consideration by the Pre-Sessional Working Group of the Committee for the Elimination of Discrimination against Women (the "Committee") for the 66<sup>th</sup> Session. The Center's report highlights El Salvador's serious failure to comply with its obligations under the Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW"). In particular, El Salvador has failed to take all appropriate measures to eliminate discrimination against women in the field of healthcare (including family planning), reproductive rights and other human rights and fundamental freedoms by:

1. **Prohibiting abortion under any circumstances**, even in cases of rape or incest, where it endangers the mother's life, or where the fetus is unviable; and
2. By effectively **obliging health professionals to report patients to the police** who they merely suspect *may* have had an abortion, in total disregard of patient confidentiality, and resulting in the incarceration and prosecution of many innocent women who have suffered uninduced miscarriages.

### EL SALVADOR'S TOTAL CRIMINALIZATION OF ABORTION: THE LEGISLATION

In 1998, El Salvador criminalized abortion *under any circumstances*,<sup>1</sup> and in 1999 passed a constitutional amendment recognizing an embryo as a human being from "*the moment of conception*".<sup>2</sup> Thus a person who performs or self-induces an abortion, even before the fetal stage, is liable to be prosecuted for homicide. This carries a penalty of up to 50 years' imprisonment.<sup>3</sup> Further, it is a blanket offence in El Salvador for public employees or officials of any public authority (including hospitals and clinics) to fail to report crimes.<sup>4</sup> This includes failing to report abortion. The result is that many women who suffer serious unprovoked complications in pregnancy (such as a miscarriage), opt not to seek healthcare assistance due to a fear that they will be prosecuted and imprisoned. In the event that women do seek medical attention, they face the risk of being unjustly reported and prosecuted without adequate legal advice and representation.<sup>5</sup> There remains a stigma in El Salvador against speaking about abortion law reform and reproductive rights.<sup>6</sup> Those who do speak out are often subject to abuse, aggression, and political violence and harassment.<sup>7</sup>

## RECOMMENDATIONS

Now more than ever, an explicit recommendation decriminalizing abortion in El Salvador, at least in certain circumstances, is crucial to upholding women's right to health without discrimination.

We respectfully request the Committee to make the following recommendations to El Salvador during the 66<sup>th</sup> Session:

- To urgently repeal El Salvador's highly restrictive anti-abortion legislation.
- Alternatively, to urgently amend El Salvador's anti-abortion legislation to permit exceptions for pregnancy resulting from sexual violence, rape or incest, where there is a threat to the mother's life or health, or where the fetus is unviable.
- In any event, to urgently amend El Salvador's anti-abortion legislation to remove the obligation of health professionals and public officials to report women to the police based merely on a suspicion of abortion; and to formulate and actively implement policies to provide for the widespread dissemination of contraceptive products (particularly emergency contraception) and accurate family planning information to allow women (particularly adolescents in rural areas) to exercise their reproductive rights.

## THE CONSEQUENCES OF EL SALVADOR'S TOTAL CRIMINALIZATION OF ABORTION

El Salvador's severe anti-abortion legislation effectively restricts women's access to healthcare and has led to the preventable deaths of many El Salvadoran women. Between 2000 and 2011, 57.4% of formal complaints to the authorities regarding potential breaches of anti-abortion legislation came from staff in public hospitals and from the Salvadoran Social Security Institute.<sup>8</sup> Women with obstetric complications have died or suffered long-term health damage from lack of medical treatment because they have been afraid to attend public hospitals.<sup>9</sup> Women have also committed suicide or otherwise died, or suffered long-term damage to health following backstreet abortions or self-inducement, whether by inserting an object or by ingesting potentially lethal medication or substances.<sup>10</sup>

El Salvador's laws lead to the prosecution and imprisonment of vulnerable women. Between 2000 and 2011, 129 women in El Salvador were prosecuted for abortion or homicide when the fetal deaths occurred in the last months of pregnancy.<sup>11</sup> Of these 129 women, 26 were convicted of homicide<sup>12</sup> and 23 were convicted of abortion.<sup>13</sup> Most of these women were young, poor, with limited education, and from remote communities.<sup>14</sup> Indeed, 68.2% of the incarcerated women were between 18 and 25 years old and with limited education. Almost three-quarters were single.<sup>15</sup>

"Las 17" are a group of 17 El Salvadoran women who, between 1999 and 2011, were each sentenced to up to 40 years in jail following reported miscarriages, mostly on charges of aggravated homicide.<sup>16</sup> One of these women, "Guadalupe", suffered a miscarriage at 18 after being raped and was sentenced to 30 years imprisonment in February 2008. She was pardoned in January 2015,<sup>17</sup> a decision welcomed by a group of eminent UN experts.<sup>18</sup> However, nine of these women remain in prison still seeking pardons. A petition submitted by the Center on their behalf asserting that El Salvador's conduct breaches international human rights law is currently being considered by the Inter-American Commission on Human Rights.

El Salvador has maintained its stance against abortion and reproductive rights despite the outbreak of the Zika virus, which the Centers for Disease Control and Prevention has now concluded is a cause of neurological disorders (including microcephaly) in fetuses.<sup>19</sup> El Salvador's wholly inadequate response to this crisis has been to urge women to avoid pregnancy until 2018 as a means of militating against the risk of having children with birth defects.<sup>20</sup> This contradicts the World Health Organization's official interim guidance of February 18, 2016, which states that women at risk of being infected with the Zika virus should have "ready access to emergency contraceptive services and counseling".<sup>21</sup>

## WOMEN'S RIGHTS TO SUBSTANTIVE EQUALITY AND TO BE FREE FROM DISCRIMINATION (ARTICLES 2, 3, 5, 15 AND 24)

El Salvador's total criminalization of abortion reflects a systemic bias against women, and furthers the cycle of pervasive gender-based discrimination. It impacts disproportionately on young women from poor, vulnerable and rural backgrounds. While men are unaffected, most young girls who fall pregnant are forced to drop out of school, with little or no prospect of resuming their studies.<sup>22</sup> This entrenches a cycle of poverty and discrimination in a way that distinctly affects women, and leads to a continuing state of inequality. Those who do seek access to healthcare when suffering from obstetric complications fear being reported to the authorities. Again, women are distinctly affected, even where they may have been forced into abortion by a male counterpart, because they are the ones who are reported, investigated, interrogated and often detained without any real sensitivity or consideration for their vulnerable state. And in the event of prosecution, they are exposed to a real risk of a breach of due process and injustice. Instead of advancing women's rights, El Salvador's total criminalization of abortion exacerbates and entrenches discrimination against women, in contravention of the central tenet of CEDAW.

## WOMEN'S RIGHT OF EQUAL ACCESS TO HEALTHCARE (ARTICLE 12)

El Salvador has failed to provide health services that are appropriate for and available to women, in the sense that health services must be delivered in a manner consistent with women's rights, including the rights to dignity, autonomy, privacy, confidentiality, informed consent and choice.<sup>23</sup> El Salvador has created real and significant barriers to healthcare during and after pregnancy. In so doing, it fails to meet the "specific, distinctive health needs and interests of women".<sup>24</sup> This violates Article 12(2), and discriminates against women in violation of Articles 2 and 12(1).

## WOMEN'S RIGHT TO REPRODUCTIVE FREEDOM (ARTICLE 16(1)(e))

El Salvador has failed to create the necessary conditions for women to control their reproductive capacity.<sup>25</sup> By enacting highly restrictive anti-abortion legislation, and by failing to provide adequate access to information and education, women in El Salvador are prevented from exercising their reproductive rights in contravention of Article 16(1)(e).

## DISCRIMINATION AGAINST WOMEN IN RURAL AREAS (ARTICLE 14)

El Salvador must eliminate discrimination against women in rural areas. Rural living increases women's socio-economic disadvantages by excluding them from services and opportunities, and constitutes a distinct source of discrimination against women.<sup>26</sup> Rural women (including many of the "Las 17") tend to use the most unsafe methods of abortion and the most untrained abortion-providers. Such women are therefore more likely to suffer severe complications from abortion.<sup>27</sup> El Salvador has violated Article 14, since its anti-abortion legislation has a distinctly and disproportionately negative impact on women in rural areas.

## WOMEN'S RIGHTS TO EDUCATION, EMPLOYMENT AND PARTICIPATION IN PUBLIC AND POLITICAL LIFE (ARTICLES 7, 8, 10 & 11)

Anti-abortion legislation creates lasting detriment to women and equality in El Salvadoran society by entrenching poverty and by depriving women of educational, economic, social and political opportunities, leading to cross-generational prejudice and disadvantage. El Salvador's breaches of Articles 12, 14 and 16(1)(e) give rise to a consequential breach of a number of other rights under CEDAW, including the right to education under Article 10, the right to employment under Article 11, and the right to participate in public and political life under Articles 7 and 8.

<sup>1</sup> Performing an abortion on another carries a penalty of imprisonment of up to twelve years, and self-inducing an abortion carries a penalty of imprisonment of up to eight years, see Decreto N° 1030, Código Penal (1998) (hereinafter '1998 Criminal Code'), Articles 133-137. See also Código de Ética y Deontología Médica (2015) (hereinafter '2015 El Salvador Doctors' Code of Ethics and Deontology'), Article 87, which provides that "performing abortion constitutes serious misconduct according to the Criminal Code".

<sup>2</sup> Decreto N°38, Constitución, Article 1.

<sup>3</sup> 1998 Criminal Code, Articles 128-132.

<sup>4</sup> 1998 Criminal Code, Article 312.

<sup>5</sup> Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned – The Effects of El Salvador's Total Criminalisation of Abortion*, 2014, p. 14 (hereinafter "CRR, *Marginalized, Persecuted, and Imprisoned*").

<sup>6</sup> The Center for Reproductive Law and Policy, *Persecuted – Political Process and Abortion Legislation in El Salvador: A Human Rights Analysis*, 2001, p. 40 (hereinafter "The Center for Reproductive Law and Policy, *Persecuted – Political Process and Abortion Legislation*").

<sup>7</sup> US State Department Country Reports on Human Rights Practices, *El Salvador 2014 Human Rights Report*, available at <http://www.state.gov/documents/organization/236900.pdf> (last accessed March 23, 2016) (hereinafter 'US State Department Country Reports on Human Rights Practices, *El Salvador*'); See also Women's Global Network for Reproductive Rights, *WGNRR Demands the Protection of Sexual and Reproductive Rights Defenders in El Salvador* (August 28, 2015), available at <http://wgnrr.org/wgnrr-demands-the-protection-of-sexual-and-reproductive-rights-defenders-in-el-salvador/> (last accessed February 12, 2016).

<sup>8</sup> Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico, *Del hospital a la cárcel: consecuencias para las mujeres por la penalización sin excepciones, de la interrupción del embarazo en El Salvador*, 2013 ("Citizen's Coalition for the Decriminalisation of Abortion on Grounds of Health, Ethics and Fetal Anomaly, *From Hospital to Jail: the Impact on Women of El Salvador's Total Criminalisation of Abortion*", *Reproductive Health Matters*, Vol. 22 (44) (November 2014)", p. 54 (hereinafter "*From Hospital to Jail Report*").

<sup>9</sup> *From Hospital to Jail Report*, pp. 53-55 (it is impossible to state the number of deaths: as long as abortion remains illegal, statistics cannot be expected to reflect the true position).

<sup>10</sup> *From Hospital to Jail Report*, p. 53, citing research from the Guttmacher Institute and the International Family Planning Federation Western Hemisphere Region, which estimates that the rate of unsafe abortions in El Salvador is about 25 per 1,000 women of childbearing age, such that over 35,000 unsafe abortions take place in El Salvador every year. Additionally, according to the Maternal Death Surveillance System of the Ministry of Health of El Salvador, the suicide rate among pregnant women was the third largest cause of maternal deaths in 2011, after hypertensive disorders and obstetric hemorrhage.

<sup>11</sup> *From Hospital to Jail Report*, pp. 53-55.

<sup>12</sup> Of these 26 convictions, 19 were for aggravated homicide, 4 were for attempted homicide and 3 were for manslaughter.

<sup>13</sup> Of the 80 remaining cases, 67 were dismissed or acquitted, and nine were subject to default judgment. No information is available about four cases. *From Hospital to Jail Report*, p. 55.

<sup>14</sup> Of the accused women, 43.4% were aged 21–25 years, 24.8% were aged 18–20 and 16.3% were aged 26–30. Thus, some 85% were women younger than 30. These women had very low levels of education: 46.3% were illiterate or had at most finished two years of primary school. Only 25.6% had attended secondary school, a technical school or university. *From Hospital to Jail Report*, pp. 53-54.

<sup>15</sup> CRR, *Marginalized, Persecuted, and Imprisoned*, p. 13.

<sup>16</sup> See Las 17, *No Dejemos que sus vidas se marchiten*, available at <http://www.las17.org/> (last accessed March 30, 2016). See also E. Guevara-Rosas, *El Salvador and Las 17*, NEW YORK TIMES (March 2, 2015), available at [http://www.nytimes.com/2015/03/03/opinion/el-salvador-and-las-17.html?\\_r=0](http://www.nytimes.com/2015/03/03/opinion/el-salvador-and-las-17.html?_r=0) (last accessed March 30, 2016).

<sup>17</sup> This was a prolonged process in which El Salvador's Congress approved Guadalupe's pardon by 43 votes, following the recommendations of the Human Rights Congressional Committee and the Supreme Court Committee. See Center for Reproductive Rights, *El Salvador Releases One Woman Wrongfully Imprisoned, But Refuses to Pardon 15 Others* (February 19, 2015), available at <http://www.reproductiverights.org/press-room/el-salvador-releases-one-woman-wrongfully-imprisoned-but-refuses-to-pardon-15-others> (last accessed March 30, 2016); OHCHR, *Guadalupe's pardon: UN experts urge El Salvador to pardon all women jailed for pregnancy complications and repeal restrictive abortion law* (January 28, 2015), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15520&LangID=E> (last accessed March 30, 2016) (hereinafter 'OHCHR, *Guadalupe's pardon*').

<sup>18</sup> OHCHR, *Guadalupe's pardon* (The experts were **Emna Aouij** (Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice), **Mads Andenas** (Chair-Rapporteur on the Working Group on arbitrary detention), **Dainius Pūras** (Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health), **Juan Ernesto Mendez** (Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment), **Rashida Manjoo** (Special Rapporteur on violence against women, its causes and consequences), and **Gabriela Knaut** (Special Rapporteur on the independence of judges and lawyers).

<sup>19</sup> World Health Organization, *Zika Virus Microcephaly and Guillain-Barré Syndrome, Situation Report* (February 26, 2016), p. 1.

<sup>20</sup> N. Renteria, G. Stardardter, R. Chang, *El Salvador Urges Against Pregnancies Until 2018 as Zika Virus Spreads*, REUTERS (January 21, 2016), available at <http://www.reuters.com/article/us-health-zika-el-salvador-idUSKCN0UZ2SP> (last accessed February 16, 2016).

<sup>21</sup> Centers for Disease Control and Prevention, *CDC Concludes Zika Causes Microcephaly and Other Birth Defects* (April 12, 2016), available at <http://www.cdc.gov/media/releases/2016/s0413-zika-microcephaly.html>; World Health Organization, *Prevention of Potential Sexual Transmission of Zika Virus: Interim Guidance*, WHO/SIKV/MOC/16.1 (February 18, 2016).

<sup>22</sup> HRC, *Report of the Special Rapporteur on Violence against Women, Addendum – follow-up mission to El Salvador*, ¶ 67.

<sup>23</sup> CEDAW, *General Recommendation 24*, ¶¶ 22 and 31(e).

<sup>24</sup> CEDAW, *Communication No 17/2008, Alyne v Brazil*, CEDAW/C/49/D/17/2008 (July 25, 2011), ¶ 7.3.

<sup>25</sup> The Center for Reproductive Law and Policy, *Persecuted – Political Process and Abortion Legislation*, 2001, p. 65.

<sup>26</sup> M. A. Freeman, C. Chinkin, B. Rudolf, *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY* (Oxford University Press 2012), pp. 358 and 359.

<sup>27</sup> Guttmacher Institute, *Facts on Abortion in Latin America and the Caribbean*, November 2015, p. 2.