

## NOTE

### SUFFERING IN SILENCE: THE URGENT NEED TO ADDRESS EL SALVADOR'S LACK OF REPRODUCTIVE RIGHTS

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#### I. INTRODUCTION

“I don’t want to die,” Beatriz, a twenty-two-year old pregnant woman, told a reporter by telephone in May of 2013.<sup>1</sup> Her government was denying her an abortion, even though delivery risked killing her due to pre-existing lupus and kidney failure. Her fetus was anencephalic<sup>2</sup> and had almost no chance of surviving after birth.<sup>3</sup> Beatriz lives in El Salvador, where abortion is banned under all circumstances—even when the mother’s life is at risk or the fetus is nonviable.<sup>4</sup> Her case went all the way to the Salvadoran Supreme Court, which affirmed the denial of an abortion needed to save her life.<sup>5</sup> In serious and urgent situations such as Beatriz’s, the Inter-American Commission on Human Rights (IACHR) may request a state to adopt precautionary measures to prevent irreparable harm to persons.<sup>6</sup> Facing the prospect of state-sanctioned death, Beatriz’s case prompted the IACHR to grant precautionary measures ordering Salvadoran officials to allow doctors to intervene and pre-

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1. Karla Zabłudovsky, *A Salvadoran at Risk Tests Abortion Law*, N.Y. TIMES, May 28, 2013, <http://www.nytimes.com/2013/05/29/world/americas/pregnant-sick-and-pressing-salvadoran-abortion-law.html>.

2. Anencephaly is a serious birth defect in which a baby is born without parts of the brain and skull. *Facts About Anencephaly*, CENTER DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/birthdefects/anencephaly.html> (last visited Nov. 10, 2014).

3. Zabłudovsky, *supra* note 1.

4. See CITIZEN WORKING GRP. ON THE DECRIMINALIZATION OF THERAPEUTIC, EUGENESIC & ETHICAL ABORTION (EL SAL.) ET AL., REPORT TO THE U.N. HUMAN RIGHTS COMMITTEE: REPORT ON VIOLATIONS OF WOMEN’S HUMAN RIGHTS DUE TO THE COMPLETE CRIMINALIZATION OF ABORTION 1–2 (2010) [hereinafter CITIZEN WORKING GRP. ET AL.].

5. Press Release, Center for Reproductive Rights, Inter-American Court of Human Rights Orders El Salvador Government to Allow Pregnant Woman with Critical Complications Access to Life-Saving Health Care (May 30, 2013), *available at* <http://reproductive-rights.org/en/press-room/inter-american-court-of-human-rights-orders-el-salvador-government-to-allow-pregnant-woma>.

6. *Precautionary Measures*, INTER-AM. COMM’N ON HUM. RTS. (IACHR), <http://www.oas.org/en/iachr/decisions/precautionary.asp> (last visited Nov. 10, 2014).

serve her life, personal integrity, and health.<sup>7</sup> Recognizing the injustice of Beatriz's experience, four nongovernmental organizations filed a petition with the IACHR in December 2013 on behalf of Beatriz against the Salvadoran government.<sup>8</sup>

The case brought international attention to the suffering that many Salvadoran women face as a result of El Salvador's abortion laws and revealed the stark reality that cases such as Beatriz's are not uncommon.<sup>9</sup> The abortion laws of El Salvador, a country steeped in a strong and ubiquitous Catholic tradition, are among the most restrictive in the world,<sup>10</sup> with only five other countries implementing this type of categorical ban.<sup>11</sup> Prior to 1998, El Salvador allowed abortion in three circumstances: when it was the only means of saving the life of the mother, when it was for victims of rape or statutory rape, and when there is a case of foreseeable, serious fetal deformity.<sup>12</sup> However, a newly appointed conservative right-wing archbishop successfully campaigned for reform of the country's abortion laws in 1995.<sup>13</sup> The new penal code went into effect in April 1998; it eliminated all exceptions to the abortion ban, made the procedure illegal under all circumstances, and subjected violators to a prison sentence.<sup>14</sup>

El Salvador has strongly enforced these abortion laws and established "a policing apparatus to prosecute, investigate and denounce any suspicious activities in public hospitals and other places in the country."<sup>15</sup> Enforcement is so strict that even women who suffered legitimate miscarriages have been prosecuted for abortion or aggravated homicide and sentenced to prison.<sup>16</sup> This hostility has led many women suffering legitimate pregnancy com-

7. Press Release, Center for Reproductive Rights, *supra* note 5.

8. Gloria Marisela Moran, *Denuncian a Estado ante CIDH por caso Beatriz*, CONTRA PUNTO (Dec. 2, 2013), <http://www.contrapunto.com.sv/genero/denuncian-a-estado-ante-cidh-por-caso-beatriz>.

9. See *Abortion in Latin America: Miscarriages of Justice*, ECONOMIST (June 8, 2013), <http://www.economist.com/news/americas/21579065-brutal-farce-el-salvador-highlights-regional-failing-miscarriages-justice>.

10. U.N. DEP'T OF ECON. & SOC. AFFAIRS, WORLD ABORTION POLICIES (2013), *available at* [http://www.un.org/en/development/desa/population/publications/pdf/policy/WorldAbortionPolicies2013/WorldAbortionPolicies2013\\_WallChart.pdf](http://www.un.org/en/development/desa/population/publications/pdf/policy/WorldAbortionPolicies2013/WorldAbortionPolicies2013_WallChart.pdf).

11. The five other countries with absolute abortion bans are Malta, Dominican Republic, Nicaragua, Chile, and the Holy See (Vatican City). *Id.*

12. *Id.*

13. See Jack Hitt, *Pro-Life Nation*, N.Y. TIMES MAG. (Apr. 9, 2006), <http://www.nytimes.com/2006/04/09/magazine/09abortion.html>.

14. See THE CTR. FOR REPROD. LAW & POLICY, PERSECUTED: POLITICAL PROCESS AND ABORTION LEGISLATION IN EL SALVADOR: A HUMAN RIGHTS ANALYSIS 27 (2001).

15. CITIZEN WORKING GRP. ET AL., *supra* note 4, at 2.

16. See *id.* at 3.

plications to avoid seeking medical care for fear of prosecution, thereby seriously endangering both the expectant mother and fetus.<sup>17</sup>

Furthermore, no legal alternatives exist for women who seek abortions because their own life is at risk, their fetus is nonviable, or they are a victim of rape or incest. Many such women opt for illegal abortions,<sup>18</sup> which are often very dangerous or prohibitively expensive.<sup>19</sup> Doctors are forced to report any suspicious circumstances under threat of being prosecuted themselves, which has led to a rapid deterioration of doctor-patient confidentiality.<sup>20</sup> Another result of the current conservatism is a lack of access to contraception or adequate education regarding reproductive health.<sup>21</sup> It is well established that access to sexual health information and contraception is a powerful tool to combat unwanted pregnancies and abortions.<sup>22</sup> Lacking these services, Salvadoran women are stuck in a difficult dilemma in which they are deprived of the necessary information to make educated decisions regarding their reproductive health but then are left with no alternatives when an unwanted pregnancy occurs.<sup>23</sup> These circumstances, taken together, reveal a systematic deprivation of women's fundamental human rights, including the rights to life, to physical integrity, to be free from cruel, inhuman, or degrading treatment, and to equality.<sup>24</sup> El Salvador's denial of these fundamental rights directly contravenes its obligation under the American Convention on Human Rights (American Convention) to protect and promote them.<sup>25</sup>

This Note will argue that El Salvador's current abortion laws banning therapeutic abortions<sup>26</sup> are a grave violation of the aforemen-

17. *See id.*

18. *See* Michelle Oberman, *Cristina's World: Lessons from El Salvador's Ban on Abortion*, 24 *STAN. L. & POL'Y REV.* 271, 284 (2013).

19. *See id.*

20. *See* CITIZEN WORKING GRP. ET AL., *supra* note 4, at 3.

21. *See* Rep. of the Comm. on the Elimination of Discrimination Against Women, 28th Sess., Jan. 13–31, 2003, ¶¶ 259–60, U.N. DOC A/58/38; GAOR, 58th Sess., Supp. No. 38 (Mar. 21, 2003).

22. *See* THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 23.

23. *See id.*

24. *See* American Convention on Human Rights: "Pact of San José, Costa Rica" arts. 1, 4, 5, 24, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

25. *See id.*

26. The term "therapeutic abortion" is defined as an "abortion induced when pregnancy constitutes a threat to the physical or mental health of the mother." *Therapeutic Abortion Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/medical/therapeutic%20abortion> (last visited Nov. 10, 2014).

tioned fundamental human rights of women, and as such, these violations must be immediately addressed and remedied. The IACHR dealt with the ban in a narrow, individualized capacity through the issuance of precautionary measures for Beatriz, which demonstrates that the issues underlying her case—primarily the violative effects of the law—remain unresolved.<sup>27</sup> Therefore, the IACHR should admit Beatriz's December 2013 petition on the basis of El Salvador's violation of the human rights enshrined in the American Convention.<sup>28</sup> The IACHR can then properly refer her petition to the Inter-American Court of Human Rights (IACtHR), which has the power to issue a binding decision for *all* women that will force reformation of Salvadoran abortion laws to provide for therapeutic abortions at the very least.

Part II discusses the historical development and current state of Salvadoran abortion laws and their enforcement, including analysis of the laws' effects on women. It also examines El Salvador's obligations under both customary international law and as a party to the American Convention. Part III examines El Salvador's violations of the American Convention Articles 1, 4, 5, and 24, as well as customary international law, and argues that Beatriz's petition should be admitted by the IACHR as a result. It also discusses the need for development of reproductive health education. Part IV concludes by discussing the importance of Salvadoran legal reformation and the potential for this case to become a model of successful utilization of the Inter-American System to address the issue of abortion laws that contravene the American Convention and customary international law.

## II. BACKGROUND

### A. *Abortion Laws in El Salvador*

To understand the current state of abortion laws in El Salvador, one must understand some history of the country and the historical development of its abortion laws. This Section introduces this historical development, explains El Salvador's current abortion laws, and discusses how those laws are applied. This discussion will expose the social, political, and cultural underpinnings that have led to the abusive application of Salvadoran abortion laws today.

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27. See Marcia Aguiluz, *Inter-American Court of Human Rights Orders the Salvadoran State to Save the Life of "Beatriz"*, CENTER JUST. & INT'L L. (May 30, 2013), <http://cejil.org/en/comunicados/inter-american-court-human-rights-orders-salvadoran-state-save-life-beatriz>.

28. See *id.*

## 1. Historical Development

Despite El Salvador's current absolute ban on pregnancy termination, the law was not always so restrictive.<sup>29</sup> Similar to many other countries, abortion was generally banned under the previous Salvadoran Penal Code, but exceptions were provided in cases where the woman's life or health was threatened, as well as for cases involving rape, incest, or severe fetal abnormality.<sup>30</sup> The law was enforced "quietly and somewhat subjectively."<sup>31</sup> However, other political circumstances would eventually lead to a stark reformation of these laws.<sup>32</sup> During this time, Salvadoran armed forces controlled the government; only the landholding class benefitted from the country's economy, which led to grave wealth disparities.<sup>33</sup> As a result of widespread poverty, the exclusionary economic system, and a lack of recourse to political or legal avenues for change, an armed movement of men and women from many social classes arose to fight the existing regime—beginning a civil war that engulfed the country.<sup>34</sup> The armed conflict raged for twelve years and resulted in the death of seventy-five thousand Salvadorans before a peace accord was finally signed in 1992.<sup>35</sup>

After the peace accords, El Salvador focused on social issues that were ignored during the war, which prompted a bipartisan call for re-examination of the country's abortion laws.<sup>36</sup> In 1993, conservative Assembly members proposed December 28th as a national day to remember the unborn.<sup>37</sup> Then in 1995, the country's main left-wing party, the Frente Farabundo Martí para la Liberación Nacional (FMLN), instead supported a proposal that addressed a variety of women's issues, such as domestic violence and rape.<sup>38</sup> The controversial proposal included a provision allowing abortions not only in cases where the mother's physical health was in danger but also in cases where the mother's mental health was at risk.<sup>39</sup> Although the proposal was rejected, it made abortion a contentious issue within El Salvador<sup>40</sup>—a country with a staunchly Roman

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29. See CITIZEN WORKING GRP. ET AL., *supra* note 4.

30. *Id.*

31. Hitt, *supra* note 13.

32. See THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 16–17.

33. See *id.* at 15.

34. See *id.* at 16.

35. See *id.*

36. See Hitt, *supra* note 13, at 2.

37. See *id.* at 3.

38. See *id.*

39. See *id.*

40. See *id.*

Catholic population where the Church bears a strong social influence on politics and morals.<sup>41</sup>

The same year, Pope John Paul II appointed Fernando Sáenz Lacalle as the new archbishop for San Salvador.<sup>42</sup> Prior to Lacalle's appointment, many Salvadoran clergy as well as the two previous archbishops for San Salvador were proponents of a liberal evangelical doctrine of social justice known as liberation theology.<sup>43</sup> Liberation theology established the Church as the protector of social justice and human rights, with great influence over social issues, much to the disapproval of the Salvadoran ruling class.<sup>44</sup> Accordingly, many clergy members supported the revolution during the civil war, including Archbishop Oscar Romero, who was eventually killed by a right-wing death squad because of his strong influence among the rebels.<sup>45</sup>

The liberal tendency within the Church changed with the appointment of Archbishop Lacalle on April 22, 1995.<sup>46</sup> Lacalle's appointment ushered in a new era of conservatism, particularly surrounding the hotly debated issue of abortion.<sup>47</sup> Lacalle was an outspoken member of the conservative right-wing Catholic group *Opus Dei* and had the support of the ruling class in addition to strong ties to right-wing nongovernmental organizations.<sup>48</sup> Although Lacalle's predecessors were just as opposed to abortion, he was the first to insist that the Church's opposition should become state legislation and that the Church should play a public role in that process.<sup>49</sup>

In 1997, when conservative Assembly legislators proposed a bill banning abortion in all circumstances, Lacalle used his influence in the Catholic country to campaign heavily in support of its passage—even likening abortion to the extermination of prisoners in Nazi concentration camps during World War II.<sup>50</sup> With Lacalle's outspoken support and the fervent work of conservative groups, it became very difficult to oppose the ban, with proponents countering any argument supporting therapeutic abortions with a relig-

41. See THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 17.

42. See Hitt, *supra* note 13.

43. See *id.* at 3.

44. THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14.

45. Hitt, *supra* note 13.

46. Archbishop Fernando Sáenz Lacalle, CATH. HIERARCHY, <http://www.catholic-hierarchy.org/bishop/bsaenz.html> (last visited Nov. 10, 2014).

47. THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14.

48. *Id.*

49. Hitt, *supra* note 13.

50. THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 17.

ious argument.<sup>51</sup> Even the local media strongly espoused an absolute ban on abortion, characterizing the procedure as a selfish decision and refusing to approach the topic from a woman's perspective.<sup>52</sup> The conservative majority of the Assembly leadership supported the ban, while the FMLN, which held only a minority of the Assembly seats, was powerless to stop it.<sup>53</sup> The bill passed in 1997 and became part of El Salvador's new Penal Code effective April 1998.<sup>54</sup>

## 2. Salvadoran Abortion Laws Today

After April 20, 1998, all abortions—including those which were previously allowed—were criminalized and became punishable by harsher sentences than the previous Penal Code had imposed.<sup>55</sup> The abortion provisions were placed in a new section of the Penal Code that details offenses against the “human life in formation.”<sup>56</sup> Article 1 states that it is the government's primary responsibility to protect life from “the very moment of conception.”<sup>57</sup> Absolutely no exception to the abortion ban exists, even in dire cases where there is danger to the mother's health, the fetus is nonviable, or the pregnancy resulted from rape or incest.<sup>58</sup>

The new Penal Code, still in effect today, provides for a two to eight year term of imprisonment for (1) a person who induces an abortion with the consent of the woman, or (2) a woman who induces her own abortion, or (3) a woman who consents to another person inducing her pregnancy termination.<sup>59</sup> A person who induces an abortion without the woman's consent or obtains consent through violence or deception is subject to imprisonment for four to ten years, while a physician, pharmacist, or related health worker who devotes him- or herself to such practices is subject to imprisonment for six to twelve years.<sup>60</sup> A person who encourages a woman to have an abortion or provides economic or

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51. Hitt, *supra* note 13.

52. THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 30.

53. Hitt, *supra* note 13.

54. *Id.* at 4.

55. THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 27.

56. Código Penal de la República de El Salvador [Cód. Pen.] [Criminal Code of the Republic of El Salvador] ch. II (1997).

57. *Id.* art. 1. Article 1 was amended in 1999.

58. Eleanor Klibanoff, *Fear, Loss and Secrets: Abortion Laws in El Salvador and Nicaragua*, PULITZER CENTER (Oct. 1, 2013), <http://www.pulitzercenter.org/reporting/south-america-el-salvador-nicaragua-abortion-law-politics-government-illegal-pregnancy-rape>.

59. Cód. Pen. art. 133.

60. *Id.* arts. 134–35.

other means for the procedure is subject to two to five years in prison.<sup>61</sup> Furthermore, judges have the discretion to rule—and in some cases have ruled—that a charge of aggravated homicide may be brought for abortion of a viable fetus, raising the penalty for the mother to thirty to fifty years in prison.<sup>62</sup>

### 3. How Salvadoran Abortion Laws Are Administered in Practice

While the Penal Code provisions seemed harsh in theory, they have proven even more cruel, unjust, and discriminatory in practice.<sup>63</sup> Although accurate figures regarding Salvadoran abortion rates are difficult to ascertain given their clandestine nature and inaccuracy of hospital records, regional estimates offer insight into the efficacy of absolute abortion bans.<sup>64</sup> In Central America, where most countries either ban the practice entirely or provide an exception for therapeutic abortions only, an estimated twenty-nine percent of pregnancies are terminated, resulting in 1.1 million abortions annually.<sup>65</sup> Since highly restrictive laws are not associated with lower abortion rates,<sup>66</sup> there is no reason to believe that El Salvador's rates deviate significantly from this regional estimate.<sup>67</sup>

Incidences of abortion did not disappear with the abortion ban's implementation; instead, the ban required women to find new ways to terminate their pregnancies.<sup>68</sup> A woman's economic resources often decide what method she will use.<sup>69</sup> As such, wealthy women retain the "right to choose" despite criminalization by flying to countries where the procedure is legal or by visiting the

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61. *Id.* art. 136.

62. Hitt, *supra* note 13, at 12. In addition to viability, judges may also consider the innocence of the victim, the length of dilation, failure to take precautionary measures, and whether the woman has been pregnant before—and is therefore expected to recognize symptoms of labor. See Oberman, *supra* note 18, at 297.

63. See CITIZEN WORKING GRP. ET AL., *supra* note 4.

64. Oberman, *supra* note 18, at 279.

65. *Id.*

66. For example, regions such as Africa and Western Europe, which enjoy liberal abortion laws, have abortion rates of twenty-nine per thousand women of childbearing age and twelve per thousand women, respectively. Conversely, in Latin America, where abortion is illegal under most circumstances in the majority of countries, the abortion rate is thirty-two per thousand, which does not take into account the many unreported abortions that occur. *Facts on Induced Abortion Worldwide*, GUTTMACHER INST. (Jan. 2012), [http://www.guttmacher.org/pubs/fb\\_IAW.html](http://www.guttmacher.org/pubs/fb_IAW.html).

67. Oberman, *supra* note 18, at 279.

68. See Hitt, *supra* note 13, at 5.

69. *Id.*

office of a private doctor who accepts high fees for his services.<sup>70</sup> Middle class women rely on home remedies or the use of Misoprostol to induce an abortion.<sup>71</sup> Misoprostol, a drug used to treat ulcers, causes uterine contractions and bleeding.<sup>72</sup> It is inserted into the cervix and, once dissolved, is undetectable.<sup>73</sup> However, the drug is prohibitively expensive for most Salvadoran women, where the average daily income is only \$9. Misoprostol costs \$60 per pill, while the recommended dosage for inducing an abortion ranges from four to eight pills.<sup>74</sup> Additionally, Misoprostol alone is not medically approved for use in abortions and therefore does not come with instructions for this use, which leads to confusion about the method of ingestion and dosage for women with no medical oversight.<sup>75</sup> It is only effective in terminating a pregnancy eighty-five percent of the time, resulting in the remaining fifteen percent of women continuing the pregnancy with uncertain effects on the fetus and experiencing complications such as allergic reactions or continued bleeding.<sup>76</sup> This often leads to a need for emergency surgical intervention or women being forced to resort to other unsafe methods to complete the procedure.<sup>77</sup>

For the poorest women in El Salvador, who cannot afford Misoprostol or trips to more liberal countries and are therefore disproportionately affected by the ban, the only alternative to pregnancy is a “back alley” abortion.<sup>78</sup> Research has found that the majority of women charged with abortion-related offenses occupy the lowest socioeconomic positions, such as domestic servants, factory workers, or ticket takers on the bus.<sup>79</sup> They attain “back alley” abortions through extremely dangerous methods and inadequately trained providers.<sup>80</sup> These methods include inserting objects such as coat hangers or iron rods into the cervix, douching with battery acid or

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70. *Id.*

71. *Id.*

72. Oberman, *supra* note 18, at 281.

73. Hitt, *supra* note 13, at 6.

74. Oberman, *supra* note 18, at 283.

75. *Id.*

76. *Id.* at 281–82.

77. *See id.* (describing the methods women who are unable to afford Misoprostol take in order to end an unwanted pregnancy); Hitt, *supra* note 13, at 6–7 (describing how one woman received incorrect dosage information and went to a traditional back-alley abortionist).

78. Hitt, *supra* note 13, at 5–6.

79. *Id.* at 9.

80. GUTTMACHER INST., WORLD HEALTH ORG., FACTS ON INDUCED ABORTION WORLDWIDE (2012), available at [http://www.who.int/reproductivehealth/publications/unsafe\\_abortion/induced\\_abortion\\_2012.pdf](http://www.who.int/reproductivehealth/publications/unsafe_abortion/induced_abortion_2012.pdf).

fertilizers, throwing themselves down steps, and punching themselves in the stomach.<sup>81</sup> Each of these techniques can result in severe infection, a perforated uterus, coma, and death.<sup>82</sup> Though figures are unavailable for El Salvador given the secrecy of abortion attempts, more than one thousand women in Central America die annually and one million are hospitalized as a result of complications from “back alley” abortions.<sup>83</sup> Furthermore, according to the World Health Organization, complications from these procedures cause thirteen percent of maternal deaths worldwide.<sup>84</sup> In addition to the unreliability and grave health risks inherent in these methods, another problem for Salvadoran women is that they often leave incriminating evidence of the attempted abortion that can lead to criminal charges in such a vigilant country.<sup>85</sup>

Furthermore, El Salvador also has an active law enforcement system that includes police, investigators, medical spies, forensic vagina inspectors, and a special division of the prosecutor’s office responsible for Crimes Against Minors and Women.<sup>86</sup> This division is tasked with capturing, trying, and incarcerating women who attempt abortions.<sup>87</sup> After a doctor or hospital reports a suspected abortion, police are dispatched to collect evidence at the woman’s home or hospital, seize medical records, and sometimes interrogate coworkers, neighbors, or family members.<sup>88</sup> In some cases, doctors from the nation’s main forensic lab, the Forensic Institute, are called to examine the woman’s pelvis.<sup>89</sup> When the botched abortion has caused such uterine damage that a hysterectomy is performed, the woman’s uterus is sent to the Forensic Institute for analysis by government doctors who then retain custody of her uterus as evidence against her.<sup>90</sup>

Between 2000 and 2011, police received reports against more than two hundred women and instigated 129 abortion prosecutions.<sup>91</sup> Of those, forty-nine were convicted—twenty-six for murder

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81. Oberman, *supra* note 18, at 284; Hitt, *supra* note 13, at 6.

82. *See* Hitt, *supra* note 13, at 7.

83. *Abortion in Latin America: Miscarriages of Justice*, *supra* note 9.

84. CITIZEN WORKING GRP. ET AL., *supra* note 4, at 7.

85. Oberman, *supra* note 18, at 284.

86. Hitt, *supra* note 13, at 1.

87. *Id.* at 8–9.

88. *Id.*

89. *Id.*

90. *Id.*

91. Nina Lakhani, *El Salvador: Where Women May Be Jailed for Miscarrying*, BBC NEWS (Oct. 17, 2013), <http://www.bbc.co.uk/news/magazine-24532694>.

and twenty-three for abortion.<sup>92</sup> Prosecutors obtained seven more convictions since 2012.<sup>93</sup> The distinction between charges for murder and abortion lies in the viability of the fetus.<sup>94</sup> These harsh charges largely result from judicial activism and the belief of many Salvadoran prosecutors that the longer the sentence the better.<sup>95</sup> Abortion policing is so aggressive that some women who suffered legitimate miscarriages and sought medical assistance were charged with abortion or aggravated homicide and sent to prison.<sup>96</sup> Fear of prosecution inhibits women from seeking medical attention when suffering from legitimate pregnancy complications.<sup>97</sup>

One representative example is Cristina Quintanilla, an eighteen-year-old woman who suffered a miscarriage while seven months pregnant.<sup>98</sup> She and her older boyfriend were very excited about the pregnancy;<sup>99</sup> her boyfriend, who was in the United States on a work visa, sent money every month which Cristina and her mother used to buy new linens and clothes in preparation for the baby.<sup>100</sup> One night, she awoke with crippling pain and went to the bathroom, where she felt the fetus fall out.<sup>101</sup> She later awoke in the hospital to find police investigators questioning her about the whereabouts of her baby.<sup>102</sup> She was then transferred—handcuffed and still bleeding—to the police station for further interrogation and ultimately left on the dirt floor of a prison cell.<sup>103</sup> The court charged Cristina with aggravated homicide since the fetus was viable, theorizing that once a woman experiences labor pains, she cannot mistake them for anything else and claiming that Cristina killed her child by not telling anyone she was in labor.<sup>104</sup> She was sentenced to thirty years in prison.<sup>105</sup>

Abortion law enforcement and prosecutions like Cristina's require the dutiful cooperation of doctors and medical person-

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92. *Id.*

93. *Id.*

94. Hitt, *supra* note 13, at 12.

95. *Id.*

96. CITIZEN WORKING GRP. ET AL., *supra* note 4, at 3.

97. *Id.*

98. *See* Oberman, *supra* note 18, at 295–96.

99. *Id.* at 295.

100. *Id.* at 295–96.

101. *Id.* at 296.

102. *Id.*

103. *Id.*

104. *Id.* at 296–97.

105. *Id.* at 297.

nel.<sup>106</sup> The harsh penalties imposed by the Penal Code convince doctors and nurses that they have a legal responsibility to report any woman suspected of abortion to the police.<sup>107</sup> This prevents them from adequately performing their duty of assisting women with labor complications, for fear of prosecution as accomplices to the crime of abortion or homicide.<sup>108</sup> This poses a serious ethical conflict for doctors in particular due to their obligation to abide by the Salvadoran Health Code, which makes breach of doctor-patient confidentiality a sanctionable offense for which a doctor may lose her license.<sup>109</sup> Furthermore, the Penal Code makes breach of doctor-patient confidentiality a crime punishable by six months to two years in prison.<sup>110</sup> Doctors are expected to respect these obligations while being forced to report suspicious patient circumstances to the police or risk being charged under the Penal Code's abortion laws.<sup>111</sup>

This contradictory system scares doctors into reporting women for fear of either themselves or their hospital being charged as accomplices, or out of fear that their nurses will report them for not coming forward.<sup>112</sup> Ultimately, each doctor must decide for himself whether to not report a patient, risking prosecution and civil sanctions, or to report her and risk civil and criminal sanctions for breach of confidentiality.<sup>113</sup> Regardless of which choice a doctor ultimately makes, the new abortion laws have caused a deterioration in doctor-patient confidentiality and complicated the duties of medical personnel.

### B. *The Case of Beatriz*

El Salvador's absolute abortion ban gained international attention in early 2013 with the case of Beatriz, a twenty-two-year-old Salvadoran woman suffering from lupus and kidney failure while twenty-six weeks pregnant.<sup>114</sup> Doctors believed her health complications would only worsen throughout pregnancy, and her lupus and kidney failure had become so acute that delivery had a high

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106. *See id.* at 288.

107. Hitt, *supra* note 13, at 9.

108. CITIZEN WORKING GRP. ET AL., *supra* note 4, at 3.

109. *See* Oberman, *supra* note 18, at 286–87.

110. *Id.* at 287.

111. *See id.* at 286, 288–89.

112. *See* Hitt, *supra* note 13, at 10.

113. Oberman, *supra* note 18, at 288–89.

114. *See Abortion in Latin America: Miscarriages of Justice*, *supra* note 9.

probability of killing her.<sup>115</sup> Doctors' determination that the fetus was anencephalic—developing without parts of its brain and skull—and would not survive more than a few hours outside the womb made her case even more compelling.<sup>116</sup> Due to the fetus' nonviability, Beatriz's doctors urged an abortion to protect her health from further deterioration.<sup>117</sup>

Beatriz petitioned the Salvadoran Supreme Court to grant an exception to the absolute abortion ban and allow her to have a life-saving therapeutic abortion due to the nonviability of her fetus.<sup>118</sup> In a 4-1 decision, the Court denied her request, reasoning that El Salvador's absolute ban did not allow them to authorize an abortion and that the rights of the mother could not be privileged over those of the fetus.<sup>119</sup> The opinion also stated that Beatriz's health problems were under control and the threat to her life was eventual rather than imminent, indicating that if the danger became imminent, doctors could intervene.<sup>120</sup> The Court noted that "an eventual interruption of the pregnancy would not imply, much less have as an objective, the destruction of the fetus."<sup>121</sup> The Court reached this decision despite evidence that forcing a woman to deliver a nonviable anencephalic fetus is harmful to the woman's mental health because she must deliver the deformed fetus only to watch it die.<sup>122</sup>

Prior to the Court's decision, various abortion advocacy groups petitioned the IACHR to adopt precautionary measures to prevent irreparable harm to Beatriz.<sup>123</sup> The IACHR did so and required that El Salvador implement the treatment recommended by doctors to safeguard Beatriz's life, personal integrity, and health.<sup>124</sup> When the state did not comply with the IACHR's orders, it then requested the intervention of the IACtHR, the highest tribunal with jurisdiction over human rights on the American continent.<sup>125</sup>

115. *Id.*

116. *Id.*

117. Karla Zabłudovsky & Gene Palumbo, *Salvadoran Court Denies Abortion to Ailing Woman*, N.Y. TIMES, May 29, 2013, <http://www.nytimes.com/2013/05/30/world/america/salvadoran-court-denies-abortion-to-ailing-woman.html>.

118. *See* Zabłudovsky, *supra* note 1.

119. Zabłudovsky & Palumbo, *supra* note 117.

120. *Id.*

121. *Id.*

122. *See* U.N. Human Rights Comm., 85th Sess., Oct. 17–Nov. 3, 2005, at 4–5, U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005) [hereinafter Human Rights Comm., Communication No. 1153/2003].

123. Aguiluz, *supra* note 27.

124. *Id.*

125. *Id.*

In extremely serious and urgent situations, the IACtHR can take provisional measures that it deems necessary, even though a case has not been formally presented before it.<sup>126</sup>

The IACtHR issued its decision hours after the decision of the Salvadoran Supreme Court and required the state to take all necessary medical measures to ensure Beatriz's right to life and personal integrity, including the interruption of her pregnancy as recommended by her doctors.<sup>127</sup> The IACtHR reasoned that Beatriz's situation was one of extreme seriousness and urgency and that there was a grave risk of irreparable harm to her rights to life and personal, physical, and mental integrity.<sup>128</sup> El Salvador compromised and allowed Beatriz to undergo a premature cesarean section instead of an abortion because Beatriz was already past twenty weeks.<sup>129</sup> In a press conference discussing the decision to allow a cesarean section, the Salvadoran Health Minister stated, "[a]t this point, the interruption of the pregnancy is no longer an abortion . . . it is an induced birth."<sup>130</sup> She also cited saving Beatriz's life as a factor in the decision.<sup>131</sup> Doctors delivered the fetus, which died a few hours later; the surgery left Beatriz in intensive care.<sup>132</sup> Without the involvement of the IACtHR and its authority, Beatriz likely would not have been able to receive medical intervention to interrupt her dangerous pregnancy.<sup>133</sup> On November 29, 2013, four nongovernmental organizations filed a new petition on her behalf with the IACHR against El Salvador for alleged violations of various articles of the American Convention.<sup>134</sup> The petition sought reparations for Beatriz's suffering and an order requiring the Salvadoran government to modify its laws in order to guarantee women's enjoyment of rights enshrined in the American Convention.<sup>135</sup>

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126. *Id.*

127. *Precautionary Measures*, *supra* note 6.

128. Aguiluz, *supra* note 27.

129. *Abortion in Latin America: Miscarriages of Justice*, *supra* note 9.

130. Karla Zabludovsky, *El Salvador: Doctors Can Induce Birth to Save Woman*, *Official Says*, N.Y. TIMES, May 30, 2013, <http://www.nytimes.com/2013/05/31/world/americas/el-salvador-doctors-can-induce-birth-to-save-woman-official-says.html>.

131. *Id.*

132. *Abortion in Latin America: Miscarriages of Justice*, *supra* note 9.

133. See Aguiluz, *supra* note 27 (noting that the resolution was "a historic milestone in the protection of the rights of women" and that the Court's resolutions are binding on the signatory states).

134. See Moran, *supra* note 8.

135. *Id.* The petition was only filed in November 2013; therefore, the IACHR has not yet made a decision regarding its admissibility, nor is the text of the petition available online.

### C. *The Relationship Between Salvadoran Domestic Law and International Law*

As a member of various international human rights instruments, El Salvador must examine its abortion laws within the context of the state's international law obligations.<sup>136</sup> The laws also must be analyzed within the context of customary international law.<sup>137</sup> This Section introduces the Inter-American System, which is the regional human rights enforcement body that oversees Salvadoran compliance with its obligations under the American Convention on Human Rights. It also explains El Salvador's obligations as a party to the American Convention and discusses customary international law regarding abortion laws. In so doing, this Section establishes the foundation for an examination of El Salvador's failure to fulfill its obligations under the American Convention and customary international law.

#### 1. The Inter-American System

Decisions of the IACtHR are obligatory for all Salvadoran authorities because El Salvador is a member of the Organization of American States and ratified the American Convention on June 20, 1978.<sup>138</sup> Under the American Convention, there are two enforcement bodies that monitor implementation of its articles: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.<sup>139</sup> The IACHR has power to receive and act on petitions from any person, group of persons, or nongovernmental organizations claiming violations of rights guaranteed by the American Convention.<sup>140</sup> Upon receipt of a petition, the IACHR investigates and may hold hearings before issuing a report with its findings and recommendations.<sup>141</sup>

In cases of state noncompliance with the IACHR recommendations, a case is referred to the IACtHR, which has advisory and contentious jurisdiction and the power to issue binding decisions on state parties in contentious cases.<sup>142</sup> The IACtHR can award monetary damages and issue declaratory judgments ordering states to

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136. THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 61.

137. See Berta E. Hernández, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309, 317–18 (1991).

138. SUSAN DELLER ROSS, *WOMEN'S HUMAN RIGHTS: THE INTERNATIONAL AND COMPARATIVE LAW CASEBOOK* 153–54 (2008).

139. *Id.* at 153.

140. *Id.*

141. *Id.* at 154.

142. *Id.*

provide specific remedies.<sup>143</sup> Although contentious decisions are binding and advisory opinions receive great deference, women's rights advocates rarely use the Inter-American System to advance women's rights.<sup>144</sup> The reasons for this are unclear.<sup>145</sup>

## 2. El Salvador's Obligations Under the American Convention

As a party to the American Convention, El Salvador is obligated to undertake to respect the rights and freedoms contained in the American Convention and to ensure the free and full exercise of those rights and freedoms to all persons under its jurisdiction.<sup>146</sup> Among the many rights and freedoms El Salvador must respect, Articles 1, 4, 5, and 24 are especially pertinent to the issue of Salvadoran abortion laws.

Article 4(1) states “[e]very person has the right to have his life respected.”<sup>147</sup> The IACtHR has interpreted this provision as imposing a positive obligation on State Parties to take reasonable steps to prevent and avoid situations that could result in the violation of this right.<sup>148</sup> To that end, it also imposes a duty on State Parties to guarantee the *creation of conditions* that may be necessary in order to prevent violations of the right to life, and to take all appropriate measures necessary to protect and preserve this right.<sup>149</sup> This includes a duty on the State Party to prevent its agents from endangering the right to life.<sup>150</sup> Legislators and state institutions are required to actively protect this right.<sup>151</sup>

Although decisions of the United Nations Human Rights Committee (UNHRC) are not binding on State Parties to the American Convention, the UNHRC's findings can offer interpretive guidance on obligations—such as the right to life under the American Convention.<sup>152</sup> In explaining states' obligation to report compliance

143. *Id.*

144. *See id.*

145. *See id.* (explaining that the Inter-American Court of Human Rights (IACtHR) is not used often, but giving no reason for this gap).

146. American Convention, *supra* note 24, art. 1.

147. *Id.* art. 4.

148. *See* Godinez Cruz v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 8, ¶ 198 (Jan. 20, 1989).

149. Sawhoyamaya Indigenous Community v. Paraguay, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 151 (Mar. 29, 2006).

150. Miguel Castro-Castro Prison v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 237 (Nov. 25, 2006).

151. *Id.*

152. *See* Rep. of the Human Rights Comm., 67th Sess., Oct. 18–Nov. 5, 1999, 68th Sess., Mar. 13–31, 2000, 69th Sess., July 10–28, 2000, ¶ 10, at 134, U.N. Doc. A/55/40; GAOR,

with the right to life enshrined in the International Covenant on Civil and Political Rights (ICCPR),<sup>153</sup> the UNHRC stated that State Parties “should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undertake life-threatening clandestine abortions.”<sup>154</sup> This suggests that, in order to be compliant with the right to life under the ICCPR, states must take measures to help women prevent unwanted pregnancies and to ensure they are not forced to resort to dangerous alternative measures.<sup>155</sup> The UNHRC’s analysis is especially salient given that the IACtHR has used the UNHRC’s interpretation of the right to life in its own decisions in order to explain states’ obligations under the American Convention as well.<sup>156</sup>

Article 5(1) states that every person has the right to have his physical, mental, and moral integrity respected.<sup>157</sup> The IACHR has established that the right to personal integrity is a very broad concept<sup>158</sup> whose purpose is to protect the person from any state action that can adversely affect that person.<sup>159</sup> The right to personal integrity implies the obligation of states to respect this right and guarantee that no one is subject to physical or mental aggression.<sup>160</sup> Additionally, the IACtHR has established a link between the right to personal integrity and the right to life, determining that both are directly and immediately linked to human health care.<sup>161</sup> For example, provision of adequate and timely maternal health services is one of the principal ways to ensure women’s right to personal integrity.<sup>162</sup> Moreover, the IACHR has articulated that the right to personal integrity in the area of maternal health

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55th Sess., Supp. No. 40 (2000) [hereinafter Human Rights Comm.: General Comment No. 28].

153. See CTR. FOR REPROD. RIGHTS, *SAFE AND LEGAL ABORTION IS A WOMAN’S HUMAN RIGHT 1* (2011), available at [http://reproductiverights.org/sites/ctr.civicactions.net/files/documents/pub\\_fac\\_safeab\\_10.11.pdf](http://reproductiverights.org/sites/ctr.civicactions.net/files/documents/pub_fac_safeab_10.11.pdf).

154. Human Rights Comm.: General Comment No. 28, *supra* note 152, ¶ 10, at 134.

155. *Id.*

156. See “Street Children” v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 145 (Nov. 19, 1999).

157. American Convention, *supra* note 24, art. 5.

158. Inter-Am. Comm’n H.R., *Access to Maternal Health Services from a Human Rights Perspective*, ¶ 22, OEA/Ser.L/V/II, doc. 69 (June 7, 2010) [hereinafter *Access to Maternal Health Services*].

159. Inter-Am. Comm’n H.R., *Report on the Situation of Human Rights in Chile*, ¶ 6, OEA/Ser.L/V/II.66, doc. 17 (Sept. 9, 1985) [hereinafter *Situation of Human Rights in Chile*].

160. *Access to Maternal Health Services*, *supra* note 158, ¶ 26.

161. *Id.*

162. *Id.* ¶ 23.

implies an obligation on states to guarantee, through legislation or otherwise, that women enjoy the right to the highest possible level of physical and mental health without discrimination.<sup>163</sup> Furthermore, a report by the Rapporteurship on the Rights of Women stated that “cases in which women’s dignity is assaulted, such as when they are denied medical care in the area of reproduction, thus damaging their health or causing them considerable emotional stress, would constitute a violation of the right to personal integrity.”<sup>164</sup>

The American Convention Article 5(2) establishes that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”<sup>165</sup> Additionally, it states that all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.<sup>166</sup> As articulated by the IACtHR, violations of this right range “from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors.”<sup>167</sup> Article 7 of the ICCPR identically states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment.”<sup>168</sup> The UNHRC’s decision in *K.L. v. Peru* provides important analysis and interpretation of this right under the ICCPR as it relates to therapeutic abortions.<sup>169</sup>

In *K.L. v. Peru*, a seventeen-year-old Peruvian woman brought a complaint for various violations under the ICCPR, including Article 7, which is identical to the American Convention Article 5(2).<sup>170</sup> The alleged violations of K.L.’s rights under the ICCPR arose from her state’s refusal to allow a therapeutic abortion after she learned her fetus was anencephalic and had no chance of survival.<sup>171</sup> K.L. argued that the state’s refusal to grant a therapeutic abortion and her resultant obligation to carry the pregnancy to term constituted cruel and inhuman treatment.<sup>172</sup> This cruel and inhuman treatment would result from K.L. being forced to give

163. *Id.*

164. *Id.* ¶ 39.

165. American Convention, *supra* note 24, art. 5.

166. *Id.*

167. *Loayza-Tamayo v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 57 (Sept. 17, 1997).

168. International Covenant on Civil and Political Rights art. 7, Mar. 23, 1976, 999 U.N.T.S. 171.

169. Human Rights Comm., Communication No. 1153/2003, *supra* note 122.

170. *Id.* ¶ 2.1.

171. *Id.* ¶ 2.3.

172. *Id.* ¶ 3.4.

birth and endure the distress of seeing her daughter's marked deformities, knowing of her extremely short life expectancy, seeing her die, and experiencing deep depression as a result of her daughter's "extended funeral."<sup>173</sup> The UNHRC found this violated Peru's obligation to prevent cruel, inhuman, or degrading treatment because K.L.'s suffering was foreseeable and the state's refusal to grant a therapeutic abortion caused her suffering.<sup>174</sup> It further defined the right at issue as relating to not only physical pain but also mental suffering—a protection that is especially important for minors.<sup>175</sup> The UNHRC's finding regarding the interpretation and violation of the right to be free from cruel, inhuman, and degrading treatment as it relates to therapeutic abortions is especially pertinent due to the lack of the IACtHR jurisprudence in the area.

Additionally, women are protected by the American Convention Articles 1 and 24, which specifically address equality.<sup>176</sup> Article 1 requires states to undertake to ensure the free and full exercise of the rights and freedoms recognized within the American Convention, "without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."<sup>177</sup> This includes exercise of the explicit rights and freedoms listed in the American Convention, as well as the rights and freedoms implicit in an explicit right.<sup>178</sup> For example, the explicit right to personal integrity implicitly includes a right to healthcare because adequate and timely healthcare is a principal way to ensure personal integrity.<sup>179</sup> The Committee on the Elimination of Discrimination Against Women specifically recognized that "barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women [and] punish women who undergo those procedures."<sup>180</sup> In order to be considered discriminatory, abortion laws must have the effect or purpose of preventing women from enjoying at least one of the rights recog-

173. *Id.*

174. *Id.* ¶ 6.3.

175. *Id.*

176. *See* American Convention *supra* note 24, arts. 1, 24.

177. *Id.* art. 1.

178. *Access to Maternal Health Services*, *supra* note 158, ¶ 2.

179. *Id.*

180. Rep. of the Comm. on the Elimination of Discrimination Against Women, 20th Sess., Jan. 6–Feb. 19, 1999, ¶ 14, at 6–7, U.N. Doc. A/54/38; GAOR, 54th Sess., Supp. No. 38, (May. 4, 1999) [hereinafter Rep. on Elimination of Discrimination Against Women: Gen. Recommendation No. 24].

nized within the American Convention on an equal footing with men.<sup>181</sup>

Article 24 establishes that “[a]ll persons are equal before the law,” and, as such, they are entitled to equal protection of the law without discrimination.<sup>182</sup> The IACtHR has held that the right to equality before the law prohibits all discriminatory treatment originating in a legal prescription and, in order to achieve that objective, states have an obligation not to introduce discriminatory regulation in their legal systems.<sup>183</sup> Furthermore, states have an affirmative obligation to combat discriminatory practices and adopt measures needed to ensure the effective right to equal protection for all individuals.<sup>184</sup> This includes an active role in guaranteeing that women are able to enjoy their human rights free from all forms of discrimination.<sup>185</sup> The IACHR has also indicated that laws, practices, and policies that at first glance seem neutral but produce disproportionate distinctions when applied are manifestations of discrimination in that they conceal their prejudicial effect on groups in vulnerable situations.<sup>186</sup> As such, any measure that promotes harmful, disparate treatment for persons or groups of persons is contrary to the acknowledgement of equality before the law.<sup>187</sup>

### III. ANALYSIS

#### A. *El Salvador's Violation of State Obligations Under the American Convention*

In assessing El Salvador's prohibitory abortion laws and the manner in which they are executed, in light of its obligations under the American Convention, it becomes clear that El Salvador has seriously failed in fulfilling its duties. As evidenced by the discrimination against and harm to women inherent in its abortion laws, El Salvador has not undertaken to respect the rights and freedoms recognized in the American Convention or to ensure to all persons subject to its jurisdiction the free and full exercise of those rights and freedoms without discrimination.<sup>188</sup> On the basis of its abor-

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181. THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 66.

182. American Convention, *supra* note 24, art. 24.

183. *Access to Maternal Health Services*, *supra* note 158, ¶ 57.

184. *Id.*

185. *Id.*

186. *Id.* ¶ 58.

187. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter. Am. Ct. H.R. (ser. A) No. 18, at 11 (Sept. 17, 2003).

188. American Convention, *supra* note 24, art. 1.

tion laws, El Salvador has specifically violated its obligations under Articles 1, 4, 5, and 24 of the American Convention.

As a result of its absolute criminalization of abortion, El Salvador has failed to meet its obligations under Article 4(1), which requires that states protect the right to life and ensure that no one is arbitrarily deprived of it.<sup>189</sup> El Salvador has not fulfilled its obligation to prevent and avoid situations in which the right to life may be violated, which the IACtHR held is necessary in order to comply with Article 4(1),<sup>190</sup> because its laws do not attempt to prevent or avoid maternal mortality resulting from unsafe abortions. Rather, by eliminating access to safe abortions, Salvadoran laws have not only failed to prevent situations in which the right to life may be violated but also *created* situations in which a woman's right to life is violated by subjecting her to a pregnancy or birth that may kill her, as evidenced by the case of Beatriz.<sup>191</sup> Deliberately denying a pregnant woman a medical procedure that could save her life contravenes the meaning of a State Party's obligations regarding the right to life.<sup>192</sup>

Moreover, providing no safe means of terminating a pregnancy when the fetus is nonviable or the pregnancy resulted from rape or incest forces women to seek dangerous alternatives that can cause severe health complications and death.<sup>193</sup> This further violates El Salvador's obligation regarding the right to life, as interpreted by the UNHRC when it indicated that compliance with the right to life includes measures by the state to help women prevent unwanted pregnancies and ensure that women did not have to undertake life-threatening clandestine abortions.<sup>194</sup> Far from providing these measures, El Salvador has left no other alternative for women with unwanted pregnancies and has effectively created a market for the very life-threatening clandestine abortions the UNHRC warns against.<sup>195</sup>

As noted by the World Health Organization, complications from unsafe abortions cause thirteen percent of worldwide maternal deaths annually, which demonstrates the relationship between lack

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189. *Id.* art. 4.

190. Cruz v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 8, ¶ 198 (Jan. 20, 1989).

191. CITIZEN WORKING GRP. ET AL., *supra* note 4, at 8.

192. THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 63.

193. CITIZEN WORKING GRP. ET AL., *supra* note 4.

194. Human Rights Comm.: General Comment No. 28, *supra* note 152, ¶ 10, at 134.

195. See Hitt, *supra* note 13, at 5.

of access to safe abortions and maternal mortality.<sup>196</sup> Furthermore, despite recommendations from human rights organizations such as the Committee on the Elimination of Discrimination Against Women, the Salvadoran government has failed to conduct research or provide information regarding the number of unsafe abortions conducted annually or the number of women and girls who commit suicide due to unwanted pregnancy.<sup>197</sup> The state's indifference toward a better understanding of the national problem plaguing Salvadoran women further demonstrates El Salvador's failure to fulfill its duty to prevent and avoid violations of women's right to life.<sup>198</sup> The restrictive laws that force pregnant women to risk their lives by giving birth or seeking unsafe abortions, coupled with the state's complete lack of due diligence in tackling the problem of maternal mortality within the country, demonstrate that El Salvador has not fulfilled its positive obligation to protect the right to life for Salvadoran women.

El Salvador also has not fulfilled its obligations under the American Convention Article 5(1), which requires the state to protect every person's right to physical, mental, and moral integrity, as its abortion laws violate the physical and mental integrity of Salvadoran women.<sup>199</sup> The country's categorical abortion ban is a violation of a woman's physical integrity. This is because forcing women to carry an unwanted or endangering pregnancy to term constitutes an unauthorized invasion of women's bodies.<sup>200</sup> Enforcement of the state's laws grants forensic experts permission to examine a woman's body in order to obtain evidence to use against her in abortion prosecutions.<sup>201</sup> Furthermore, the practice of allowing forensic experts to examine a woman's uterus—after it must be removed because of severe damage from an illegal abortion—and allowing the state to retain custody of it as evidence against her is perhaps the most extreme embodiment of a violation of a woman's physical integrity.<sup>202</sup>

Additionally, El Salvador has failed to meet its obligations under Article 5(1) as articulated by the IACHR; this provision requires State Parties to guarantee, through legislation or otherwise,

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196. CITIZEN WORKING GRP. ET AL., *supra* note 4, at 7.

197. *Id.*

198. See generally Jessica Lenahan v. United States, Case 12.626, Inter-Am. Ct. H.R., Report No. 80/11, ¶¶ 122–36 (July 21, 2011) (discussing the principle of due diligence).

199. American Convention, *supra* note 24, art. 5.

200. THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 64.

201. Hitt, *supra* note 13, at 9.

202. *Id.*

women's enjoyment of the right to the highest possible level of physical and mental health without discrimination.<sup>203</sup> El Salvador's abortion laws deny medical care to women like Beatriz who, according to expert medical opinion, require interruption of their pregnancy to preserve their own health.<sup>204</sup> Far from promoting the highest possible level of physical health, denial of this kind of medical care is exactly what the Rapporteurship on the Rights of Women identified as a violation of the right to personal integrity.<sup>205</sup>

Moreover, El Salvador's abortion laws also deny women enjoyment of the right to the highest possible level of mental health. Forcing women to carry a nonviable fetus to term only to watch it die causes great mental suffering<sup>206</sup> and constitutes a violation of a woman's mental integrity.<sup>207</sup> Similarly, forcing a woman to give birth in cases where a pregnancy is the product of rape or incest can cause more mental and emotional anguish to a victim who has already suffered through a rape or incestuous sexual experience, further violating her mental integrity.<sup>208</sup> As stated by the Rapporteurship on the Right of Women, denial of medical care for reproductive health, which damages a woman's physical health or causes considerable emotional stress—as occurs in El Salvador—constitutes a violation of the right to personal integrity enshrined in Article 5(1).<sup>209</sup>

Likewise, Salvadoran abortion laws also violate Article 5(2), which bans torture or cruel, inhuman, or degrading treatment.<sup>210</sup> This is defined as encompassing not only physical but also mental treatment.<sup>211</sup> As the UNHRC established in *K.L. v. Peru*, denying an abortion to a woman whose fetus is anencephalic and nonviable—as was Beatriz's—can cause extreme mental suffering for which the state is responsible.<sup>212</sup> Therefore, forcing such women to give birth to a nonviable fetus, as the Salvadoran state did, directly causes preventable and extreme mental suffering, violating

203. *Access to Maternal Health Services*, *supra* note 158, ¶ 23.

204. *See* Hitt, *supra* note 13, at 1.

205. *Access to Maternal Health Services*, *supra* note 158, ¶ 39.

206. Human Rights Comm., Communication No. 1153/2003, *supra* note 122.

207. *Id.*

208. CITIZEN WORKING GRP. ET AL., *supra* note 4, at 2, 4, 5.

209. *Access to Maternal Health Services*, *supra* note 158, ¶ 51.

210. *See* American Convention, *supra* note 24, art. 5.

211. U.N. Human Rights Comm., 44th sess., Mar. 23–Apr. 10, 1992, at 30, U.N. Doc. HRI/GEN/1/Rev.1 (1994) [hereinafter Human Rights Comm.: Gen. Comment No. 20].

212. *See* Human Rights Comm., Communication No. 1153/2003, *supra* note 122, ¶ 6.3.

a woman's right to be free from cruel treatment.<sup>213</sup> Furthermore, Salvadoran officials interrogate women in the hospital immediately after regaining consciousness following a failed abortion or miscarriage, as in the case of Cristina<sup>214</sup> and many others. Women are then frequently transferred from the hospital to a jail cell, while still bleeding. Both of these practices amount to cruel, inhuman, and degrading treatment of women in violation of Article 5(2).<sup>215</sup>

El Salvador has also failed to fulfill its obligations under both Article 1, requiring states to ensure the free and full exercise of rights and freedoms recognized in the American Convention without any discrimination,<sup>216</sup> and Article 24, requiring equal protection of the law without discrimination.<sup>217</sup> By completely criminalizing abortion—a medical procedure that can only be undertaken by women—El Salvador's abortion laws apply only to a woman's conduct and choices. By comparison, vasectomies have been legal in El Salvador since 1979, even though they are medical procedures undertaken only by men primarily for contraceptive purposes.<sup>218</sup> Thus, the ban prevents women's enjoyment of recognized rights, such as the rights to life and personal integrity, on an equal footing with men as required by Article 1.<sup>219</sup> As the Committee on the Elimination of Discrimination Against Women specifically recognized, "barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women [and] punish women who undergo those procedures."<sup>220</sup> Access to appropriate healthcare is implicit in the enjoyment of other recognized rights under the American Convention,<sup>221</sup> and Salvadoran abortion laws pose a barrier to the enjoyment of those rights by criminalizing a procedure needed only by women;<sup>222</sup> this constitutes a violation of Article 1.

In addition to requiring equal protection of the law, Article 24 also imposes obligations on the state to abstain from introducing

213. American Convention, *supra* note 24, art. 5.

214. Oberman, *supra* note 18, at 296.

215. *Id.*; American Convention, *supra* note 24, art. 5.

216. American Convention, *supra* note 24, art. 1.

217. *Id.* art. 24.

218. ENGENDERHEALTH, CONTRACEPTIVE STERILIZATION: GLOBAL ISSUES AND TRENDS 89 (2002), available at <http://www.engenderhealth.org/pubs/family-planning/contraceptive-sterilization-factbook.php>.

219. See THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 66.

220. Rep. on Elimination of Discrimination Against Women: Gen. Recommendation No. 24, *supra* note 180.

221. *Access to Maternal Health Services*, *supra* note 158, ¶ 2.

222. See *supra* Part II.A.2.

discriminatory regulation in the legal system, to combat discriminatory practices, and to adopt measures needed to ensure the effective right to equal protection.<sup>223</sup> As aforementioned, Salvadoran abortion laws apply solely to women because only women can undertake an abortion. Nonetheless, in addition to the effect Salvadoran abortion laws have on the enjoyment of other rights, they also affect a woman's protection and treatment under the law in El Salvador. For example, the aggressive policing employed to enforce such laws routinely deprives women specifically of the legal protection of a presumption of innocence by imprisoning them for suspected abortions or even legitimate miscarriages, as illustrated by Cristina, who served four years of a thirty year sentence for her miscarriage.<sup>224</sup> Women are immediately treated as guilty and interrogated as a suspect upon waking from a coma.<sup>225</sup>

Furthermore, given the nature of the charges, the investigation often requires forensic doctors to inspect a woman's vagina or her extracted uterus in order to obtain evidence that will be used against her.<sup>226</sup> It is difficult to imagine an analogous circumstance that would require a man to undergo such an extreme invasion of privacy or allow the state to retain one of his organs for the sake of evidence collection in the early stages of a criminal investigation.

The targeting of women by Salvadoran abortion laws along with aggressive policing and investigations<sup>227</sup> result in a harsh disparity in the laws' implementation. While critics may argue that these abortion laws also affect male accomplices, this is not entirely accurate because the woman herself is the body of evidence, and male accomplices are not often found or brought to justice unless authorities are able to elicit a confession from her regarding potential accomplices.<sup>228</sup> Additionally, male accomplices are not always involved, whereas a woman is *always* involved and her legal protections are always infringed upon.

In addition to unequal protection of the law between men and women, there is also unequal protection between wealthy and poor Salvadoran women, in violation of Article 1's prohibition of discrimination on the basis of economic status or social condition.<sup>229</sup> Salvadoran abortion laws disproportionately affect poor women

223. *Access to Maternal Health Services*, *supra* note 158, ¶¶ 56–57.

224. Oberman, *supra* note 18, at 296–98.

225. *Id.*

226. Hitt, *supra* note 13, at 9.

227. *Id.* at 1.

228. *Id.* at 8–9.

229. American Convention, *supra* note 24, art. 1.

who do not have the means to secure safe clandestine abortion to avoid prosecution in the way that their wealthier counterparts can.<sup>230</sup> Poor women suffer the brunt of a legal system eager to prosecute and imprison them, while wealthier women retain the “right to choose” by paying for it.<sup>231</sup> This is illustrated by the fact that the majority of women charged with abortion-related offenses are domestic servants, followed by factory workers, then ticket takers on buses.<sup>232</sup> As a result of its abortion laws which promote adversely disparate treatment for women relative to men and poor women relative to wealthy, it is clear that El Salvador has failed to fulfill its obligation under Article 24 to provide equal protection of the law.<sup>233</sup>

B. *The Necessity of the Inter-American Commission on Human Rights’ Acceptance of Beatriz’s Petition*

In order for El Salvador to be held accountable for multiple violations of its obligations under the American Convention and customary international law, the IACHR must accept Beatriz’s petition on the basis of her state’s violation of women’s human rights. On its face, the petition is admissible because (1) Beatriz exhausted all domestic remedies by appealing to El Salvador’s highest court, (2) the petition was filed within six months of the highest court’s notice of a final decision, and (3) the petition has not been submitted to another international adjudicatory body.<sup>234</sup> Therefore, the IACHR should admit the petition for review on the merits and initiate an invitation for response by the state. This would enable proper referral to the IACtHR, which could then issue a binding decision for *all* women that demands modification of Salvadoran abortion laws to provide for therapeutic abortions at minimum. This is necessary even though Beatriz’s life was saved by the issuance of precautionary measures because the narrow decision in her case did not address the rest of El Salvador’s women who suffer in silence.<sup>235</sup>

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230. Hitt, *supra* note 13, at 5.

231. *Id.*

232. *Id.* at 9.

233. See American Convention, *supra* note 24, art. 24.

234. The Commission specifies these three requirements for a petition to be admissible. INTER-AM. COMM’N ON HUMAN RIGHTS, PETITION AND CASE SYSTEM: INFORMATIONAL BROCHURE § 4 (2010), available at [https://www.cidh.oas.org/cidh\\_apps/manual\\_pdf/MANUAL2010\\_E.pdf](https://www.cidh.oas.org/cidh_apps/manual_pdf/MANUAL2010_E.pdf).

235. *Precautionary Measures*, *supra* note 6.

Ideally, the IACtHR's judgment should include several components that, taken together, can effectively improve the situation for women in El Salvador. First, as mentioned, the IACtHR should order El Salvador to reform its abortion laws to allow for therapeutic abortion. Although critics may claim that the scope of the petition's goal is too narrow and the decision should instead seek to legalize abortion entirely, this may be an unrealistic goal given the significant social influence of the Catholic Church, which opposes all abortion.<sup>236</sup> One weakness of the Inter-American System is the lack of an enforcement mechanism available to enforce the IACtHR judgments.<sup>237</sup> For a country so deeply steeped in Catholic traditions, where the Church retains considerable influence over the country's politics,<sup>238</sup> it is likely that a judgment calling for the outright legalization of abortion would be met with much resistance and no means of forcing compliance. Therefore, it is advisable to approach El Salvador's abortion laws in a gradual manner, focusing on the need for therapeutic abortions first and leaving the opportunity open for more widespread legalization later on.

Second, the judgment should order monetary damages for Beatriz because the IACtHR has a strong record of compliance with orders requiring such penalties.<sup>239</sup> This would allow compensation for Beatriz's suffering and possibly allow allocation of some funds to support local efforts to establish family planning and reproductive health services for Salvadoran women. In this way, the judgment would focus on not only remediation but also preventative efforts by improving access to reproductive health services and information that can prevent the occurrence of unwanted pregnancies.

Third, the judgment should also require El Salvador to strengthen its sex education by developing a comprehensive national program offered both in schools and at local clinics. The program should include traveling workshops that have the capacity to reach more rural areas, given that poorer rural women suffer the most from lack of access to sex education and have the fewest options when an unwanted pregnancies arises. A judgment that includes these components would not only liberalize El Salvador's abortion laws to avoid further violation of women's rights under the American Convention but also break the cycle between lack of

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236. THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14, at 17, 31–33, 37.

237. PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 1023 (2012).

238. THE CTR. FOR REPROD. LAW & POLICY, *supra* note 14.

239. ALSTON & GOODMAN, *supra* note 237.

information regarding reproductive health and unwanted pregnancies.

Beatriz's petition to the IACHR is the best option for addressing these matters because the regional Inter-American System is familiar with issues that plague Latin American countries and is thus in a better position to issue a judgment, as opposed to the UNHRC, which may be less familiar with the political and religious influences that affect the region. The IACHR is likely to rule in Beatriz's favor; its issuance of precautionary measures for her indicated an understanding of the danger of El Salvador's abortion laws and the injustice of their application.<sup>240</sup> Additionally, in 2006, the IACHR issued a landmark statement addressed to the Nicaraguan government, declaring that Nicaragua's recently passed abortion ban was contrary to international law and threatened women's human rights.<sup>241</sup> This statement reveals the IACHR's opposition to absolute abortion bans and recognizes that such bans contravene international law and human rights norms, lending support to the notion that Beatriz will be successful in her petition.

#### IV. CONCLUSION

Beatriz's case shed light on El Salvador's absolute abortion ban and the alarming way in which its abortion laws are enforced, attracted international attention, and emphasized the need for the legalization of therapeutic abortions. This Note began by discussing El Salvador's development historically, emphasizing the role of the Catholic Church in reformation of the country's abortion laws. It examined Salvadoran abortion laws before 1998 and described the drastic changes undertaken when conservative right-wing Assembly members pushed for more restrictive legislation.

The Note also described the scope of the new laws and discussed how they are enforced in practice. The country's current ban has denied women like Beatriz life-saving medical treatment and forced countless women to suffer unsafe clandestine abortions rather than face a potentially dangerous or unwanted pregnancy. Additionally, the aggressive policing and enforcement of these laws has encouraged unequal protection and application of the law and eroded the fundamental principle of doctor-patient confidential-

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240. Aguiluz, *supra* note 27.

241. *Inter-American Commission Issues Landmark Statement Declaring Nicaragua's Abortion Ban Jeopardizes Women's Human Rights*, CENTER REPROD. RTS. (Dec. 1, 2006), <http://reproductiverights.org/en/press-room/inter-american-commission-issues-landmark-statement-declaring-nicaragua%E2%80%99s-abortion-ban-je>.

ity. This injustice has had dire, and sometimes deadly, consequences for pregnant Salvadoran women, making the need for a solution all the more compelling.

Furthermore, this Note argued that El Salvador's restrictive abortion laws violate many of its obligations under the American Convention, including Articles 1, 4, 5, and 24. Thus, in order to improve the situation of Salvadoran women and hold the state accountable for its violations, the Note asserted that the IACHR must accept Beatriz's recent petition in order to receive a judgment from the IACtHR requiring El Salvador to reform its abortion laws to allow for therapeutic abortions and establish preventative programs aimed at providing sex education.

Although a judgment of this kind would have an immense impact on El Salvador domestically, it also has the potential to become a model of successful utilization of the Inter-American System to address the issue of abortion laws that violate articles of the American Convention and contravene the advisory opinions of various human rights bodies. Such a model could be very useful for citizens and nongovernmental organizations in Chile, Nicaragua, and the Dominican Republic, given that those countries currently have similar abortion bans and are also parties to the American Convention.<sup>242</sup> Moreover, if a favorable judgment in Beatriz's case spurs other Latin American countries to utilize the Inter-American System in their favor, this could empower the region to fight against violations of other human rights and advance the cause of women's rights to ensure that all countries meet international human rights standards, sending the message that state-imposed deprivation of human rights will no longer be tolerated in this day and age.

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242. *American Convention on Human Rights: Signatories and Ratification*, ORG. AM. STS., [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm) (last visited Nov. 12, 2014).

