

## *Amicus Curiae* Brief

# before the Inter-American Court of Human Rights in the case of Manuela and Others vs. El Salvador

### Contents

Interest of the <i>Amici Curiae</i> Organisations	1
Summary of the Argument	3
The Effective Criminalisation of Obstetric Emergencies as Intersectional Gender Discrimination	4
The blanket abortion ban's effective criminalisation of obstetric emergencies constitutes intersectional gender discrimination	6
The importance of intersectionality in access to sexual and reproductive health rights (SRHR)	12
Conclusion	18

### Interest of the *Amici Curiae* Organisations

1. This *amicus curiae* brief is presented, respectfully, by the **Feminist Alliance for Rights (FAR)/Center for Women's Global Leadership (CWGL); International Women's Rights Action Watch - Asia Pacific (IWRAW-AP);** and the **Women's Legal Centre (WLC);** with coordination by the **secretariat of ESCR-Net - International Network for Economic, Social, and Cultural Rights.**
2. The **Feminist Alliance for Rights (FAR)**, whose Global Coordinator is the **Center for Women's Global Leadership (CWGL)**, is a global alliance working to advance gender equality by strengthening accountability for women's human rights. FAR's purpose is to amplify women's voices and enhance their leadership from the Global South and from marginalized communities in the Global North. It facilitates feminist organizing and collective action to influence global norms and processes and improves the implementation of human rights at all levels. For the period 2019-2021, the main focus of FAR is to contribute towards the realization of human rights by addressing gender inequality and gender-based violence. To this end, FAR utilizes a comprehensive framework that recognizes the links among sexual and reproductive health and rights, labor and economic policy, in situations of conflict and crisis. FAR's framework embodies an intersectional approach with a specific focus on women and girls in situations of vulnerability.

3. **International Women’s Rights Action Watch - Asia Pacific** (IWRAP-AP) is an international, Global South women’s rights and feminist organisation committed to the full realisation of women’s human rights through the pursuit of equality. IWRAP-AP’s political intent is to disrupt the structures, systems and institutions that violate women’s human rights, and to engage in movement building that amplifies women’s voices and activism to create alternative political narratives and spaces. IWRAP Asia Pacific is intergenerational, guided both by the expertise and achievements of those who have devoted decades to the women’s rights movement and by the fresh insights and commitment of younger and newer activists. We are committed to honouring and embodying the rallying cry “nothing about us without us!”
4. The **Women's Legal Centre** (WLC) is an African Feminist law centre in South Africa that works to advance the rights of vulnerable and marginalised women. Through an intersectional lens, the WLC works to advance the law from a gendered perspective, doing so primarily through strategic litigation, advocacy, education and training. The WLC focuses its work in five programmatic areas: the right to just and favourable working conditions for women; rights in relationships; the right to be free from violence; land, housing and tenure security; and sexual and reproductive health rights (SRHR). WLC’s work is focused on the promotion and achievement of substantive gender equality and eradication of gender-based discrimination. WLC are keenly aware of the interconnections of the struggles and challenges that women navigate on a daily basis. firmly believe that women in any context are not free or substantively equal if all women are not free and substantively equal. The objectives of the SRHR programme at the WLC is to, among other things, “hold the state and private entities accountable for the implementation of sexual and reproductive health rights; and challenge all discriminatory laws, policies, and practices, which interfere with women’s rights to autonomous decision-making around issues of sexuality and reproduction.” In seeking to join this case as *amicus curiae*, the WLC is giving effect to these objectives and placing its submissions before this Court in the advancement thereof.
5. CWGL, IWRAP-AP and WLC are members of ESCR-Net - International Network for Economic, Social and Cultural Rights. ESCR-Net is a network-based organization dedicated to furthering economic, social, cultural and environmental rights and social justice with over 280 members across 75 countries. In recent years, the **ESCR-Net secretariat** has supported *amicus curiae* briefs, third-party interventions and expert opinions from different groups of members in various international, regional and national jurisdictions.
6. In addition to their organisational focus and work, the *amici* organisations are intervening in this case because the Inter-American Court of Human Rights (IACtHR) is a regional Court that is highly regarded. Those countries that consider decisions from other Courts when making their own decisions domestically and regionally will certainly consider this Court’s decisions. The decision of the Court in *Manuela y Familia vs. El Salvador* will therefore not only be a consideration for those countries for which the Court has jurisdiction, but will indeed

have an impact beyond the Americas. It is therefore important to place key considerations and contexts before the Court from other jurisdictions.

7. The *amici* organisations' interests in this matter also pertain to access to SRHR as an economic, social, and cultural right. Indeed, this is the first time the Court has considered SRHR within the context of the effective criminalisation of obstetric emergencies. The decision by the Court in this case on this issue will set the tone on how the Court regards SRHR, ESCR and women's rights within this context. The *amici* organisations are therefore compelled to assist the Court in this capacity to ensure that the decision of the Court supports the global efforts to increase access to SRHR, ESC and the attainment of substantive gender equality for all women.

## Summary of the Argument

8. The *amici* organisations argue that the IACtHR should recognize that the effective criminalisation of obstetric emergencies in El Salvador--operating as a result of the State's blanket criminalisation of abortion--constitutes intersectional gender discrimination, violative of Articles 1.1, 2 and 24 of the American Convention on Human Rights (ACHR), in connection with Articles 4, 5, 7, 8, 11, 24, 25 and 26; and Article 7, interpreted in conjunction with Articles 4(f) and 6, of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention).
9. The blanket criminalisation of abortion in El Salvador is a main violative cause of intersectional gender discrimination in the case of *Manuela and Others v. El Salvador*. The Inter-American Commission on Human Rights (the Commission) referenced in its Merits Report that the case took place in the context of the blanket criminalisation of abortion in El Salvador.<sup>1</sup> As the Petitioners explained, the blanket abortion ban is part of a structural "context that violates the rights of women," including those, like Manuela, who have obstetric emergencies in El Salvador.<sup>2</sup> They further added that, "the accusation [against Manuela], was linked to the way in which the law on abortion is interpreted, and the way in which the criminal law is applied."<sup>3</sup> Hospital staff were so preoccupied with labeling and reporting Manuela to criminal justice authorities on the basis of a suspicion of abortion that they provided seriously deficient healthcare, as detailed by expert witness Dr. Guillermo Antonio Ortiz Avendaño. Dr. Ortiz stated that it had become apparent the health staff in her

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<sup>1</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 32, <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

<sup>2</sup> See Public Hearing before the Inter-American Court of Human Rights, *Manuela y otros Vs. El Salvador*, Part 3, March 11, 2021, (2:31:19): [https://www.youtube.com/watch?v=i-ivk1VJXvw&list=PLUhWZuDPzeZOb0D-VSv-FRBiKWuUvbfj&index=10&ab\\_channel=CorteInteramericanadeDerechosHumanos](https://www.youtube.com/watch?v=i-ivk1VJXvw&list=PLUhWZuDPzeZOb0D-VSv-FRBiKWuUvbfj&index=10&ab_channel=CorteInteramericanadeDerechosHumanos).

<sup>3</sup> Public Hearing before the Inter-American Court of Human Rights, *Manuela y otros Vs. El Salvador*, Part 3, March 11, 2021, (2:33:35): [https://www.youtube.com/watch?v=i-ivk1VJXvw&list=PLUhWZuDPzeZOb0D-VSv-FRBiKWuUvbfj&index=10&ab\\_channel=CorteInteramericanadeDerechosHumanos](https://www.youtube.com/watch?v=i-ivk1VJXvw&list=PLUhWZuDPzeZOb0D-VSv-FRBiKWuUvbfj&index=10&ab_channel=CorteInteramericanadeDerechosHumanos).

case “began entering into the question of criminality...[and] the focus on medicine was lost.”<sup>4</sup> The blanket abortion ban is therefore more than a mere context, but rather an operative and systematic discriminatory piece of domestic law in this case and in those of many other women in El Salvador.

10. As an impoverished, rural, young woman not possessing the ability to read and bearing the sole burden of caring for her two children, Manuela disproportionately suffered the persecutory and discriminatory effects of the blanket abortion ban due to these fundamental and intersecting characteristics. Her persecution is part of a pattern of patriarchal surveillance and punishment of women’s reproductive health by El Salvador’s criminal justice and health systems as enabled by the blanket abortion ban. This persecution, as recognized by various international human rights bodies discussed further below, disproportionately affects impoverished women and can further marginalize women in rural areas and women without the ability to read. As detailed by the Commission:

this case shows the deadly impact that the absolute prohibition on abortion has on women, especially on poor women in El Salvador. In this discriminatory legal framework, women who suffer obstetric emergencies are immediately thought to have committed the crime of abortion as soon as they enter a hospital, especially young poor women. They become suspects rather than patients and are so treated by the medical personnel supposedly treating them...”<sup>5</sup>

11. As a result, the blanket abortion ban in El Salvador constitutes impermissible intersectional gender discrimination.

## **The Effective Criminalisation of Obstetric Emergencies as Intersectional Gender Discrimination**

12. The Court should recognize that the effective criminalisation of obstetric emergencies in El Salvador—operating as a result of the State’s blanket criminalisation of abortion—constitutes intersectional gender discrimination, violative of Articles 1.1, 2 and 24 of the ACHR, in connection with Articles 4, 5, 7, 8, 11, 24, 25 and 26; and Article 7, interpreted in light of Articles 4(f) and 6, of the Belém do Pará Convention.
13. ACHR Article 24 and Articles 4(f) of the Belém do Pará Convention both guarantee the right of women to equality under the law. Article 6 of the Belém do Pará Convention

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<sup>4</sup> See Public Hearing before the Inter-American Court of Human Rights, *Manuela y otros Vs. El Salvador*, Part 1, March 10, 2021, (1:12:58-1:14:14): [https://www.youtube.com/watch?v=PPOkQEQuqkk&list=PLUhWZuDPzeZOb0D-VSv-FRBiKWuUvbfj&index=9&ab\\_channel=CorteInteramericanadeDerechosHumanos](https://www.youtube.com/watch?v=PPOkQEQuqkk&list=PLUhWZuDPzeZOb0D-VSv-FRBiKWuUvbfj&index=9&ab_channel=CorteInteramericanadeDerechosHumanos).

<sup>5</sup> Public Hearing before the Inter-American Court of Human Rights, *Manuela y otros Vs. El Salvador*, Part 1, March 10, 2021, (0:42:12): [https://www.youtube.com/watch?v=PPOkQEQuqkk&list=PLUhWZuDPzeZOb0D-VSv-FRBiKWuUvbfj&index=9&ab\\_channel=CorteInteramericanadeDerechosHumanos](https://www.youtube.com/watch?v=PPOkQEQuqkk&list=PLUhWZuDPzeZOb0D-VSv-FRBiKWuUvbfj&index=9&ab_channel=CorteInteramericanadeDerechosHumanos).

provides that, “the right of every woman to be free from violence includes, among others: a) [t]he right of women to be free from all forms of discrimination; and b) [t]he right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.” Furthermore, under the Court’s jurisprudence on economic, social, cultural and environmental rights recognized under ACHR Article 26, the right to health entails immediate State obligations to “take effective measures to ensure access *without discrimination* to the services necessary for the right to health.”<sup>6</sup> In addition, Article 1.1 of the ACHR obliges States to ensure the “free and full exercise” of the Convention’s rights “without discrimination,” including the rights to life, personal integrity, personal liberty, due process, privacy, equal protection of the law, judicial guarantees, and health. Moreover, Article 2 of the ACHR binds States to the duty to “adopt...such legislative or other measures as may be necessary to give effect to [Convention] rights or freedoms,” including the rights provided for in Articles 4, 5, 7, 8, 11, 24, 25 and 26.

14. Collectively, these human rights obligations prohibit States Party to these two Conventions from engaging in and condoning intersectional gender discrimination, including via a blanket criminalisation of abortion that foreseeably and empirically enables patriarchal surveillance and punishment of women--especially impoverished young women--in connection with their reproductive health. Comparative international and regional standards reinforce this conclusion, in consonance with the Court’s interpretative practice in light of Article 29 of the ACHR and the Vienna Convention on the Law of Treaties. For instance, United Nations (UN) Special Rapporteur Juan Mendez recognized that the healthcare denials and “humiliating and judgmental attitudes” to which women are subjected in the context of abortion access restrictions can amount to torture and other cruel, inhuman or degrading treatment.<sup>7</sup> As detailed by the Rapporteur, “[i]nternational and regional human rights bodies have begun to recognize that abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender.”<sup>8</sup> Accordingly, the Rapporteur has stressed that, “States have an affirmative obligation to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women safe access and care.”<sup>9</sup>
15. El Salvador’s blanket abortion ban enabled the State hospital’s discriminatory treatment of Manuela, and of other women seeking care for obstetric emergencies, as criminal suspects--a paradigm shift that expert testimony in this case indicated both misdirected the medical staff’s gravely deficient treatment and led them to breach their duties of confidentiality, thus violating Manuela’s rights to life, personal integrity, privacy, and health. Discrimination also

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<sup>6</sup> Inter-American Court of Human Rights, *Cuscul Pivaral and Others vs. Guatemala*, Judgment, August 23, 2018, par. 98 (emphasis added).

<sup>7</sup> Report of the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, January 5, 2016, A/HRC/31/57, par. 44 (internal citations omitted).

<sup>8</sup> Report of the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, February 1, 2013, A/HRC/22/53, par. 46 (internal citations omitted).

<sup>9</sup> Report of the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, January 5, 2016, A/HRC/31/57, par. 44 (internal citations omitted).

undergirded the State's violative detention and prosecution of Manuela, which were both unlawful (due in part to discriminatory violations of due process via the application of gender stereotypes<sup>10</sup>) and arbitrary (due to the criminalisation of abortion and resulting legal processes being themselves a form of intersectional gender discrimination<sup>11</sup>).

16. The UN Working Group on Arbitrary detention found that El Salvador's effective criminalization of obstetric emergencies resulting from the blanket abortion ban led to, *inter alia*, Category V cases of arbitrary detention ("for constituting detention on the basis of discrimination based on sex, gender and socioeconomic condition"), observing that "the absolute prohibition on abortion has resulted in the systematic criminalization of women who suffer obstetric emergencies, the great majority of them in situations of poverty."<sup>12</sup> Indeed, Manuela's status as an impoverished rural young woman who was unable to read placed her at greater risk of such violations and thus heightened the State's duty of care in her case, thereby aggravating the State's intersectional gender discrimination against her.

### **The blanket abortion ban's effective criminalisation of obstetric emergencies constitutes intersectional gender discrimination**

17. Manuela's case is part of a systemic pattern of criminalisation of impoverished women who suffer obstetric emergencies leading to poor pregnancy outcomes in El Salvador, a pattern documented over the past two decades by civil society organisations.<sup>13</sup> The legal entry point for that criminalisation, as illustrated by the State's ill treatment of Manuela, is the blanket ban on abortion.<sup>14</sup> As we have already noted, the blanket ban on abortion is thus not only contextual information but a main cause of the violations that occurred in the case of *Manuela*.

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<sup>10</sup> The Merits Report recognised that "a series of gender stereotypes throughout the criminal process, the impact of which was to close certain lines of investigation or prevent an exhaustive analysis of the evidence; to determine the supposed motive of what happened without any evidentiary support; and to presume the guilt of the alleged victim." See Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, Section IV(D), <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

<sup>11</sup> See United Nations Working Group on Arbitrary Detention, *Opinion No. 68/2019, concerning Sara del Rosario Rogel García, Berta Margarita Arana Hernández y Evelyn Beatriz Hernández Cruz (El Salvador)*, March 4, 2021, par. 3(e), 98-119.

<sup>12</sup> United Nations Working Group on Arbitrary Detention, *Opinion No. 68/2019, concerning Sara del Rosario Rogel García, Berta Margarita Arana Hernández y Evelyn Beatriz Hernández Cruz (El Salvador)*, March 4, 2021, par. 100, 116.

<sup>13</sup> See Agrupación Ciudadana por la Despenalización del Aborto, *Del Hospital a la Cárcel, Consecuencias para las mujeres por la penalización, sin excepciones de la interrupción del embarazo en El Salvador 1998 - 2019*, 2019, p. 26, 41, 54-55:

<https://agrupacionciudadana.org/download/del-hospital-a-la-carcel-tercera-edicion/?wpdmdl=13171&refresh=605bac3abc83b1616620602>. Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador's Total Criminalisation of Abortion* 2014, p. 13-14, <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/El-Salvador-CriminalizationOfAbortion-Report.pdf>.

<sup>14</sup> It is important to note El Salvador's blanket criminalisation of abortion does not admit exceptions. Indeed, the IACtHR was previously compelled to adopt provisional measures to protect the rights to life and personal integrity of a Salvadoran woman, B., whose health was endangered by a pregnancy. The Commission argued in that matter that B. had been unable to access treatment to end the pregnancy that constituted a critical risk to her because of the "principal obstacle" constituted by the "absolute criminalisation of abortion in the State of El Salvador." Inter-American Court of Human Rights, *Matter of B, Provisional Measures Concerning El Salvador*, May 23, 2013, par. 4(ii)(a-b).

18. In seeking to punish women for ending a pregnancy, El Salvador's patriarchal criminal justice system is underpinned by harmful and mutually reinforcing stereotypes, regarding women's sexual and reproductive health rights and bodily autonomy. This system includes interconnected norms instrumentalized by authorities to that end: 1) criminalising abortion in all circumstances, and 2) applying aggravated homicide to maximize penalties and intimidate women. Stereotypes based on gender and class and discriminatory practices during the investigation and judicial process are also part of this system, as evident in Manuela's case. Thereby, the objectivity and impartiality of the authorities are negatively affected by the patriarchal nature and application of the blanket abortion ban.
19. The UN Working Group on Discrimination against Women and Girls has asserted that the use of criminal law to punish women for the end of pregnancies, "is one of the most damaging ways of instrumentalizing and politicizing women's bodies and lives, subjecting them to risks to their lives or health in order to preserve their function as reproductive agents and depriving them of autonomy in decision-making about their own bodies."<sup>15</sup> The Working Group has also highlighted that restrictive abortion laws, "give deference to a societal interest in gestation in preference to protecting the woman's right to life, health and her other human rights."<sup>16</sup>
20. The interconnectedness of the blanket ban on abortion with prosecutions for aggravated homicide on a practical and legal level is evident in the Commission's Merits Report. For instance, the Commission noted the UN Committee on Economic, Social and Cultural Rights' 2014 Concluding Observations on El Salvador, which affirmed the Committee's particular concern, "at cases in which women whose health was seriously at risk have turned to the health system and been reported on suspicion of having had an abortion."<sup>17</sup> Indeed, according to police records, Manuela's doctor stated Manuela was "treated for abortion," when describing the rationale for reporting the case to criminal justice channels.<sup>18</sup>

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<sup>15</sup> Working Group on the Issue of Discrimination against Women in Law and in Practice (now Working Group on the Issue of Discrimination against Women and Girls), *Women deprived of liberty*, A/HRC/41/33, (2019) par. 79.

<sup>16</sup> Working Group on the Issue of Discrimination against Women in Law and in Practice (now Working Group on the Issue of Discrimination against Women and Girls), *Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends*, (2017), p. 4.

<sup>17</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 33, <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

<sup>18</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 39, <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

21. El Salvador's Penal Code does not define abortion and, therefore, health providers and prosecutors have resorted to a definition of the Panamerican Health organisation (PAHO).<sup>19</sup> When the Attorney General investigates a case in which the unborn's characteristics of size or weight does not fit within PAHO's definition, or where there is no evidence that an abortion was committed, the classification is changed.<sup>20</sup> Ambiguity surrounding the crime of abortion in El Salvador has contributed to the criminalisation of impoverished women who have obstetric emergencies followed by poor pregnancy outcomes.
  
22. Agrupación Ciudadana por la Despenalización del Aborto conducted research, published in 2019, documenting this worrying trend. According to the report:
 

[w]hen analyzing the cases of the 181 women who were prosecuted in the period 1998 to 2019, it is observed in the judicial files that the initial complaint, in almost all cases, is for abortion, however in a significant percentage of cases, as the criminal proceedings advance, the crime was reclassified to homicide, [this occurred] when the Attorney General's Office did not have evidence that shows that an abortion was performed, or when the death of the fetus occurred in an advanced stage of gestation greater than 22 weeks, and medically, it was not considered an abortion.<sup>21</sup>
  
23. El Salvador's illtreatment, investigation and prosecution of Manuela for a suspicion of abortion converted to aggravated homicide violates her right to substantive intersectional gender equality protected by Articles 1.1, 2 and 24 of the ACHR (in connection with Article 4, 5, 7, 8, 11, 25, and 26), and Article 7 of the Belém do Pará Convention (interpreted in light of Articles 4(f) and 6).
  
24. Complementing inter-American standards, Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines discrimination against women as, "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by

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<sup>19</sup> "As a definition of abortion does not appear in the Penal Code, the adjudicators refer to the medical definition of the Pan American Health Organization (PAHO), which is also the one adopted by the Ministry of Health of El Salvador (MINSAL): ' Abortion: it is defined as the expulsion or extraction of the product of conception outside the maternal uterus, weighing 500 grams or less or before 22 weeks.'" Agrupación Ciudadana por la Despenalización del Aborto, *Del Hospital a la Cárcel, Consecuencias para las mujeres por la penalización, sin excepciones de la interrupción del embarazo en El Salvador 1998 - 2019*, 2019, p. 21:

<https://agrupacionciudadana.org/download/del-hospital-a-la-carcel-tercera-edicion/?wpdmdl=13171&refresh=605bac3abc83b1616620602> (internal citation omitted).

<sup>20</sup> Agrupación Ciudadana por la Despenalización del Aborto, *Del Hospital a la Cárcel, Consecuencias para las mujeres por la penalización, sin excepciones de la interrupción del embarazo en El Salvador 1998 - 2019*, 2019, p. 21-22:

<https://agrupacionciudadana.org/download/del-hospital-a-la-carcel-tercera-edicion/?wpdmdl=13171&refresh=605bac3abc83b1616620602>.

<sup>21</sup> Agrupación Ciudadana por la Despenalización del Aborto, *Del Hospital a la Cárcel, Consecuencias para las mujeres por la penalización, sin excepciones de la interrupción del embarazo en El Salvador 1998 - 2019*, 2019, p. 50:

<https://agrupacionciudadana.org/download/del-hospital-a-la-carcel-tercera-edicion/?wpdmdl=13171&refresh=605bac3abc83b1616620602>.

women,” and Article 5 of CEDAW requires States to, “take all appropriate measures to (a) modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on stereotyped roles for men and women.”<sup>22</sup>

25. The CEDAW Committee has referred in multiple concluding observations to the obligation to eliminate patriarchal attitudes and deeply-rooted stereotypes regarding the roles and responsibilities of women in the family and in society under Article 5.<sup>23</sup> In the context of criminalization of abortion in particular, the CEDAW Committee in its Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland has stated that:

Article 5 addresses gender stereotypes including social and cultural patterns of conduct. Read with articles 12 and 16, it requires States parties to eliminate gender stereotypes that impede equality in the health sector and negatively impact women’s capacity to make free and informed choices about their health care, sexuality and reproduction.<sup>24</sup>

26. The Working Group on Discrimination against Women and Girls has noted that, “[w]omen may face deprivation of liberty when they do not conform to stereotyped notions of what constitutes good motherhood.”<sup>25</sup> The Working Group has also highlighted that, “[i]n some countries, women are criminalized and incarcerated even when the termination was not their decision, as in cases of miscarriage.”<sup>26</sup> Thus, women frequently risk imprisonment for attempted abortion, miscarriage and for terminating a pregnancy, in some cases even when their own safety is at risk or when the foetus is not viable.<sup>27</sup>
27. On the other hand, under Articles 1.1, 2 and 24 of the American Convention, interpreted in light of the definition of discrimination included in the Article 1 of CEDAW, States have the obligation to eliminate any law that has the effect or purpose of discriminating against women and girls. CEDAW General Recommendation 28 asserts that States must “refrain

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<sup>22</sup> As stated by the United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee), “Women should be able to rely on a justice system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions.” CEDAW Committee, *General Recommendation 33 on women’s access to justice*, CEDAW/C/GC/33 (2015), par. 26, 28.

<sup>23</sup> See Mudgway, Cassandra, *Smashing the patriarchy: why international law should be doing more*, Blog, October 7, 2019, <https://blogs.lse.ac.uk/wps/2019/10/07/smashing-the-patriarchy/>.

<sup>24</sup> CEDAW Committee, *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/OP.8/GBR/1 (2018), par. 55.

<sup>25</sup> Working Group on the Issue of Discrimination against Women in Law and in Practice (now Working Group on the Issue of Discrimination against Women and Girls), *Women deprived of liberty*, A/HRC/41/33 (2019), par. 38.

<sup>26</sup> Working Group on the Issue of Discrimination against Women in Law and in Practice (now Working Group on the Issue of Discrimination against Women and Girls), *Women deprived of liberty*, A/HRC/41/33 (2019), par. 40.

<sup>27</sup> Working Group on the Issue of Discrimination against Women in Law and in Practice (now Working Group on the Issue of Discrimination against Women and Girls), *Women deprived of liberty*, A/HRC/41/33 (2019), par. 38.

from making laws that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights”.<sup>28</sup>

28. CEDAW General Recommendation 33 obligates states to *inter alia*, “abolish discriminatory criminalisation, and review and monitor all criminal procedures to ensure that they do not directly or indirectly discriminate against women... decriminalise behaviours that can only be performed by women such as abortion...”<sup>29</sup> CEDAW General Recommendation 35 states that violations of women’s sexual and reproductive health rights including criminalisation of abortion are a form of gender-based violence and may constitute torture.<sup>30</sup> According to the CEDAW Committee, States must repeal legal provisions that discriminate against women, including provisions that criminalise abortion.<sup>31</sup> Further, the CEDAW Committee holds that, “criminalisation [of abortion] has a stigmatising impact on women, and deprives women of their privacy, self-determination and autonomy of decision, offending women’s equal status, constituting discrimination.”<sup>32</sup>
29. While the definition of homicide included in Articles 128 and 129 of El Salvador’s Penal Code has a neutral formulation, its implementation has had discriminatory effects on women and girls’ rights. First, these laws have been used to criminalise reproductive behaviour that is exclusive to women and girls, impeding the pursuit of healthcare services that only women and girls need.<sup>33</sup>
30. Second, research indicates impoverished women are disproportionately affected, as in the case of Manuela. For instance, in research of abortion-related criminal cases in El Salvador over the past 20 years by Agrupación Ciudadana por la Despenalización del Aborto en El Salvador:

It should be noted that no complaints are reported from private hospitals, clinics or doctors, either because no case of pregnancy interruption reaches them that can be suspected of being induced or, more likely, because complaints are not made by private health institutions, which would be clear

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<sup>28</sup> CEDAW Committee, *General Recommendation 28 on the core obligations of States parties under article 2 of the CEDAW* CEDAW/C/GC/28 (2010), par. 9.

<sup>29</sup> CEDAW Committee, *General Recommendation 33 on women’s access to justice*, CEDAW/C/GC/33 (2015), par. 51(l).

<sup>30</sup> CEDAW Committee, *General Recommendation 35 on gender-based violence against women*, CEDAW/C/GC/35 (2017), par. 18.

<sup>31</sup> CEDAW Committee, *General Recommendation 35 on gender-based violence against women*, CEDAW/C/GC/35 (2017), par. 31(a).

<sup>32</sup> CEDAW Committee, *Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* CEDAW/C/OP.8/GBR/1 (2018), par. 59.

<sup>33</sup> The CEDAW Committee has highlighted that Article 12 of CEDAW forbids, “barriers to women’s access to appropriate health care includ[ing] laws that criminalise medical procedures only needed by women and that punish women who undergo those procedures.” CEDAW Committee, *General Recommendation 24 on women and health*, A/54/38/Rev.1, chap. I, (2008), par. 14, 31(b).

discrimination for those women who do not have the resources to pay for private care in a health complication of this nature.<sup>34</sup>

By contrast, “[i]t is observed that the highest percentage of complaints, that is, 54%, comes from public hospitals and the Salvadoran Social Security Institute (ISSS). This is followed by employers, relatives and neighbors.”<sup>35</sup>

31. The intersection of poverty, rural status and illiteracy compounded Manuela’s vulnerability to criminalisation. The following facts are relevant to this understanding: Manuela’s father, who could not read or write, stated he was pressured into putting his finger print on a document condemning his daughter.<sup>36</sup> Manuela herself could not read or write, and this limited her ability to understand the legal proceedings she was facing.<sup>37</sup> Lastly, she did not have access to legal counsel during the investigative stage and received ineffective legal representation during the trial stage.<sup>38</sup> Even as these facts point to violations of the right to fair trial and to equal protection of the law, they must additionally be recognized as the State’s failure to protect Manuela against intersectional gender discrimination linked directly to the blanket abortion ban. El Salvador’s blanket abortion ban and the structural inequalities it produces thus constitute gender discrimination in and of itself. It disproportionately impacts women such as Manuela, who face multiple and intersecting vulnerabilities.
32. For the reasons set above, El Salvador’s ban on abortion has a clear operative and violative impact on women like Manuela as in the current case under consideration.

### **The importance of intersectionality in access to sexual and reproductive health rights (SRHR)**

33. It is important to recognize the intersectional nature of the challenges faced by Manuela and other women similarly placed in accessing SRHR. This is particularly crucial in

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<sup>34</sup> Agrupación Ciudadana por la Despenalización del Aborto, *Del Hospital a la Cárcel, Consecuencias para las mujeres por la penalización, sin excepciones de la interrupción del embarazo en El Salvador 1998 - 2019*, 2019, p. 57: <https://agrupacionciudadana.org/download/del-hospital-a-la-carcel-tercera-edicion/?wpdmdl=13171&refresh=605bac3abc83b1616620602>.

<sup>35</sup> Agrupación Ciudadana por la Despenalización del Aborto, *Del Hospital a la Cárcel, Consecuencias para las mujeres por la penalización, sin excepciones de la interrupción del embarazo en El Salvador 1998 - 2019*, 2019, p. 54: <https://agrupacionciudadana.org/download/del-hospital-a-la-carcel-tercera-edicion/?wpdmdl=13171&refresh=605bac3abc83b1616620602>.

<sup>36</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 15, 44, <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

<sup>37</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 19, 149, <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

<sup>38</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 97, 99, <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

understanding the burden that the effective criminalisation of obstetric emergencies places on women within an already tough, exclusionary situation with severe power imbalances.

34. As noted earlier, Manuela was an impoverished, rural woman who was unable to read.<sup>39</sup> She was also a young mother raising two children on her own. She was suffering from cancer and had to frequently visit the closest health clinic to her home, which was 3 kilometers away and difficult to access.<sup>40</sup> Prior to her obstetric emergency, she was deprived of adequate medical care for cancer from which she had been suffering.<sup>41</sup> These factors are crucial to understanding the situation of structural discrimination facing Manuela before and during her obstetric emergency and subsequent criminalisation.
35. The barriers presented by her illiteracy and status as an impoverished, rural woman must be considered in relation to her ability to seek effective medical treatment. The State's obligation to ensure the right to health for Manuela, and particularly its obligation to ensure protection against intersectional discrimination in accessing the right to sexual and reproductive health, was breached by its failure to ensure effective medical treatment for her leading up to, during and following her obstetric emergency.
36. Several international human rights standards "affirm that good health is critical for the enjoyment of all human rights, including participation in socio economic and political life," and attaining "a decent and dignified life".<sup>42</sup> SRHR are integral to good health and thus to human rights as a whole.
37. Complementing inter-American human rights standards, the right to the highest attainable standard of physical and mental health is guaranteed by Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), among others.<sup>43</sup> The right to sexual and reproductive health is a fundamental component of the right to health.

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<sup>39</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 7, <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

<sup>40</sup> United Nations University World Institute for Development Economics Working Paper 2017/187, Jocelyn Viterna, Jose Santos Guardado Bautista, Silvia Ivette Juarez Barrios, Alba Evelyn Cortez, *Governance and the reversal of women's rights: The case of abortion in El Salvador* November 2017, p. 8: <https://www.wider.unu.edu/sites/default/files/Publications/Working-paper/PDF/wp2017-187.pdf>.

<sup>41</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 7, 15, <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

<sup>42</sup> Danwood Mzikenge Chirwa, *The Right To Health in International Law: Its Implications for the Obligations of State and Non-State Actors in Ensuring Access to Essential Medicine*, South African Journal on Human Rights, Vol. 19, No. 4 (2003), 541: [https://open.uct.ac.za/bitstream/handle/11427/18181/article\\_2003\\_chirwa\\_d\\_m.pdf;sequence=1](https://open.uct.ac.za/bitstream/handle/11427/18181/article_2003_chirwa_d_m.pdf;sequence=1).

<sup>43</sup> The right to health is guaranteed, *inter alia*, in Art 25 of the Universal Declaration of Human Rights, Article 24(1) of the Convention on the Rights of the Child, and Article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination, which mandates States party to prohibit and eliminate racial discrimination and promote equality in the enjoyment of the right to "public health, medical care, social security and social services." Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women mandates states to take all appropriate measures to eliminate discrimination in the field of health care and ensure that there is equality between men and women in accessing health care services including those related to family planning.

38. The adoption of the Programme of Action of the International Conference on Population and Development in 1994 further highlighted reproductive and sexual health issues within a human rights framework. Moreover, the 2030 Agenda for Sustainable Development includes goals and targets to be achieved in the area of sexual and reproductive health.
39. SRHR must be understood within the context equality and non-discrimination guarantees.
40. First, Article 2(1) ICESCR states that, “States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Many women and girls continue to live without full enjoyment of the right to sexual and reproductive health despite the set of freedoms and entitlements that are necessitated by it.<sup>44</sup> The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has explained these entitlements as the right “to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one’s body and sexual and reproductive health” and unobstructed access to a range of health facilities, goods, services and information critical for the enjoyment of SRHR.<sup>45</sup> The realization of SRHR also requires States to guarantee other ESCR equally, including the rights to education, to work and to just and favorable conditions of work.<sup>46</sup> SRHR are also intricately interlinked with other rights connected to non-discrimination, such as the International Covenant on Civil and Political Rights (ICCPR) guarantees of the “rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality”.<sup>47</sup>
41. Second, Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) mandates states to take all appropriate measures to eliminate discrimination in the field of health care and ensure that there is equality between men and women in accessing health care services, including those related to family planning. The CEDAW Committee has emphasised that any steps taken within the context of Article 12 to eliminate discrimination against women in accessing health care systems will be deemed inappropriate if such system fails to adopt and implement services that “prevent, detect and treat illnesses specific to women.”<sup>48</sup>
42. The CEDAW Committee has further explained that State parties have an obligation to guarantee women “the right to safe motherhood and emergency obstetric services and to allocate to these services the maximum extent of available resources.”<sup>49</sup> Article 12(2) of

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<sup>44</sup> CESCR, *General Comment 22*, E/C.12/GC/22, (2016), par. 2, 5.

<sup>45</sup> CESCR, *General Comment 22*, E/C.12/GC/22, (2016), par. 5.

<sup>46</sup> CESCR, *General Comment 22*, E/C.12/GC/22, (2016), par. 2, 9.

<sup>47</sup> CESCR, *General Comment 22*, E/C.12/GC/22, (2016), par. 10.

<sup>48</sup> CEDAW Committee, *General Recommendation 24 on women and health*, A/54/38/Rev.1, chap. I, (2008), par. 11.

<sup>49</sup> CEDAW Committee, *General Recommendation 24 on women and health*, A/54/38/Rev.1, chap. I, (2008), par. 27.

CEDAW obligates States party to ensure to women, “appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”

43. In views by the CEDAW Committee in *Alyne da Silva Pimentel Teixeira vs Brazil*, it emphasised that where a death is regarded as a maternal death, an examination of whether a State violated Article 12(2) of the ICESCR becomes necessary.<sup>50</sup>
44. Manuela’s death was a discriminatory maternal death:
  - 44.1. As a result of an emergency related to the expulsion of “several blood masses” including a fetus, Manuela went to the Hospital San Francisco Gotera on 28 February 2008.<sup>51</sup>
  - 44.2. Manuela’s physician accused her of having an abortion and, violating her right to confidentiality as a patient, reported her to hospital authorities who later reported her to criminal justice authorities.<sup>52</sup>
  - 44.3. Expert testimony by Dr. Ortiz described the preoccupation of hospital staff with the blanket criminal ban on abortion, a factor that made them “unfocused on the medical aspect” to the detriment of the healthcare Manuela needed and deserved; for example, according to Dr. Ortiz, hospital staff provided deficient care in a series of ways, including by missing signs of the malignant tumor on Manuela’s neck, though the corresponding masses had been previously detected (though not appropriately examined, diagnosed and treated) at a clinic.<sup>53</sup>
  - 44.4. Indeed, a criminal justice, rather than health, paradigm dominated Manuela’s hospitalization. On the very same day that Manuela arrived at the hospital, the police arrived, harassed her, accused her of murder and handcuffed her to the hospital bed. She stayed at the hospital for eight days.<sup>54</sup>

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<sup>50</sup> CEDAW Committee, Views, Communication No. 17/2008, *Alyne vs Brazil*, 2011, par. 7.2-7.3.

<sup>51</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 8, <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

<sup>52</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 8-9, <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

<sup>53</sup> See Public Hearing before the Inter-American Court of Human Rights, *Manuela y otros Vs. El Salvador*, Part 1, March 10, 2021, (1:12:01-1:14:14): [https://www.youtube.com/watch?v=PPOkOEQuqkk&list=PLUhWZuDPzeZOb0D-VSv-FRBiKWuUvbfj&index=9&ab\\_channel=CorteInteramericanadeDerechosHumanos](https://www.youtube.com/watch?v=PPOkOEQuqkk&list=PLUhWZuDPzeZOb0D-VSv-FRBiKWuUvbfj&index=9&ab_channel=CorteInteramericanadeDerechosHumanos).

<sup>54</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 10, <https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

- 44.5. Manuela was then transferred to jail by the Morazán Police. Before she was transferred, there was no full medical check-up conducted, despite Manuela's repeated complaints and discomforts.<sup>55</sup>
- 44.6. Manuela's obstetric emergency was thus viewed and treated, to her detriment, through the lens of gender stereotypes, contributing to her death and thereby making it a discriminatory maternal death breaching CEDAW Article 12(2).
45. We emphasise again that the State's gender discrimination against Manuela, as with similarly situated women, must be understood intersectionally.
46. Identity characteristics of certain individuals and population groups cause them to experience multiple and intersecting forms of discrimination.<sup>56</sup> These forms of discrimination exacerbate exclusion of these individuals and population groups in both law and practice. It hinders them from fully enjoying their right to sexual and reproductive health, among other rights. This was also the experience of Manuela when seeking to access healthcare, including obstetric emergency healthcare.
47. The Constitutional Court of South Africa has explained that intersectionality, "means nothing more than acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play."<sup>57</sup>
48. An analysis of intersectional discrimination and exclusion from accessing SRHR enables the Court to take a nuanced, purposive and socio-contextual consideration and understanding of the realities.
49. As elaborated by the Constitutional Court of South Africa:

[o]ne consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is

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<sup>55</sup> Inter-American Commission on Human Rights, *Manuela y Familia v. El Salvador*, Case 13.069, Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175, 2018, par. 10,

<https://www.oas.org/es/cidh/decisiones/corte/2019/13069FondoEs.pdf>.

<sup>56</sup> CESCR, *General Comment 22*, E/C.12/GC/22, (2016), par. 2.

<sup>57</sup> *Mablangu and Another v Minister of Labour and Others*(CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020), par. 76,

<http://www.saflii.org/za/cases/ZACC/2020/24.html>.

subjected to scarring of a sufficiently serious nature as to merit constitutional intervention.<sup>58</sup>

50. In highlighting intersectionality within the CEDAW framework, the CEDAW Committee stated that within the context of Article 2 of CEDAW, “discrimination against women based on sex and gender is inextricably linked to other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, cast, and sexual orientation and gender identity.” This was also affirmed in the views by the CEDAW Committee on a communication relating to obstetric emergencies in the *Alyne da Silva Pimentel Teixeira vs Brazil* communication.<sup>59</sup>
51. Specifically, in defining the scope of States’ general obligation under CEDAW to ensure that women are protected against discrimination, the CEDAW Committee has drawn on the principle of intersectionality. The CEDAW Committee outlined, among others, health, status and age, as factors that inextricably impact women’s experiences of discrimination. General Recommendation 28 of the CEDAW Committee also makes it incumbent upon States to “legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.”<sup>60</sup>
52. Within the context of this case, the principle of intersectionality must also be applied to fully understand the scope of discrimination faced by Manuela as it manifested in the form of stereotypes applied to her throughout her ordeal. Gender stereotypes applied to Manuela included assumptions made about what the responses of a pregnant woman and a mother in her situation would be, as well as repeated references to infidelity. Further, during her sentencing, the judge referred to her lack of education and rural status as factors that would not justify her actions but that nonetheless had to be taken into consideration in imposing the minimum punishment. While the stereotypes pertaining to Manuela’s class were considered as mitigating factors by the judge, they are discriminatory nevertheless. They also point to a larger issue with the context of the blanket criminalisation of abortion in El Salvador, which is the negative impact of gender and class stereotypes on the impartiality of legal processes. The CEDAW Committee holds that “stereotyping affects the credibility given to women’s voices, arguments and testimonies, as parties and witnesses”; as stated by CEDAW, “[w]omen should be able to rely on a justice system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. Eliminating judicial stereotyping in the justice system is a crucial step in ensuring equality and justice for victims and survivors.”<sup>61</sup>

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<sup>58</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*(CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998), par. 113, <http://www.saflii.org/za/cases/ZACC/1998/15.html> (internal citations omitted).

<sup>59</sup> CEDAW Committee, Views, Communication No. 17/2008, *Alyne vs Brazil*, 2011, par. 7.7.

<sup>60</sup> CEDAW Committee, *General Recommendation 28 on the core obligations of States parties under article 2 of the CEDAW*, CEDAW/C/GC/28 (2010), par. 18.

<sup>61</sup> CEDAW Committee, *General Recommendation 33 on women’s access to justice*, CEDAW/C/GC/33 (2015), par. 26-28.

53. Importantly, CEDAW General Recommendation 24 further states that in addition to considering the societal factors that are “determinative of the health status of women and that can vary among women themselves..special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups.”<sup>62</sup> Similarly, CESCR General Comment 22 on the right to reproductive and sexual health recognizes that “groups such as, but not limited to, poor women, persons with disabilities, migrants, indigenous or other ethnic minorities... are more likely to experience multiple discrimination”; it further obligates states to take measures to address the exacerbated impact of intersectional discrimination in seeking to guarantee substantive equality and non-discrimination in the realization of the right to sexual and reproductive health.<sup>63</sup>
54. It is our firm submission that the objectives of international human rights law are hindered when an intersectional lens is not adopted. Current narratives of SRHR that are focused on the empowerment of women frames these rights as only a gender issue and fails to also take into race, class and other factors. The failure to take an intersectional approach within the context of SRHR means that gender inequality is not holistically analysed, meaning that certain issues causing, supporting and creating this inequality will not be understood and dismantled.
55. Adopting an intersectional lens promotes “inward-looking analysis” of gender discrimination, which:
- primarily involves the recognition of privilege. When analysing intersections of race, class, and gender, the power hierarchies that are operating both on individual as well as systemic levels become clearer. Further, an intersectional paradigm promotes the analysis of privileged positions, as well as points of oppression. Recognizing the power inherent in one’s own privilege allows for a re-evaluation of interests, and perhaps the de-centring of interests of those holding power. This is valuable for individual advocates of SRHR, such as members of the donor community, as well as for organisations and systems in themselves. Of course, a system cannot recognize its privilege, nor do institutions change easily. However, for the privileged people within those institutions to recognize the power they maintain simply for being themselves (white, male, wealthy) and for them to extend this analysis to the system around them is significant, albeit hopeful.<sup>64</sup>
56. Intersectionality thus exposes structural and systemic inequalities that are often erroneously dismissed as pertaining to one individual, one country or one community, albeit based on

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<sup>62</sup> CEDAW Committee, *General Recommendation 24 on women and health*, A/54/38/Rev.1, chap. I, (2008), par. 6.

<sup>63</sup> CESCR, *General Comment 22*, E/C.12/GC/22, (2016), par. 24, 30.

<sup>64</sup> Amie Ritchie, *Intersectionality and the Struggle for Sexual and Reproductive Health and Rights: An Analysis of UN Discursive Patterns*, A Thesis Submitted to the Victoria University of Wellington in Partial Fulfilment of the Requirements for the Degree of Master of International Relations (MIR) School of History, Philosophy, Political Science and International Relations Victoria University of Wellington, 2012, p. 62: <https://core.ac.uk/download/pdf/41337572.pdf>.

bias, discrimination and stereotyping. As we see in Manuela's case, gender stereotypes were informing the levels and quality of service that she experienced to the point of presuming her guilt, indicating that it was systematic and institutionalised, though the State denies its existence or its role in Manuela's case. These gender stereotypes also indicate the levels of power and ab(use) of power by the State of El Salvador in the subjugation of women like Manuela – impoverished, rural, unable to read, and a mother shouldering the sole care of her two children. Understood in this context, Manuela's discrimination was not just about her gender.

57. The framework of intersectionality within SRHR informs the understanding of:

race, class, and gender as relational concepts, not as attributes of people of color, the dispossessed, or women but as historically created relationships of differential distribution of resources, privilege, and power, of advantage and disadvantage. Attention to the historical and contemporary processes by which populations are sorted into hierarchical groups with different degrees of access to the resources of society shifts our analysis to racism rather than race, toward gender subordination as well as sex as biology, and to resource distribution as the larger context that constrains and enables what appears as voluntary lifestyle choices.<sup>65</sup>

58. In our view, it is important for this Court to understand the intersectional nature of the challenges faced by Manuela and other women similarly placed in accessing SRHR. This is particularly important in comprehending the burden that the effective criminalisation of obstetric emergencies places on women within an already tough, exclusionary situation with severe power imbalances.

## Conclusion

59. For the reasons set forth above, El Salvador's employment of its blanket abortion ban to surveil and punish women who have obstetric emergencies--disproportionately impoverished women at the intersection of multiple forms of marginalization, like in Manuela's case--directly or in conjunction with its homicide laws, violates its obligations to guarantee substantive intersectional gender equality in breach of applicable inter-American human rights norms informed by relevant comparative international and regional human rights standards.

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<sup>65</sup> Leith Mullings, *Resistance and Resilience: The Sojourner Syndrome and the Social Context of Reproduction in Central Harlem*, *Transforming Anthropology* 13, no. 2 (2005): p. 79-80, <https://anthrosource.onlinelibrary.wiley.com/doi/epdf/10.1525/tran.2005.13.2.79>.

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