

INTER-AMERICAN COURT OF HUMAN RIGHTS

Amicus Curiae Brief

Re: Case of *Manuela and Family v. El Salvador*

Presented by

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I. INTEREST OF AMICI

1. Pursuant to Article 44 of the American Convention on Human Rights (hereinafter the “American Convention”), and by request under the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter the “Court” or “IACtHR”), the undersigned *Amici Curiae* humbly submit the following brief for consideration by the Court in relation to the case of *Manuela and Family v. El Salvador*, which was filed by the Center for Reproductive Rights and La Colectiva Feminista para el Desarrollo Local de El Salvador before the Inter-American Commission on Human Rights (“IACHR”) in 2012.
2. The undersigned *Amici Curiae* are, collectively, international human rights organizations, international law clinics and the professors, fellows, and students so associated, and experts on international human rights who have expertise concerning the right to health and international and regional fair-trial standards. *Manuela and Family v. El Salvador* is a case of first impression in the IACtHR. Given the significant impact this case will have on the state parties to the American Convention, the undersigned *Amici* respectfully urge the Court to order El Salvador to make adequate reparations by vacating the judgment against Manuela¹ and to take appropriate measures to reform both its criminal law and practice so that it complies with the American Convention and international human rights standards and is not used to prosecute women for obstetric emergencies. *Amici* also support the position, consistent with the views of the UN Human Rights Committee² and the UN Committee on the Elimination of Discrimination Against Women,³ that El Salvador's criminalization of abortion is inconsistent with international standards.⁴
3. This brief draws upon and uses as case studies similar criminal proceedings against two other Salvadoran women, monitored by the American Bar Association Center for Human Rights as

¹ Petitioners have asked that the name of the alleged victim be kept confidential and that she be identified by the pseudonym "Manuela." *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175 at para. 1 (2018) [hereinafter Report No. 153/18].

² Human Rights Committee, *General Comment No. 36 on Article 6: Right to Life*, para 8, U.N. Doc CCPR/C/GC/36 (2008) (states should not "apply criminal sanctions against women and girls undergoing abortion")

³ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 35 on Gender-Based Violence Against Women*, para. 18, UN Doc. CEDAW/C/GC/35 (2017).

⁴ See U.N. Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of El Salvador*, para. 16, U.N. Doc. CCPR/C/SLV/CO/7 (May 9, 2018) (“The Committee reiterates its previous recommendation and urges the State party to suspend immediately the criminalization of women for the offence of abortion”).

part of the Clooney Foundation for Justice’s TrialWatch initiative⁵ and evaluated by Professor Juliet Sorensen⁶ in reports co-authored by Professor Sorensen, Alexandra Tarzikhan and staff at the ABA Center for Human Rights⁷: the prosecutions of Evelyn Hernandez and “Diana”⁸ for aggravated homicide based on obstetric emergencies they suffered at home. These proceedings show that Manuela’s case is not unique. Indeed, they shed further light on how El Salvador’s investigation and prosecution of obstetric emergencies as aggravated homicide violates the right to non-discrimination, the right to health, the right to privacy, and the right to a fair trial, among other rights.⁹ They also demonstrate the need for legal reform.

⁵ TrialWatch monitors and grades the fairness of trials of journalists, women, minorities, LGBTQ+ persons, and human rights defenders and advocates for those unjustly imprisoned. See TrialWatch, “Justice for Victims of Unfair Trials,” Clooney Foundation for Justice (2021), <https://cfj.org/project/trialwatch/>.

⁶ Professor Sorensen is also a member of the TrialWatch Experts Panel and evaluated the trials in this capacity.

⁷ Juliet S. Sorensen, Alexandra Tarzikhan, and Staff at the American Bar Association Center for Human Rights, *El Salvador: The Case Against Evelyn Hernandez*, Clooney Foundation for Justice (2020); Juliet S. Sorensen, Alexandra Tarzikhan, and Staff at the American Bar Association Center for Human Rights, *El Salvador: The Case Against Diana*, Clooney Foundation for Justice (2020).

⁸ “Diana” is also a pseudonym.

⁹ This brief is focused on the use of aggravated homicide charges against women. While it addresses El Salvador’s criminalization of abortion as it relates to the use of aggravated homicide charges, it is not focused on El Salvador’s overall approach to reproductive health and rights. It thus does not address other human rights that are implicated by El Salvador’s approach to reproductive health and rights, including the right to life. It bears noting, however, that human rights bodies have made clear that the total prohibition of abortion is inconsistent with international human rights law and standards. See generally, Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Combined Seventh and Eight Periodic Reports of: Peru*, para 36, U.N. Doc. CEDAW/C/PER/CO/7-8 (July 24, 2014) (urging Peru to “[e]xtend the grounds for legalization of abortion to cases of rape, incest and severe foetal impairment”); CEDAW Committee, *Statement on Sexual and Reproductive Health and Rights: Beyond 2014 ICPD Review* (Feb. 10-28, 2014) (“States parties should legalize abortion at least in cases of rape, incest, threats to the life and/or health of the mother, or severe foetal impairment.”); *L.C. v. Peru*, CEDAW Committee, Commc’n No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009 (finding that Peru should have provided access to an abortion given that there were “sufficient reasons to state that continuing the pregnancy would put the girl’s physical and mental health at serious risk”); *K.L. v. Peru*, Human Rights Committee, Commc’n No. 1153/2003, para 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (finding violation of right to privacy due to failure to permit abortion, despite satisfying domestic law requirements); *V.D.A. v. Argentina*, Human Rights Committee, Commc’n No. 1608/2007, para 9.3, U.N. Doc. CCPR/C/101/D/1608/2007 (finding Article 17 violation where judiciary enjoined abortion that was ‘non-punishable’ under domestic law); *Mellet v. Ireland*, Human Rights Committee, Commc’n No. 2324/2013, paras 7.7-7.11, U.N. Doc. CCPR/C/116/D/2324/2013 (finding a violation of the right to be free of cruel, inhuman, or degrading treatment, specifically stating that “a woman’s decision to request termination of pregnancy is an issue which falls under the scope of [Article 17]. In the present case, the State party interfered with the author’s decision not to continue her non-viable pregnancy . . . [and] the failure of the State party to provide the author with the services that she required constituted discrimination.”); *Whelan v. Ireland*, Human Rights Committee, Commc’n No. 2425/2014, paras. 7.7-7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (finding that Ireland’s limited exception to abortion ban resulted in violation of Articles 7, 17, and 26); Human Rights Committee, *General Comment No. 36 on Article 6: Right to Life*, para. 8, U.N. Doc. CCPR/C/GC/36 (2018) (“States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.”).

II. SUMMARY OF THE ARGUMENT

4. This brief first reviews the Salvadoran laws at issue in this case. Next, the brief sets forth the essential facts of Manuela's case along with those of the cases of Evelyn Hernandez and Diana, which closely resemble Manuela's. Using data from the experiences of thirty-eight Salvadoran women, including Manuela, Ms. Hernandez, and Diana, the brief then further shows how Manuela's case is part of a systemic pattern whereby women who suffer poor pregnancy outcomes are prosecuted for aggravated homicide.
5. The brief then proceeds to explain that this pattern violates (i) the right to be free from gender-based discrimination and (ii) the right to health, that common investigative practices violate (iii) the right to privacy, and that subsequent prosecutions frequently result in violations of (iv) the right to liberty and to a fair trial. Finally, the brief sketches the broader impact of this pattern on women in El Salvador.

III. EL SALVADORAN LAW

6. El Salvador outlawed abortion in all forms and circumstances in 1997.¹⁰ Previously, Article 169 of the 1973 Salvadoran Penal Code permitted abortion under three circumstances: (i) to save a woman's life, (ii) if the pregnancy was a result of rape or sexual relations with a minor, and (iii) if the fetus carried severe abnormalities.¹¹ Since 1997, however, Article 133 of El Salvador's Penal Code ("Penal Code") has completely banned abortion under all circumstances, providing for a potential sentence of between two and eight years' imprisonment for women convicted of obtaining an abortion.¹² Furthermore, Article 135 of the Penal Code criminalizes performing an abortion, and provides for a potential sentence of six to twelve years in prison, as well as professional disqualification.¹³ Finally, Article 136 criminalizes those who support a woman in obtaining an abortion, whether through economic

¹⁰ Penal Code of El Salvador, Legis. Decree 1030 of June 10, 1997, Tit. I, Chap. II, Art. 133 [hereinafter Penal Code].

¹¹ Penal Code 1973, Art. 169 (El Sal.).

¹² Penal Code, Tit. I, Chap. II, Art. 133.

¹³ Penal Code, Tit. I, Chap. II, Art. 135.

or other tangible resources, with a potential sentence of between two and five years—with a sentencing enhancement of an additional one-third if the person assisting the woman is her parent.¹⁴ These criminal provisions relating to abortion are among the most severe in the world.¹⁵

7. In 1998, one year after the amendments to the Penal Code, the Salvadoran government also amended Article 1 of its Constitution to recognize the right to life from the moment of *conception*, rather than birth.¹⁶ This revision to the constitution allowed El Salvador to prosecute alleged abortions as aggravated homicide.
8. Article 128 of the Penal Code states that “[w]hoever kills another will be punished with a prison term of ten to twenty years.”¹⁷ Article 129 provides that aggravated homicide is committed under any of the following circumstances:

- 1) Ascendant or descendant, adopter or adoptee, brother, spouse or person with whom he coexists maritally; 2) When the homicide occurs, where appropriate, to prepare, facilitate, consummate or conceal the crimes of kidnapping, rape, sexual assault, robbery, extortion, acts of terrorism, illicit associations, illegal trade and deposit of weapons, smuggling, money laundering and assets and those included in Chapter II of this Code regarding crimes of corruption and Chapter IV of the Law regulating Activities Related to Drugs or to ensure the results of any of them or impunity for the author or for his accomplices or for not having achieved the intended purpose when attempting any of the offenses mentioned; 3) With treachery, premeditation, or abuse of superiority; 4) With poison or other insidious means; 5) With cruelty or deliberate increase of the pain of the offended; 6) By price, reward, or remuneration promise; 7) For heinous or futile motives; 8) When it is executed by civil or military authority, taking advantage of such quality; 9)

¹⁴ Penal Code, Tit. I, Chap. II, Art. 136.

¹⁵ Jocelyn Viterna & Jose Santos Guardado Bautista, *Pregnancy and the 40-Year Prison Sentence: How “Abortion Is Murder” Became Institutionalized in the Salvadoran Judicial System*, 19 HEALTH AND HUMAN RIGHTS JOURNAL 81 (2017), at 82.

¹⁶ Constitution of the Republic of El Salvador, 1983, Art. 1 (amended 2003).

¹⁷ Penal Code, Tit. I, Chap. I, Art. 128.

When it is preceded by the forced disappearance of person; 10) When it is executed in the person of a public official, public authority, agent of authority, or members of the prison staff, whether they are or are not in the exercise of their functions or on the occasion of them.¹⁸

9. A conviction under Article 129 increases the potential prison sentence for homicide convictions to 30 to 50 years.¹⁹

10. Most pertinent to this case is the fact that El Salvador also began to prosecute poor pregnancy outcomes as homicide.²⁰ Anti-abortion advocates specifically began to target those suffering late-term obstetric emergencies, on the theory that if the baby died, it was the mother's fault. For instance, a 2001 article in *El Diario de Hoy* described the fetuses of women who suffered obstetric emergencies as “human beings who . . . await the sweet hands of a mother, but what they find instead are the talons of soulless women.”²¹ Likewise, a study published in the Health and Human Rights Journal (HHR Study) found that rallying cries and rhetoric used by anti-abortion activists such as “abortion is murder” and “perverse mother” influenced participants in the criminal justice system, including judges and police officers, which led them to assume that women should be able to save a child if they wish—and thus that an obstetric emergency

¹⁸ Penal Code, Tit. I, Chap. I, Art. 129.

¹⁹ *Id.*

²⁰ This is due in part to the fact that El Salvador's laws are ambiguous regarding the definition of abortion. Indeed, the Penal Code does not offer any definition at all. The World Health Organization (WHO) defines an abortion as the “. . . the voluntary termination of pregnancy [...] used to end an already established pregnancy (i.e. a method that acts after nidation has been completed).” See World Health Organization, *Definition and Indicators in Family Planning Maternal & Child Health and Reproductive Health, Used in the WHO Regional Office for Europe*, at 1 (Jan. 2001). An abortion is generally understood to be an intentional act. By contrast, miscarriage generally connotes “a spontaneous or natural loss of a fetus.” The Free Medical Dictionary, (last visited Feb. 10, 2021), <https://medical-dictionary.thefreedictionary.com/miscarriage>. A miscarriage is the term used if the loss of the fetus occurs prior to the twenty-eighth weeks of pregnancy. World Health Organization, *Why we need to talk about losing a baby*, (last visited Feb. 23, 2021), <https://www.who.int/news-room/spotlight/why-we-need-to-talk-about-losing-a-baby>. An unintended loss of a fetus *at or after* twenty-eight weeks of pregnancy is considered a stillbirth if “born with no signs of life.” World Health Organization, *Maternal, newborn, child and adolescent health*, (last visited Feb. 23, 2021), https://www.who.int/maternal_child_adolescent/epidemiology/stillbirth/en/. A preterm delivery is considered a baby “born alive before 37 weeks of pregnancy”. World Health Organization, *Preterm birth*, (last visited Feb. 23, 2021), <https://www.who.int/news-room/fact-sheets/detail/preterm-birth>. “Obstetric emergencies” are discussed *infra*.

²¹ Viterna & Bautista, *supra* note 15, at 86. (“Combined, these data demonstrate that convictions for both ‘abortion’ and the attempted or actual ‘aggravated homicide of a newborn’ began to increase significantly in the year 2000—about the same time that anti-abortion newspaper discourses in El Salvador began targeting the ‘perverse mother.’”).

resulting in the death of a fetus must be homicide.²² By 2005, the attorney general’s office of El Salvador had begun to encourage law enforcement officers to find the deceased fetus in order to upgrade an initial charge of abortion to aggravated homicide, depending on whether the fetus had breathed upon exiting the womb.²³

11. In addition, Article 312 reinforces the criminalization of abortion by fining any healthcare professional for not reporting “punishable act[s]”—including abortion and pregnancy-related ‘aggravated homicide’—to public authorities within twenty-four hours.²⁴ While the Criminal Procedural Code provides for an exception where the information is protected by professional confidentiality, as the IACHR explained, “the procedure that a doctor must follow to determine whether an obstetric emergency could be the result of the commission of a crime—the result of a natural versus intentional miscarriage—is not clear.”²⁵ As a consequence, medical professionals have reported patients they suspect of having an abortion despite this information often being acquired in contexts where it should be protected by medical confidentiality. This has resulted in women like Manuela, Diana, and Evelyn Hernandez being reported to the authorities by healthcare providers.

12. As the cases of Manuela, Diana, and Evelyn Hernandez demonstrate, the prosecutions to which these trends have given rise have unfairly impacted women who suffered obstetric emergencies and sought medical assistance from health providers and, as this brief will show, resulted in violations of numerous human rights.

²² *Id.* at 86, 89.

²³ *Id.*

²⁴ Penal Code, Tit. I, Chap. I, Art. 312 (“The public official or employee, agent of authority or public authority who in the exercise of their functions or on the occasion of them, becomes aware of having perpetrated a punishable act and fails to notify the official within twenty-four hours competent, will be sanctioned with a fine of fifty to one hundred days fine. The same sanction will be imposed on the head or person in charge of a hospital, clinic or other similar establishment, public or private, that does not inform the competent official entry of injured persons, within eight hours after the same, in cases where rationally they should be considered as originating from a crime.”).

²⁵ Report No. 153/18, *supra* note 1, at para. 134.

IV. SUMMARY OF FACTS AND BACKGROUND INFORMATION

13. This section summarizes the facts of the case of *Manuela and Family v. El Salvador* and discusses two similar cases. It proceeds to show that these three cases are not outliers by reviewing data from thirty-eight Salvadoran cases, including those of Manuela, Diana, and Evelyn Hernandez, all of which involved women arrested for aggravated homicide on the basis of what appears to have been obstetric emergencies.²⁶

A. *Manuela and Family v. El Salvador*

14. Manuela was a poor and illiterate woman residing in rural El Salvador.²⁷ As described by the Inter-American Commission Manuela had a delivery outside the hospital.²⁸ She stated that “she suffered a bad fall. . . . [S]he thought she was experiencing bad indigestion that led her to expel several blood masses, among which [a] fetus was found. Her mother buried the fetus in the latrine where they had been evacuated.”²⁹ Manuela was rushed to the public hospital³⁰ after hemorrhaging.³¹

²⁶ Obstetric emergencies are serious complications in a woman’s health that can occur during pregnancy, childbirth, or postpartum. The Free Medical Dictionary, (last visited Feb. 10, 2021), <https://medical-dictionary.thefreedictionary.com/obstetrical+emergencies>. According to the Pan American Health Organization, obstetric emergencies can take many forms. See Fescina R, et. al., *Guide for the Care of the Most Relevant Major Obstetric Emergencies*, Latin American Center for Perinatology Woman and Reproductive Health (2012). Obstetric emergencies that occur during pregnancy can include miscarriages, ectopic pregnancies, placental abruption, pre-eclampsia and eclampsia, and premature rupture of membrane. Victorian Minister for Health, “Pregnancy – Obstetric Emergencies,” BetterHealth Channel (2021), <https://www.betterhealth.vic.gov.au/health/healthyliving/pregnancy-obstetric-emergencies?viewAsPdf=true>. Obstetric emergencies that occur during labor include shoulder dystocia, prolapsed umbilical cord, placenta accreta, rupture or inversion of the uterus, and amniotic fluid embolism. *Id.* Many of these emergencies can result in a loss of oxygen to the fetus and the death of the fetus and/or the mother. *Id.* The main symptoms of an obstetric emergency include: vaginal bleeding, severe abdominal pain, leaking amniotic fluid, postpartum hemorrhaging, serious complications of hypertensive states (abrupt and rapid increase in blood pressure), edema, fever, cardiorespiratory arrest, and loss of consciousness. *Id.*

²⁷ Report No. 153/18, *supra* note 1, at para. 7; Center for Reproductive Rights, “Inter-American Commission on Human Rights Opens Case Involving Salvadoran Woman Wrongfully Imprisoned,” Press Releases (Apr. 19, 2017), <https://reproductiverights.org/press-room/inter-american-commission-on-human-rights-opens-case-involving-salvadoran-woman-wrongfull>.

²⁸ Report No. 153/18, *supra* note 1, at para. 36.

²⁹ *Id.* at para. 8.

³⁰ *Id.* at para. 9 (“as a result of that emergency, she went to the Hospital.”).

³¹ *Id.* at para. 8.

15. The treating healthcare professionals reported Manuela to the police.³² The physician explained that she had reported Manuela due to the fact that “the information provided by the patient did not match with the clinical diagnosis, as the patient was attended for a miscarriage”³³ but her examination allegedly revealed there was a clean cut in the umbilical cord and that it was not torn³⁴ (although a different visual inspection “found the opposite”³⁵). Manuela has stated that she was then handcuffed to her hospital bed and interrogated by both physicians and police officers as to whether she induced an abortion to hide her infidelity.³⁶
16. Petitioners further alleged before the Inter-American Commission that Manuela’s mother and father, both indigent and illiterate, were also pressed to incriminate their own daughter.³⁷ The Inter-American Commission noted that while “[a]ccording to the petitioner, the father of the alleged victim was pressured to place his fingerprint on the document, . . . with no explanation of its contents,” “[t]he State did not address this allegation.”³⁸
17. Manuela was not represented by counsel during the initial stages of the investigation.³⁹ The investigator evinced bias in her own report, stating that “it is my opinion that what this woman did . . . she would not have done, if she did not want her son, she would have given him the opportunity to live there are people who cannot have children and want them with all their hearts . . .”⁴⁰
18. Manuela was arrested at the hospital where she was held for eight days before being transferred to a jail “without a full medical checkup prior to her release, despite the repeated complaints and discomforts expressed by her.”⁴¹ At the first detention hearing, she “was not present because she had not been transported to th[e] Court . . . due to lack of personnel.”⁴² The

³² *Id.* at para. 46.

³³ *Id.* at para. 47.

³⁴ *Id.* at para. 50.

³⁵ *Id.*

³⁶ *Id.* at paras. 9 and 74-75.

³⁷ *Id.* at para. 15.

³⁸ *Id.* at para. 52.

³⁹ *Id.* at para. 105.

⁴⁰ *Id.* at para. 57.

⁴¹ *Id.* at para. 11.

⁴² *Id.* at para. 63.

prosecution argued that she should be detained because of the gravity of the offense and because ““existing evidence indicates that she also could evade justice by fleeing.””⁴³ The judge agreed, stating that it is ““assume[d] that the accused person in question will try to evade the punishment to be handed down for the crime committed and could obstruct the specific acts of the investigation by hiding or even threatening witnesses,”” the latter claim based on the fact that ““she ha[d] caused social upheaval”” within her community.⁴⁴

19. Manuela was eventually prosecuted and convicted of aggravated homicide and given a thirty-year prison sentence. She was poorly represented at trial, with the IACHR finding that there were ““certain deficiencies [in the representation] that impacted the alleged victim’s rights.””⁴⁵ Manuela received inadequate medical treatment in detention and passed away after serving 26 months of her prison sentence.⁴⁶

20. The Inter-American Commission found that Manuela’s pre-trial detention violated the American Convention because it ““was ordered based on the nature and gravity of the crime committed,”” rather than on the basis of individual circumstances giving rise to a need to detain.⁴⁷ It further found that her right to counsel had been violated.⁴⁸ The Commission went on to find that the fact that medical professionals reported Manuela’s case to the police—as well as the content of their report, which included details regarding her first menstrual period, when she began having sexual relations, and whether she had sexually-transmitted diseases—violated her right to privacy.⁴⁹

21. Further, the Commission concluded that Manuela’s fair trial rights had been violated.⁵⁰ Indeed, it held that that the entire case—from the investigator’s report, to the pre-trial process, through the judgment—was infected with gender stereotypes, finding violations of Manuela’s rights to

⁴³ *Id.* at para. 63.

⁴⁴ *Id.* at para. 64; *see also id.* at para. 70 (quoting the trial judge as agreeing because ““the gravity of the punishment she would face should she be found guilty in the trial could cause her to flee or obstruct the investigation””).

⁴⁵ *Id.* at para. 107.

⁴⁶ *Id.* at paras. 85, 143-44.

⁴⁷ *Id.* at para. 99.

⁴⁸ *Id.* at para. 111.

⁴⁹ *Id.* at paras. 134-37.

⁵⁰ *See, e.g., id.* at para. 106 (“These facts in themselves constitute a violation of the right to legal defense.”).

the presumption of innocence, equality and non-discrimination under the law.⁵¹ For instance, the court’s judgment of conviction stated that “having the capacity to choose between having the baby, caring for the baby, feeding it, and living for it, as any biological mother would naturally do, she chose to behave contrary to nature itself”⁵² The judgment also referenced Manuela’s alleged “infidelity.”⁵³

B. Evelyn Hernandez and Diana

Evelyn Hernandez

22. Like Manuela, Evelyn is a woman from an impoverished community in El Salvador. She has stated that she was unaware of her pregnancy.⁵⁴ In 2016, Ms. Hernandez ran to the bathroom upon feeling ill. She ultimately delivered a fetus. Her mother found her there, unconscious and covered in blood.⁵⁵

23. She was rushed to a public hospital and was reported by the healthcare professionals to the police for suspected abortion.⁵⁶ Evelyn was then handcuffed to her hospital bed, detained, and eventually charged with aggravated homicide.⁵⁷

24. Based on evidence of foreign material in the fetus’ lungs,⁵⁸ the prosecution argued that Evelyn had thrown her child into the latrine. However, the evidence presented at Evelyn’s trial showed that she would not have been capable of throwing the fetus into the latrine because she had lost consciousness and was bleeding profusely.⁵⁹ Nevertheless, Evelyn was convicted of aggravated homicide and sentenced to 30 years’ imprisonment, a decision that was upheld on appeal.

⁵¹ *Id.* at paras. 155-58.

⁵² *Id.* at para. 77.

⁵³ *Id.*

⁵⁴ Juliet S. Sorensen, Alexandra Tarzikhan, and Staff at the American Bar Association Center for Human Rights, *El Salvador: The Case Against Evelyn Hernandez*, Clooney Foundation for Justice (2020), at 9 [hereinafter “Fairness Report on the Case Against Evelyn Hernandez”].

⁵⁵ *Id.* at 2, 10.

⁵⁶ *Id.* at 9.

⁵⁷ *Id.* at 3, 9.

⁵⁸ *Id.* at 10.

⁵⁹ Sentencing Court of Cojutepeque, Department of Cuscatlán, Judgment, August 19, 2019 at 5, 47.

25. In 2018, the Criminal Court of the Supreme Court of Justice of El Salvador annulled the appellate decision upholding Ms. Hernandez’s conviction. On remand, an appellate court vacated her conviction and ordered her retrial before a different judge.
26. TrialWatch monitored this retrial. It was characterized by many of the same violations as occurred during Manuela’s trial. First, Evelyn was detained for two months following the decision to vacate her conviction.⁶⁰ As the TrialWatch Fairness Report concluded, “[f]actors that might justify continued detention, such as the risk of recurrence of crime or interference with evidence, were inapplicable. All evidence in the case had already been gathered and it would have been impossible for Ms. Hernandez to again commit the alleged offense. Further, there was no indication that Ms. Hernandez would flee the jurisdiction.”⁶¹ The TrialWatch Fairness Report therefore found that Ms. Hernandez’s pre-trial detention was arbitrary.
27. Just as in Manuela’s case, the prosecution proceeded despite significant evidentiary issues, with discrimination infecting the process and undermining Ms. Hernandez’s right to the presumption of innocence. In particular, the prosecution’s theory on retrial was that Evelyn had intentionally withheld both prenatal and neonatal care from the child. Central to this theory was an effort to show that Evelyn had known she was pregnant. The witnesses presented to this effect spoke about “paleness” and her clothes.⁶² The TrialWatch Fairness Report notes that “at closing arguments, the prosecutor asserted, ‘It was not proven that Evelyn did not know she was pregnant.’” Further, just as in Manuela’s case, the prosecution relied on speculation regarding Ms. Hernandez’s relationships, arguing that “‘Evelyn intended to commit a homicide by the hiding of her pregnancy and childbirth for fear that her parents [would] retaliate against her ... she had a boyfriend and hid the relation from her parents ... therefore she planned to murder her child.’”⁶³

⁶⁰ Fairness Report on the Case Against Evelyn Hernandez, *supra* note 54, at 14-15.

⁶¹ *Id.* at 15.

⁶² *Id.* at 16.

⁶³ *Id.* at 22.

28. By contrast, the evidence that what had transpired was an obstetric emergency was considerable. The doctor who examined Evelyn at the hospital said it had been a “problematic birth”⁶⁴; a friend of the family testified that he arrived at Evelyn’s house to find her having fainted and bleeding; and a neighbor testified that they saw Evelyn’s mother taking her to the hospital unconscious.⁶⁵ And yet, in the face of this evidence, the prosecution argued that “defense witnesses who saw Ms. Hernandez unconscious and bleeding did not attend the birth itself, [and therefore] they could not be certain that Ms. Hernandez did not purposefully withhold assistance to the child.”⁶⁶
29. On this basis, the Fairness Report found that the prosecution “impermissibly sought to shift the burden of proof to the defense”⁶⁷ and that “Ms. Hernandez’s retrial reflected a reliance on gender stereotypes.”⁶⁸ While the trial court ultimately acquitted Evelyn on retrial, her case demonstrates the same willful, discriminatory disregard of contradictory evidence as in Manuela’s case.

Diana

30. Like Manuela and Evelyn, Diana is from a poor community in El Salvador.⁶⁹ She also suffers from psychological issues.⁷⁰ She has stated that she was unaware of her pregnancy before giving birth at home, unassisted, in the bathroom. The child did not survive. There is evidence that she suffered a psychotic episode at the time of her delivery.⁷¹

⁶⁴ *Id.* at 17

⁶⁵ *Id.*

⁶⁶ *Id.* at 16.

⁶⁷ *Id.*

⁶⁸ *Id.* at 22.

⁶⁹ Juliet S. Sorensen, Alexandra Tarzikhan, and Staff at the American Bar Association Center for Human Rights, *El Salvador: The Case Against Diana*, Clooney Foundation for Justice (2020), at 2-3, 9-10 [hereinafter “Fairness Report on the Case Against Diana”].

⁷⁰ *Id.* at 2.

⁷¹ See, e.g., *id.* at 13 (“The investigation identified the possibility that upon giving birth, Diana had suffered a psychotic episode triggered by the unexpected delivery in combination with pre-existing mental issues. Such an episode could have immobilized Diana and/or rendered her incapable of understanding her own actions.”).

31. Diana was rushed to a public hospital.⁷² There, the healthcare professionals reported Diana to the police.⁷³ Like in Manuela’s case, “the forensic examination report relayed to the authorities recounted Diana’s sexual experience, including the number of her previous sexual partners, and entailed an inspection of Diana for sexually transmitted diseases.”⁷⁴ Like Manuela and Evelyn, Diana was handcuffed to her hospital bed.⁷⁵ She too was eventually arrested, detained (and shuttled between a detention facility and a psychiatric hospital), and charged with aggravated homicide.⁷⁶
32. TrialWatch monitored the criminal proceedings against Diana, which bore striking similarities to those against Manuela and Evelyn. First, like Manuela, the authorities did not transport Diana from the jail to the court for a hearing on her pre-trial detention.⁷⁷ In ordering her detention, the court relied on the theory that because “the sentence might be more than three years [it] would cause ‘any citizen’ to flee” and speculation that she might interfere with evidence.⁷⁸
33. Second, as in Manuela’s case, the Fairness Report notes concerns regarding respect for the right to counsel. In particular, there were credible allegations that Diana’s ability to consult counsel was impeded. The Fairness Report explains that “Diana’s lawyers allege that during Diana’s detention at the psychiatric hospital, it was challenging for them to confer with her: even when counsel complied with an array of administrative requirements, they were still on multiple occasions denied access to the hospital.”⁷⁹ Moreover, the defense was not given a copy of the autopsy until six months after the fact.⁸⁰
34. Third, the evidence presented against Diana was weak: the autopsy of the child indicated the death was due to asphyxiation and there were no signs of trauma or drowning.⁸¹ Evidence

⁷² *Id.* at 11.

⁷³ *Id.* at 25. It is not clear whether this was due to comments she made or her presentation.

⁷⁴ *Id.* at 24.

⁷⁵ *Id.* at 4.

⁷⁶ *Id.* at 2.

⁷⁷ *Id.* at 12.

⁷⁸ *Id.* at 19.

⁷⁹ *Id.* at 21.

⁸⁰ *Id.* at 22.

⁸¹ *Id.* at 13.

indicated that Diana was not aware of what had happened due to the psychotic episode that she suffered, meaning she could not have intervened even if the child had been alive (for instance, she continued to insist that her “child [wa]s alive,” seeming unaware that the child had died⁸²). And yet, as in Manuela and Evelyn’s cases, the authorities seemed inclined to assume the worst: the report notes that “a police officer heard the prosecution representative state that homicide was ‘the only thing that could have happened based on the facts.’”⁸³

35. Fourth and finally, like Manuela, Diana received inadequate treatment while detained.⁸⁴ Diana attempted suicide while in custody at Ilopango women’s prison in January 2019 after she was not given the “specialized psychiatric treatment [she needed]”⁸⁵ Following this, she was admitted to a psychiatric hospital where she was given what appears to have been non-consensual electroconvulsive therapy treatment.⁸⁶

36. Diana faced up to 40 years in prison for the charges against her.⁸⁷ While the charges were ultimately dismissed prior to trial due to a lack of evidence,⁸⁸ she was detained for eight months.⁸⁹ The TrialWatch Fairness Report found that her right to privacy had been violated by the healthcare professionals’ report and that her shackling to a hospital bed constituted cruel, inhuman or degrading treatment.⁹⁰ It also found that her detention was unlawful because it relied on “‘mere assumption,’” with the prosecution and court failing to “consider Diana’s individual circumstances and [instead] bas[ing] their reasoning on the severity of the potential punishment.”⁹¹ It likewise found violations of Articles 9(3) and 9(4) of the International Covenant on Civil and Political Right (“ICCPR”) and Articles 7(5) and 7(6) of the American Convention due to the failure to transport Diana to her detention hearing.

⁸² *Id.*

⁸³ *Id.* at 14.

⁸⁴ *Id.* at 9; Agrupación Ciudadana por la Despenalización del Aborto, “Legal Analysis of the case of Diana”, 2019, at 16-17, 22-23; Legal Medicine Institute “Dr. Roberto Masferrer”, Expert Psychiatric Report (Mar. 12, 2019), at 3-5.

⁸⁵ Fairness Report on the Case Against Diana, *supra* note 69, at 12.

⁸⁶ *Id.* at 29-30.

⁸⁷ *Id.* at 6, 19.

⁸⁸ *Id.* at 14-15.

⁸⁹ *Id.* at 11-14.

⁹⁰ *Id.* at 27.

⁹¹ *Id.* at 19-20.

37. The report found that the denial of appropriate medical care in detention “amounted to a violation of Article 10 of the ICCPR and Article 5 of the American Convention.”⁹² It also concluded that “[t]he administration of electroconvulsive therapy (ECT) to Diana may have violated international standards on consent.”⁹³

38. The report went on to find the accounts of obstruction of Diana’s ability to consult counsel, “which appear credible, amount to a violation of Article 14(3)(b) of the ICCPR and Article 8(2)(c) and (d) of the American Convention.”⁹⁴ Finally, it concluded that the non-disclosure of the autopsy to the defense constituted a violation of the right to prepare a defense.⁹⁵

C. Other Women Similarly Situated to Manuela, Evelyn, and Diana in El Salvador

39. The cases of Manuela, Evelyn Hernandez, and Diana are not exceptional. There are many cases of women who have been similarly accused of either abortion or aggravated homicide since the 1997 and 1998 amendments to El Salvador’s Penal Code and Constitution. Approximately 38 of those cases involve women who were charged with aggravated homicide or attempted aggravated homicide for what appears to have been an obstetric emergency, similar to Manuela, Evelyn, and Diana.⁹⁶ In gathering this data, *amici* relied primarily on public sources, such as nongovernmental organization reports and news sources. Where information was not readily or publicly available, we so indicate in a footnote. The fair trial concerns are based on public descriptions of what transpired before and at trial.

⁹² *Id.* at 29.

⁹³ *Id.*

⁹⁴ *Id.* at 21.

⁹⁵ *Id.* at 22.

⁹⁶ The following women’s cases were included in this analysis: “Manuela”, Evelyn Beatriz Hernandez Cruz, “Diana”, Berta Margarita Arana Hernández, Cristina Quintanilla, Belén, María, María del Carmen García Alvarenga, María Marina Pérez Martínez, Isabel Cristina Quintanilla, Rosemary, Verónica, Teodora del Carmen Vásquez de Saldaña, María Teresa Rivera, Carmen Guadalupe Vásquez Aldana, Maira Veronica Figueroa Marroquín, Alba Lorena Rodríguez, Cinthia Marcela Rodríguez Ayala, Maria del Transito Orellana Martínez, Mirna Isabel Ramírez de Martínez, Evelyn del Carmen Sánchez Cabrera, Karina del Carmen Herrera Clímaco, Imelda Isabel Cortez Palacios, Maritza de Jesus González, Mariana López Zelada, Marina de los Angeles Portillo, Salvadora Carolina Rivas Diaz, Elsi Marlene Rosales García, Katherine Jocelyn Mazariego Orellana, Johana Iris Rosa Gutierrez, Cindi Aracely Erazo Aguilar, Sonia Ester Tabora Contreras, Jacqueline Nohem Castillo, Kenia Isabel Hernández Contreras, Ena Vinda Munguía Alvaro, Sara del Rosario Rogel García, Maricela Empress Albizuri, and Glenda Xiomara Cruz.

40. The commonalities that were considered amongst the cases were the women’s age, education level, whether they had children, whether they said they were aware of their pregnancy, if they said the pregnancy was the result of rape or sexual assault, whether healthcare professionals had reported the women to the police, whether they were handcuffed to a hospital bed or arrested immediately after delivery, if the fetus was retrieved, whether there were fair trial concerns, the length of their sentence, and whether they are currently in prison. Common features of these 38 cases are synthesized in a chart in the Appendix.
41. One of the most concerning results of this survey is that all of the women were indigent and poorly educated. This is consistent with a study conducted by the Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico (“Agrupación Ciudadana”), which found that out of 129 women prosecuted for abortion or aggravated homicide between 2000 and 2011, 82% had little or no income and most were from “rural or marginal urban areas.”⁹⁷ As discussed above, the cases of Manuela, Evelyn Hernandez, and Diana exemplify this pattern.⁹⁸
42. One reason for this is that poorer women are more likely to seek health services from public hospitals, which are often the most affordable and accessible option. The UN Working Group on Arbitrary Detention reported that “[b]etween 2002 and 2010, 57.36% of the reports registered for abortion came from health professionals.”⁹⁹ The study conducted by the Agrupación Ciudadana also found that out of the 129 cases filed against women for having an abortion or for aggravated homicide, 74 complaints originated from public hospitals or the

⁹⁷ Center for Reproductive Rights, *Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion* (2014) at 13-14 [hereinafter “Marginalized, Persecuted, and Imprisoned Report”]; see also Working Group on Arbitrary Detention, Opinion No. 68/2019, concerning Sara del Rosario Rogel García, Berta Margarita Arana Hernández, and Evelyn Beatriz Hernández Cruz (El Salvador) (advance edited version), para. 51, U.N. Doc. A/HRC/WGAD/2019/68 (March 4, 2020) [hereinafter “Opinion No. 68/2019”].

⁹⁸ Report No. 153/18, *supra* note 1, at para. 7 (“[Manuela] was a young, illiterate woman from the Municipio of Cacaoopera, a very poor area of El Salvador”); Fairness Report on the Case Against Evelyn, *supra* note 54, at 9 (“Evelyn Beatriz Hernandez Cruz is a 22 year old (as of June 2020) female from the small rural community of Cascatlan in El Salvador”); Fairness Report on the Case Against Diana, *supra* note 69, at 9 (“‘Diana’ is a 31-year old (as of June 2020) woman from a poor urban community in San Salvador.”).

⁹⁹ Opinion No. 68/2019, *supra* note 97, at para. 52.

Salvadoran Social Security Institute.¹⁰⁰ The study did not indicate that any private health care facilities reported patients to authorities. As the UN Human Rights Committee has summarized, “lower income women rely on public hospitals, where health professionals are more likely than those in private clinics to report them to the police.”¹⁰¹

V. LEGAL ANALYSIS

43. After a brief summary of the applicable international law, this section argues that El Salvador’s criminalization of obstetric emergencies violates (i) the right to be free from gender-based discrimination and (ii) the right to health, that healthcare professionals’ reporting of women suffering obstetric emergencies violates (iii) the right to privacy, and that in many cases the subsequent prosecutions resulted in violations of (iv) the right to liberty and to a fair trial.

A. Applicable International Law

44. Pursuant to Article 64 of the American Convention, the IACtHR may advise member states in “the interpretation of [the] Convention or of other treaties concerning the protection of human rights in the American states.” This section therefore draws upon the American Convention and the 1988 Additional Protocol to the ACHR (“Protocol of San Salvador”); the 1948 American Declaration of the Rights and Duties of Man (“American Declaration”); the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (“Convention of Belem Do Para”); the Inter-American Convention to Prevent and Punish Torture (“IACPPT”); the 1948 Charter of the Organization of American States, as Amended by the 1967 Protocol of Buenos Aires (“OAS Charter”); the 1976 ICCPR; the 1976 International Covenant on Economic, Social and Cultural Rights (“ICESCR”); the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”); and the UN Convention on the Elimination of All Forms of

¹⁰⁰ See Marginalized, Persecuted, and Imprisoned Report, *supra* note 97, at 42.

¹⁰¹ See U.N. Human Rights Committee, *Concluding Observations on the Seventh Periodic Report of El Salvador*, para. 15, U.N. Doc. CCPR/C/SLV/CO/7 (May 9, 2018); see also Amnesty International, *On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador* (2014), at 11 (“[t]hose with the fewest resources suffer the most.”) [hereinafter “On the Brink of Death Report”].

Discrimination Against Women (“CEDAW”). El Salvador has ratified each of these treaties.¹⁰²

i. El Salvador’s Criminalization of Obstetric Emergencies Violates Salvadoran Women’s Right to be Free from Gender-Based Discrimination

45. Under Articles 1(1) and 24 of the American Convention, El Salvador has an obligation to respect the right to freedom from discrimination and to provide equality before the law.¹⁰³ This includes an obligation to “abstain from taking measures that are in any way directly or indirectly designed to create *de jure* or *de facto* situations of discrimination.”¹⁰⁴ In *Artavia Murillo et al v. Costa Rica*, this Court noted that a “law or practice that appears to be neutral [can have] particularly negative repercussions on a person or group with specific characteristics ... the concept of disproportionate impact is related to that of indirect discrimination.”¹⁰⁵

46. The American Convention does not define “discrimination.” In *Atala Riffo and Daughters v. Chile*, however, the Court referred to the definition of discrimination articulated by the United Nations Human Rights Committee—namely, “any distinction, exclusion, restriction, or preference based on certain motives, such as...gender...or any other social condition, that seeks to annul or diminish the acknowledgment, enjoyment, or exercise, in conditions of equality, of the human rights and fundamental freedoms to which every person is entitled.”¹⁰⁶

¹⁰² Organization of American States, “Current Status of Signatures and Ratifications of the Inter-American Treaties: El Salvador,” (last visited Feb. 23, 2021),

http://www.oas.org/DIL/treaties_signatories_ratifications_member_states_el_salvador.htm; United Nations, “Depositary: Status of Treaties,” (last visited Feb. 23, 2021), <http://treaties.un.org>.

¹⁰³ American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, arts. 1(1), 24.

¹⁰⁴ *Cf.* Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/295, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 103 (Sep. 17, 2003).

¹⁰⁵ *Artavia Murillo et al v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, paras. 286-287 (Nov. 28, 2012); *see also* Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, para. 141 (Sep. 8, 2005) (discussing “discriminatory effect”).

¹⁰⁶ Human Rights Committee, *General Comment No. 18 – Non-discrimination*, para. 6, U.N. Doc. CCPR/C/37 (1989).

The Court has also recognized the concept of the intersectionality of discrimination, noting that “identifiable subgroups of women suffer from discrimination throughout their lives based on more than one factor combined with their sex, which increases their risk of suffering acts of violence and other human rights violations.”¹⁰⁷

47. Article 6 of the Convention of Belem do Para further requires El Salvador to respect the right of women to be free from all forms of discrimination and to be “valued...free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.” The rights to equality and non-discrimination on the basis of “sex” are also recognized in other international human rights instruments to which El Salvador is party, including the ICCPR,¹⁰⁸ the ICESCR,¹⁰⁹ and the CEDAW.¹¹⁰
48. While Articles 128 and 129 of El Salvador’s Penal Code, which criminalize homicide, are neutral on their face, they have been abused to prosecute and convict women and girls who have undergone miscarriages or stillbirths or suffered other obstetric emergencies.¹¹¹ Thus, these articles have a discriminatory effect because they criminalize reproductive outcomes that only women suffer and the pursuit of healthcare services only they need. As the UN Working

¹⁰⁷ *I.V. v Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 329, paras. 247 (Nov. 30, 2016).

¹⁰⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, arts 2(1), 3, 26, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR] (art 2(1): each State Party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as...sex”; art 3: State Parties undertake “to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”; and art 26: “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as...sex”).

¹⁰⁹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, arts 2(2), 3, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR] (art 2(2): State Parties undertake “to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to...sex”; and art 2: State Parties undertake “to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”).

¹¹⁰ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (*entered into force* Sep. 3, 1981) [hereinafter CEDAW] (art 1 describes discrimination against women as meaning: “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”).

¹¹¹ See Report No. 153/18, *supra* note 1, at para. 42. (noting that “many women who suffer obstetric complications or miscarriages are convicted of aggravated homicide and sentenced to up to 40 years in prison, based on the suspicion of having induced an abortion and in possible violations of their right to due process”).

Group on Arbitrary Detention has previously found, “public policies that restrict the right to personal liberty by criminalizing conduct related to the consequences of a lack of access to and enjoyment of the highest attainable standard of health, or of obstetric violence, or which criminalize the exercise of women’s reproductive rights, must be considered to be prima facie discriminatory.”¹¹² Likewise, the CEDAW Committee has made clear that Article 12 of CEDAW forbids “barriers to women’s access to appropriate health care includ[ing] laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”¹¹³

49. As documented in the cases of Evelyn Hernandez and Diana, and as previously found by the UN Working Group on Arbitrary Detention, prosecutions for aggravated homicide in El Salvador also often rely on stereotypes regarding the role of women, in particular the concept that “women, even when in a state of serious ill health and defenseless owing to an obstetric emergency, must assume the role of a mother and put the life potentially resulting from their pregnancy above their own life, even when they are unconscious.”¹¹⁴ For instance, in Evelyn Hernandez’s case, as documented in the TrialWatch Fairness Report, the prosecution asserted that “it is proven that ‘Evelyn intended to commit a homicide by the hiding of her pregnancy and childbirth for fear that her parents [would] retaliate against her ... she had a boyfriend and hid the relation from her parents ... therefore she planned to murder her child.’”¹¹⁵ This “unsubstantiated ascription of intent” relies heavily on unlawful gender stereotypes.¹¹⁶ Likewise, in Diana’s case, the authorities immediately characterized her case as homicide, despite the fact that “[t]he authorities had notice of Diana’s mental health condition from the outset of the investigation.”¹¹⁷ Instead, they “discount[ed] alternate explanations for the child’s death.”¹¹⁸

¹¹² Opinion No. 68/2019, *supra* note 97, at para. 115.

¹¹³ CEDAW Committee, *General Comment 24: Article 12 of the Convention (Women and Health)*, para. 14, U.N. Doc. HRI/GEN/1/Rev.9 (Vol.11) (2008).

¹¹⁴ Opinion No. 68/2019, *supra* note 97, at para. 71.

¹¹⁵ Fairness Report on the Case Against Evelyn, *supra* note 54, at 22.

¹¹⁶ *Id.*

¹¹⁷ Fairness Report on the Case Against Diana, *supra* note 69, at 14.

¹¹⁸ *Id.*

50. This is consistent with the findings of the HHR Study.¹¹⁹ The Study documents how even in cases where the judge acknowledged the fetus died from natural causes, they “nevertheless condemn[ed] women of aggravated homicide because, *as mothers*, they should have done more.”¹²⁰ In 16 cases covered by the HRR Study, reference is made to the “motherly” nature of women in order to find that a certain woman has not met such expectations, then illogically leaping to the conclusion that the woman is guilty of the aggravated homicide of her child.¹²¹ This kind of discrimination is especially pronounced in cases of women with previous children,¹²² as was the case with respect to Manuela, Diana, and 15 other Salvadoran women summarized in the chart in the Appendix.

51. Relatedly, the authorities frequently rely on rumors of infidelity or a forbidden relationship.¹²³ For instance, the court in Manuela’s case referred to her alleged infidelity. In Evelyn’s case, the prosecutor stressed the idea of her ‘secret boyfriend.’ Salvadoran prosecutors and courts frequently rely on witness testimony, which can include such rumors, as opposed to forensic evidence.¹²⁴ For instance, in Evelyn Hernandez’s case, the main witness for the prosecution’s assertion that Ms. Hernandez had known she was pregnant was “health worker Marjorie Lizeth Gonzalez de Mauricio, [who] could only confirm that there were rumors Ms. Hernandez was

¹¹⁹ Viterna & Bautista, *supra* note 15, at 88 (providing examples of prosecutors arguing “that mothers should always know when they are pregnant; mothers should be able to tell the difference between labor pains and the urge to defecate; mothers should know when it is necessary to seek medical care to protect their unborn babies; and mothers should act to protect their unborn or newborn babies even when suffering a severe medical crisis and losing consciousness.”).

¹²⁰ *Id.* at 89 (emphasis added). *See also id.* at 87 (comparing treatment of women with those charged with gang murders and noting that “gang murders are typically charged only with ‘homicide,’ while these women are charged with ‘aggravated homicide’ due to the relationship between mother and child.”).

¹²¹ *Id.* at 88 (“[r]ather than presenting actual evidence, state personnel justified their prosecution decisions by citing how the accused women violated social expectations of motherhood.”).

¹²² *Id.* (citing one judge’s decision: “(the defendant) has two other children, and therefore knows what it means to give birth, and knows the care that she should take with a newborn.”).

¹²³ This was the case for Manuela and Mirna Isabel Ramirez de Martínez. *See, e.g.*, Jonathan Watts, “El Salvador: where women are thrown into jail for losing a baby,” THE GUARDIAN (Dec. 17, 2015), <https://www.theguardian.com/global-development/2015/dec/17/el-salvador-anti-abortion-law-premature-birth-miscarriage-attempted-murder> (“Even though her baby survived, she was accused of attempted murder because the neighbour claimed the child had been conceived with another man during an affair.”).

¹²⁴ U.S. Department of State, “2019 Country Reports on Human Rights Practices: El Salvador,” (last visited Feb. 10, 2021), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/el-salvador/> (“Legal experts pointed to an overreliance on witness testimony in nearly all cases, as opposed to the use of forensics or other scientific evidence. The justice system lacked DNA analysis and other forensic capabilities”).

pregnant. She further stated that Ms. Hernandez and members of Ms. Hernandez’s family had explicitly told her that Ms. Hernandez was not pregnant.”¹²⁵

52. The CEDAW Committee has explained that states must eliminate reliance on bias and gender stereotypes in judicial proceedings.¹²⁶ Likewise, the UN Human Rights Committee has explained that laws and policies that are infused with “gender-based stereotype[s] of the reproductive role of women primarily as mothers, and . . . [as] reproductive instruments” give rise to discrimination¹²⁷ Additionally, this Court has also held that “gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them.”¹²⁸ The kinds of stereotyped ascriptions of intent and reliance on rumors described above run afoul of these standards.

53. Further, as demonstrated by the cases of Evelyn Hernandez, Diana, and the other women described in this brief, many of those who are prosecuted for obstetric emergencies are young, poor, rural. This perpetuates intersectional discrimination against subgroups of women who are among the most vulnerable in El Salvador. In the cases of *Mellet v. Ireland* and *Whelan v. Ireland*, the UN Human Rights Committee found that an Irish law that denied women the right to terminate their pregnancies after discovering fatal fetal impairments constituted gender-based discrimination. The Committee explained that the law forced women to either carry to term unviable pregnancies or seek abortions overseas—an option only available to those of sufficient means. The Committee found that “the differential treatment . . . created a legal distinction between similarly-situated women which failed to adequately take into account . . . medical needs and socioeconomic circumstances.”¹²⁹ Similarly, among El Salvador women,

¹²⁵ American Bar Association, “Women in El Salvador Charged with Murder for Failing to Seek Neonatal Care is Acquitted,” (last visited Feb. 10, 2021), https://www.americanbar.org/groups/human_rights/reports/neonatal-murder-trial-el-salvador/.

¹²⁶ CEDAW Committee, *General Recommendation 33 on women’s access to justice*, paras. 26, 28 U.N. Doc. CEDAW/C/GC/33 (2015) (“Often judges adopt rigid standards about what they consider to be appropriate behavior for women and penalize those who do not conform to these stereotypes. . . . 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.”).

¹²⁷ See *Mellet v. Ireland*, Human Rights Committee, Commc’n No. 2324/2013, para. 7.11, U.N. Doc. CCPR/C/116/D/2324/2013.

¹²⁸ *Artavia Murillo et al v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 257, para. 302 (Nov. 28, 2012).

¹²⁹ Human Rights Committee, Commc’n No. 2425/2014, para 7.12.

those who suffer obstetric complications and are able to afford access to private health care do not appear to be prosecuted at the same rate as women from low socioeconomic backgrounds who can only access the public health care system.

54. To the extent El Salvador asserts that these prosecutions are justified by the protection of the life of the unborn,¹³⁰ the argument does not withstand scrutiny.¹³¹ Indeed, in the *Case of Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, where the Court analyzed Costa Rica’s ban on in vitro fertilization, the Court held that Article 4(1) of the American Convention, which protects the right to life, in general, from the moment of conception, “should not be understood as an absolute right, the alleged protection of which can justify the total negation of other rights ... To the contrary, this approach denies the existence of rights that may be the object of disproportionate restrictions owing to the defense of the absolute protection of the right to life, which would be contrary to the protection of human rights, an aspect that constitutes the object and purpose of the treaty.”¹³²

55. For the reasons set forth above, El Salvador’s use of its homicide laws to prosecute obstetric emergencies violates Salvadoran women’s rights to equality and non-discrimination.

ii. El Salvador’s Criminalization of Obstetric Emergencies Violates Salvadoran Women’s Right to Health

56. The right to health is recognized in the Protocol of San Salvador, as well as the ICESCR and CEDAW. While the IACtHR is not competent to hear claims under these international and

¹³⁰ See, e.g., The Center for Reproductive Law and Policy, *Persecuted Political Process and Abortion Legislation in El Salvador: A Human Rights Analysis* (2001), 36 (At the time of the amendments to art 1 of the Constitution the Health Minister stated that his department “completely agreed with this amendment, because a human being begins when the sperm joins the ovum...no one has the right to interrupt life” and the deputies in the Legislative Assembly who supported amendments to article 1 of the Constitution “declared what was at stake was the right to life.”).

¹³¹ Cf. *María Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. Comm’n H.R., Report No. 04/01, OEA/Ser.L/V/II.95 Doc. 7, para. 31 (2001) (discussing need for “reasonable and objective criteria”). See also *Gabriel Oscar Jenkins v. Argentina*, Case 12.056, Inter-Am. Comm’n H.R., Report No. 53/16, OEA/Ser.L/V/II.22 Doc. 5 para. 139 (2016) (discussing test of legitimacy, suitability, necessity, and proportionality).

¹³² *Artavia Murillo et al v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 257, para. 258 (Nov. 28, 2012).

regional instruments, the Court has held that it can address the right to health pursuant to Article 26 of the American Convention.¹³³

57. In the case of *Poblete Vilches et al. v Chile* the Court enunciated four principles States Parties must respect: to implement appropriate regulations to ensure quality services; to provide health services in accordance with the availability, accessibility, acceptability and quality framework (the “AAAQ framework”); to ensure equal treatment free from discrimination on the basis of “race, color, sex... economic status...or any other social condition”¹³⁴; and to establish official supervision and monitoring mechanisms for both public and private health care facilities.¹³⁵ The right to health may be achieved progressively, but in all circumstances must be respected without discrimination.

58. El Salvador’s criminalization of obstetric emergencies violates the AAAQ framework and is discriminatory. First, the ICESCR Committee has found that in the context of sexual and reproductive health rights, States must “repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine access by individuals or a particular group to sexual and reproductive health facilities, services, goods and information.”¹³⁶ The criminalization of obstetric emergencies, the pressure on health professionals to report potential abortions,¹³⁷ and the resulting fear of seeking treatment all contravene this obligation.¹³⁸

59. The cases of Evelyn Hernandez and Diana exemplify the catch-22. In both cases, after an out-of-hospital birth, they arrived at a public hospital for medical treatment and were reported to the police by healthcare professionals. They were handcuffed to their beds. As in Manuela’s

¹³³ American Convention, art. 26. *See, e.g.,* *Poblete Vilches et al v. Chile*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 349, paras. 110, 117 (Mar. 8, 2018); *Casul Piveral et al v. Guatemala*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 359, para. 99.

¹³⁴ American Convention, art. 1(1).

¹³⁵ *Poblete Vilches et al v. Chile*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 349, paras. 119, 124 (Mar. 8, 2018).

¹³⁶ U.N. Econ. & Soc. Council, Comm. On Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social, and Cultural Rights)*, para. 49, U.N. Doc. E/C/12/GC/22 (2016).

¹³⁷ For instance, in Manuela’s case, the doctor reported that “her having given birth appeared to have been ‘the result of committing a crime.’” Report No. 153/18, *supra* note 1, at para. 130.

¹³⁸ On the Brink of Death Report, *supra* note 101, at 23.

case, extraneous information about Diana was reported to the authorities, including “the number of her previous sexual partners.” It appears that non-medical personnel participated in Diana’s gynecological examination, compounding the humiliation and violation of her right to privacy.¹³⁹ This cannot but have a dissuasive effect on women who have undergone out-of-hospital emergencies and need treatment. As the CEDAW Committee has made clear, the failure to protect confidentiality of patients “may deter women from seeking advice and treatment and thereby adversely affect their health and well-being.”¹⁴⁰

60. Second, as discussed above, the aggravated homicide law, in its application, discriminates against women—in particular, young women and girls from low socioeconomic backgrounds and rural areas. It is these women who use the public hospitals and who may be deterred from seeking health services they need for fear of being reported. This discrimination played out in the cases of Manuela, Evelyn Hernandez and Diana: three women who, due to their socioeconomic position, were forced to seek medical assistance at a public hospital after having suffered what appear to have been obstetric emergencies at home and who were reported by their health care professionals on suspicion of having an abortion.

iii. El Salvador’s Reporting Requirements Violate Salvadoran Women’s Right to Privacy

61. The right to privacy in El Salvador is protected by Article 11 of the American Convention, Article 5 of the American Declaration, and Article 17 of the ICCPR. Article 11 of the American Convention prohibits “arbitrary or abusive interference” with privacy.¹⁴¹ Article 135 of El Salvador’s Penal Code, which criminalizes “auxiliary activities” related to an abortion,¹⁴² and Article 312, which requires doctors to report crimes, often result in violations of these rights.

¹³⁹ Fairness Report on the Case Against Diana, *supra* note 69, at 26. *Cf. infra* discussing the right to privacy.

¹⁴⁰ CEDAW Committee, *General Comment 24: Article 12 of the Convention (Women and Health)*, para. 12, U.N. Doc. HRI/GEN/1/Rev.9 (Vol.11) (2008). Likewise, the UN Human Rights Committee has also recommended that El Salvador “should ensure that the professional secrecy of medical staff and patient confidentiality are observed.” Human Rights Committee, *Concluding Observations at the Seventh Periodic Report of: El Salvador*, para. 17, U.N. Doc. CCPR/C/SLV/CO/7 (2018).

¹⁴¹ American Convention, art. 11.

¹⁴² Penal Code, Tit. I, Chap II, Art. 135 (“Auxiliary activities of the aforementioned professions, when they are engaged in said practice, will be sanctioned with prison of six to twelve years. The penalty of disqualification will also be imposed special for the exercise of the profession or activity for the same period.”).

62. According to the UN Human Rights Committee, “legal dut[ies] [imposed] upon doctors and other health personnel to report cases of women who have undergone abortion” violate Article 17 of the ICCPR.¹⁴³ Likewise, the IACHR concluded that El Salvador’s reporting requirement violated Manuela’s right to privacy.¹⁴⁴

63. There is also evidence that El Salvador’s approach to reproductive health violates the right to privacy in practice. Even if sharing of an individual’s personal information were properly authorized, the disclosure would have to be limited to the extent reasonable and necessary to achieve the objective behind the disclosure requirement.¹⁴⁵ The IACHR concluded that in Manuela’s case extraneous medical information, including when she began having sexual relations, and whether she had contracted any sexually transmitted diseases, was reported to the authorities. Because this was unrelated to the alleged crime, the IACHR found that it violated her right to privacy.¹⁴⁶ Nor does Manuela’s experience seem isolated. For instance, in Diana’s case, doctors reported her sexual history to the police. Thus, the TrialWatch Fairness Report concluded that Diana’s right to privacy had likewise been violated.¹⁴⁷

iv. El Salvador’s Criminalization of Obstetric Emergencies Frequently Gives Rise to Arbitrary Detention and Fair Trial Violations

64. The IACHR found that Manuela had been arbitrarily detained and that her criminal proceedings were marred by fair trial violations. But Manuela is not unique. As discussed

¹⁴³ Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, para. 20, U.N. Doc. CCPR/C/21/Rev. 1/Add.10 (2000) (discussing “where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion” as an example of where “States may fail to respect women’s privacy”).

¹⁴⁴ Report No. 153/18, *supra* note 1, at paras. 132-137. (The IACHR considered that the hospital sending Manuela’s medical records to the Office Public Prosecutor constituted a restriction on the right to privacy. The IACHR held that because “the criminal legislation on doctors’ obligation to report cases involving obstetric emergencies is not clear” nor “is the procedure that a doctor must follow to determine whether an obstetric emergency could be the result of the commission of a crime...” the restriction on Manuela’s privacy did not meet the requirement of legality. The IACHR also held that the sharing of information to do with “the sexual background of [Manuela], including when she began having sexual relations, and the sexually-transmitted diseases she had” failed to fulfil the requirement of legitimacy because it went beyond the objective behind the disclosure requirement).

¹⁴⁵ *Id.* at para. 132.

¹⁴⁶ *Id.* at paras. 131, 136.

¹⁴⁷ Fairness Report on the Case Against Diana, *supra* note 69, at 25-26.

above, the TrialWatch Fairness Reports on the cases of Evelyn Hernandez and Diana show how this can unfold when obstetric emergencies are prosecuted as aggravated homicide.

65. First, Manuela was interrogated by both physicians and police officials while she was receiving emergency medical care as to whether she induced an abortion.¹⁴⁸ Likewise, Diana’s defense counsel asserted that non-medical personnel were present when she underwent a gynecological exam at the hospital.¹⁴⁹ Similar procedures have been documented in the cases of a number of other Salvadoran women, with abusive interrogation practices often occurring either immediately following delivery or while receiving medical treatment.¹⁵⁰ The interrogation of women while incapacitated violates international standards forbidding the use of coercion to gather evidence. For example, in the case of *Yuzepchuk v. Belarus*, the UN Human Rights Committee made clear that “the Covenant must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.” That case involved the use of pills and alcohol that rendered the defendant unable to think clearly to induce a confession (among other mistreatment).¹⁵¹ Analogously, interrogating someone while she is the midst of receiving crucial medical treatment—and immediately following a trauma—is coercive.
66. The IACHR also found a violation of Manuela’s right to counsel because she was not represented during the preliminary investigation.¹⁵² Likewise, Diana’s right to counsel was at issue, with her lawyers denied access to the psychiatric hospital where she was detained on multiple occasions.¹⁵³ Her lawyers also reported that on the occasions they were able to consult with her, “she was so heavily sedated that it was difficult to discuss strategy and prepare an effective defense.”¹⁵⁴ Other Salvadoran women experienced similar frustrations. For instance,

¹⁴⁸ Report No. 153/18, *supra* note 1, at para. 9.

¹⁴⁹ Fairness Report on the Case Against Diana, *supra* note 69, at 25. The reason for their presence is not clear. *Id.*

¹⁵⁰ Marginalized, Persecuted, and Imprisoned Report, *supra* note 97, at 12, 56; Opinion No. 68/2019, *supra* note 97, at paras. 52, 101.

¹⁵¹ *Yuzepchuk v. Belarus*, Human Rights Committee, Comm’n No. 1906/2009, paras. 2.2, 8.2, U.N. Doc. CCPR/C/112/D/1906/2009.

¹⁵² Report No. 153/18, *supra* note 1, at para. 21.

¹⁵³ Fairness Report on the Case Against Diana, *supra* note 69, at 105.

¹⁵⁴ *Id.*

one woman said that she had spent a mere five minutes with her defense counsel before she was convicted.¹⁵⁵

67. These practices violate the right to counsel under Article 8(2)(d) of the American Convention.¹⁵⁶ First, defendants must be granted “prompt access to counsel.”¹⁵⁷ The IACHR has made clear that this requires access to counsel from the first moment a defendant is interrogated by the authorities,¹⁵⁸ even before being charged with a crime. Further, as explained in the UN Basic Principles on the Role of Lawyers, individuals must have “adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality.”¹⁵⁹ The European Court has thus found violations of the right to counsel where a defendant was given fifteen minutes to consult his lawyer before a hearing.¹⁶⁰

68. The IACHR further found that Manuela was subjected to arbitrary detention. Likewise, the TrialWatch Fairness Reports concluded that both Evelyn and Diana were arbitrarily detained. In Diana’s case, the decision to detain her was based on the same kinds of assumptions that underlay the detention order in Manuela’s case. These assumptions failed to take into account Diana’s individual circumstances, including the fact that she had limited means and suffered from psychiatric issues that would have prevented her from fleeing the country.¹⁶¹

69. Such practices violate the right to liberty under Article 7(3) of the American Convention. As the IACHR has noted, reliance only on the gravity of an alleged crime as a basis for pretrial detention is simply “not ... justification enough for detention.”¹⁶² This is consistent with

¹⁵⁵ Jonathan Watts, *supra* note 116.

¹⁵⁶ They may also violate the right to prepare a defense under article 8(2)(c).

¹⁵⁷ Human Rights Committee, *General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, para. 34, U.N. Doc. CCPR/C/GC/32, (2017).

¹⁵⁸ Castillo Petruzzi v. Peru, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 52, paras. 146, 149 (1999).

¹⁵⁹ United Nations, *Basic Principles on the Role of Lawyers*, para 8, (1990), available at <https://www.refworld.org/docid/3ddb9f034.html>.

¹⁶⁰ Sakhnovskiy v. Russia, App. No. 21272/03, paras. 63, 103 (Nov. 2, 2010), available at <http://hudoc.echr.coe.int/fre?i=001-101568>.

¹⁶¹ Fairness Report on the Case Against Diana, *supra* note 69, at 20.

¹⁶² Report No. 153/18, *supra* note 1, at para. 95.

international jurisprudence. Indeed, the UN Working Group on Arbitrary Detention came to a similar conclusion in the cases of three Salvadoran women (one of them Evelyn Hernandez) due to the same phenomenon: a failure of the authorities to justify pretrial detention.¹⁶³ Likewise, the UN Human Rights Committee has clearly stated that “[p]retrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.”¹⁶⁴

70. Finally, at Manuela’s trial, prosecutors breached best practices, attempting to prove the crime of aggravated homicide through omission, as the “mother of her newborn child . . . was required to fulfill her duty to act or perform in order to prevent the death of her child.”¹⁶⁵ The IACHR noted that “when factual gaps emerged on aspects that were important for determining criminal responsibility, they were filled with stereotypes.”¹⁶⁶ This discriminatory and gender-stereotyped twisting of the evidence also characterized the proceedings against Evelyn and Diana. For instance, in Evelyn’s case, the prosecution’s theory was predicated upon an assumption—against the testimony of neighbors and others—that Evelyn should have been able to act to save her child, even though she was in fact unconscious and bleeding heavily.¹⁶⁷

71. This is all too often the case: The Special Rapporteur on Violence Against Women, Its Causes, and Consequences reported being informed of “several cases [in El Salvador] in which women who had suffered a miscarriage or had a complicated delivery with no medical assistance and where death occurred were automatically accused of aggravated homicide”¹⁶⁸ Salvadoran Courts rely on the remains of the fetus (and sometimes ‘proof’ that there had been air in the lungs) to convict a woman of a high crime, when in fact any number of factors can cause an obstetric emergency, including alcohol use, obesity, secondhand smoke, and even the father’s

¹⁶³ Opinion No. 68/2019, *supra* note 97, at paras. 91-97(citing a lack of “individuals analysis justifying the need for pretrial detention.”).

¹⁶⁴ Human Rights Committee, *General Comment No. 35*, para. 38, U.N. Doc. CCPR/C/GC/35, (2014).

¹⁶⁵ Sentencing Court of Cojutepeque, Department of Cuscatlán, Judgment, August 19, 2019, at 47.

¹⁶⁶ Report No. 153/18, *supra* note 1, at para. 156.

¹⁶⁷ Fairness Report on the Case Against Evelyn Hernandez, *supra* note 54, at 16-17.

¹⁶⁸ Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes, and consequences*, para. 68, U.N. Doc. A/HRC/17/26/Add.2 (Feb. 14, 2011).

age,¹⁶⁹ and when the causes of fetal death could include, for instance, meconium aspiration, an issue that commonly arises in childbirth.¹⁷⁰

72. Omissions and conclusions without a basis in evidence breach best practices governing the role of prosecutors and may result in violation of the right to be presumed innocence under Article 8(2) of the American Convention by reversing the burden of proof. The IAP Guidelines provide that prosecutors should proceed only when a case is “well-founded upon evidence reasonably believed to be reliable,” and should decline to prosecute a case “beyond what is indicated by the evidence.” Likewise, as explained by the IACtHR, “in criminal proceedings, the State bears the burden of proof. The accused is not obligated to affirmatively prove his innocence or to provide exculpatory evidence.”¹⁷¹ Where the state—as in Evelyn’s and Manuela’s cases—places the burden on the defendant to show that she was either unaware of her pregnancy or could not have intervened (as opposed to the reverse), this violates both best practices and the right to be presumed innocent. The court likewise breaches the presumption of innocence where it unquestioningly accepts prosecutorial speculation. For instance, in *Ashurov v. Tajikistan*, the UN Human Rights Committee found a breach of the presumption of innocence where the court failed to consider defense arguments and gaps in the prosecution case.¹⁷² In Manuela’s case, the court based its guilty verdict on the gender stereotyped arguments put forward by the prosecution, including that “it cannot be speculated that [Manuela] did not know anything and that another person had thrown the child into the sceptic tank because the maternal instinct is to protect the child.”¹⁷³

VI. BROADER IMPACTS OF EL SAVLADOR’S CRIMINALIZATION OF OBSTETRIC EMERGENCIES

¹⁶⁹ Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1658 (Sep. 2008).

¹⁷⁰ Fairness Report on the Case Against Evelyn Hernandez, *supra* note 54, at 17.

¹⁷¹ Zegarra Marín v. Peru, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 331 (Feb. 15, 2017), unofficial brief available at <https://www.corteidh.or.cr/cf/Jurisprudencia2/overview.cfm?doc=1786&lang=en>.

¹⁷² *Ashurov v. Tajikistan*, Human Rights Committee, Commc’n No. 1348/2005, para. 6.7, U.N. Doc. CCPR/C/89/D/1348/2005 (Mar. 20, 2007).

¹⁷³ Report No. 153/18, *supra* note 1, at para. 156.

73. El Salvador's prosecution of obstetric emergencies as aggravated homicide has broader impacts.¹⁷⁴ In particular, the country's policies increase the risk of mistreatment in hospitals and in detention. In the hospital, Manuela, Evelyn and Diana were all handcuffed to their hospital beds. This constitutes cruel, inhuman, or degrading treatment.¹⁷⁵ Indeed, the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment has specifically found "the use of . . . instruments [to restrain women during and after labor] violates international standards and may be said to constitute cruel and unusual practices."¹⁷⁶

74. Further, women convicted of abortion or 'aggravated homicide of a child' are at higher risk of sexual abuse at the hands of prison authorities or other detained individuals.¹⁷⁷ They may also experience physical violence while detained, typically as punishment for the crime they are accused of committing upon the inmates' learning of it.¹⁷⁸

¹⁷⁴ Likewise, the total prohibition on abortion has profound implications for the physical and mental health of Salvadoran women and girls. In general, restrictive abortion laws give rise to greater maternal mortality. According to the Ministry of Health, between 2011 and 2015 about 90 women and girls died from reproductive health complications. Of the 90, 63 died from being denied treatment because of risk to the fetus, 14 died from abortion-related complications, and 13 from ectopic pregnancies. The latter figure is most alarming as it signifies a dereliction of professional duty by health care professionals to provide medical assistance that could potentially save the life of a woman or girl to instead preserve the fetus. These trends are especially concerning because maternal mortality and morbidity disproportionately affect adolescent girls aged between 15-19 years and El Salvador has one of the highest rates of adolescent pregnancy in the region. While the physiological health impacts of the policy are profound, so too are the mental health impacts. According to data from the Ministry of Health, suicide is the cause of 57% of the deaths of pregnant females aged 10 to 19.

¹⁷⁵ The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (also known as "the Bangkok Rules") explicitly assert "[i]nstruments of restraint shall never be used on women during labour, during birth and immediately after birth." U.N. General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, U.N. Doc. A/C.3/65/L.5, October 6, 2010, Rule 24. The U.N. Committee against Torture has called attention to "the treatment of detained women ... including gender-based humiliation and incidents of shackling of women detainees during childbirth." Committee against Torture, *Conclusions and Recommendations: United States of America*, para. 33, U.N. Doc. CAT/C/USA/C/2 (Jul. 25, 2006). So have the U.N. Human Rights Committee and UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Human Rights Committee, *Concluding Observations: United States of America*, para. 33, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, para. 41, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008).

¹⁷⁶ Economic and Social Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, paras. 53-54, U.N. Doc. E/CN.4/1999/68/Add.2 (Jan. 4, 1999).

¹⁷⁷ See, e.g., Center for Reproductive Rights, "New Human Rights Case Filed on Behalf of Salvadoran Women Who Miscarried and Are Wrongfully Imprisoned," Press Releases, (Dec. 3, 2015), <https://reproductiverights.org/press-room/new-human-rights-case-filed-on-behalf-of-salvadoran-women-who-miscarried-and-are-wrongful>.

¹⁷⁸ Marginalized, Persecuted, and Imprisoned Report, *supra* note 97, at 12 ("Isabel Cristina was not only forced to undress in public while in prison but also raped by Ilopango prison guards"); Asier Vera, "Yo fui a la cárcel por sufrir un aborto," EL MUNDO (Sep. 6, 2019), <https://www.elmundo.es/cronica/2019/09/06/5d67ab2afdddfa89f8b463c.html> ("De su paso por la prisión, donde estuvo desde los 19 a los 30 años, recuerda que al día siguiente de entrar otras reclusas la golpearon al enterarse del

75. Finally, women convicted of such ‘crimes’ may not be given appropriate treatment. For instance, Manuela received inadequate treatment in prison following her diagnosis with nodular sclerosis Hodgkin’s lymphoma.¹⁷⁹ Other Salvadoran women experienced similar issues,¹⁸⁰ including Diana.¹⁸¹ This compounds the other violations of their rights.¹⁸²

VII. CONCLUSION

76. El Salvador’s criminalization of obstetric emergencies violates international human rights standards. It is profoundly discriminatory in practice—not just against women and girls generally, but the most vulnerable among them in particular. Further, it has significant impacts on the quality of life, healthcare and ability to access justice by Salvadoran women and girls.

77. *Amici* respectfully urge the Court to find that El Salvador violated Manuela’s rights and order the state to provide remedies, including expunging Manuela’s conviction and providing reparations. We further urge the court, consistent with the recommendations of the Commission, to order El Salvador to re-examine its use of aggravated homicide to prosecute obstetric emergencies; conduct proper training of all participants in the criminal justice system, including law enforcement, prosecutors, and judges, so as to address discriminatory gender stereotyping at all stages of investigations and prosecutions; and ensure appropriate protection of patient confidentiality in the healthcare sector.

delito por el que la acusaban. ‘Se sufre mucho, porque dormíamos 52 mujeres en la misma habitación donde sólo había dos baños. Debía dormir con otra mujer en la misma cama, mientras que la comida era fea y no nos suministraban jabón ni toallitas higiénicas, por lo que debía trabajar para otras presas lavándoles ropa para que me pagaran o me dieran estos productos.’”) (emphasis omitted).

¹⁷⁹ Report No. 153/18, *supra* note 1, at paras. 143-145.

¹⁸⁰ Center for Reproductive Rights, *supra* note 177 (Maritza denied medicine for her high blood pressure which led to health problems.).

¹⁸¹ Fairness Report on the Case Against Diana, *supra* note 69, at 27-29.

¹⁸² *García-Asto and Ramírez-Rojas v. Peru, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 137 (Nov. 25, 2005).*

VIII. APPENDIX

COMMON FEATURES IN PROSECUTIONS OF OBSTETRIC EMERGENCIES AS AGGRAVATED HOMICIDE IN EL SALVADOR (1999–present)	
Factor	How Many Out of 38
17-19 years old	12 ¹⁸³
Poor / indigent	21 ¹⁸⁴
Illiterate / poor education	18 ¹⁸⁵
Previous children	22 ¹⁸⁶
Alleged they were unaware of pregnancy	18 ¹⁸⁷
Alleged pregnancy occurred as a result of rape or sexual assault	5 ¹⁸⁸
6-9 Months Pregnant at the time of the event	20 ¹⁸⁹
Healthcare professional reported woman to the police	21 ¹⁹⁰
Handcuffed to hospital bed and arrested immediately after delivery	30 ¹⁹¹
Fetus retrieved by police (from latrine or elsewhere)	31 ¹⁹²
Fair Trial Concerns¹⁹³	38

¹⁸³ Could not find information on this for 2 of the 38 women.

¹⁸⁴ Could not find information on this for 17 of the 38 women.

¹⁸⁵ Could not find information on this for 16 of the 38 women.

¹⁸⁶ Could not find information on this for 3 of the 38 women.

¹⁸⁷ Could not find information on this for 11 of the 38 women.

¹⁸⁸ Could not find information on this for 5 of the 38 women. Four of the five women were between the ages of 17 and 19 years old, while the fifth woman's age is unknown.

¹⁸⁹ Could not find information on this for 13 of the 38 women. Only two women (of those about whom we could find this information) were below the 5-month mark at 4.5 months pregnant.

¹⁹⁰ Could not find information on this for 5 of the 38 women. 6 of the women were reported by other members of the community, including their employers, neighbors, or police officers.

¹⁹¹ Could not find information on this for 6 of the 38 women.

¹⁹² Could not find information on this for 7 of the 38 women.

¹⁹³ Concerns include: arbitrary detention, not properly notified of charges, questioning without representation and/or while the defendant was hospitalized, lack of proper defense, inadequate representation / failure to appear, lack of evidence, gender stereotypes, and failure to respect presumption of innocence.

Detained for 2+ years	28 ¹⁹⁴
Detained for 8+ years	16 ¹⁹⁵
Currently imprisoned	14 ¹⁹⁶

¹⁹⁴ Could not find information on this for 5 of the 38 women. Diana was included in this figure because she was detained for a significant period of time that was just shy of 2 years detention (21 months).

¹⁹⁵ Could not find information on this for 5 of the 38 women.

¹⁹⁶ While 14 of the women in our data set have yet to be acquitted or otherwise released from detention, as of July 2020, multiple sources reported that 18 women remain imprisoned on charges of aggravated homicide for suffering an obstetric emergency. Sally Palomino, “Bukele Government Ignores UN Claim to Release Women Imprisoned for Abortion,” EL PAÍS (Jul. 24, 2020), <https://elpais.com/internacional/2020-07-24/el-gobierno-de-bukele-ignora-el-reclamo-de-la-onu-para-liberar-a-mujeres-encarceladas-por-abortar.html>; Liz Ford, “El Salvador Woman Freed after Six Years in Jail Following Stillbirth,” THE GUARDIAN (Sep. 24, 2020), <https://www.theguardian.com/global-development/2020/sep/24/el-salvador-woman-freed-after-six-years-in-jail-following-stillbirth>.

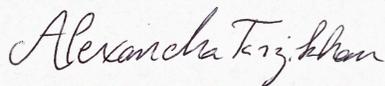
SIGNATURES OF *AMICI CURIAE*



Professor Thomas F. Geraghty, Interim Director



Professor Juliet Sorensen, Supervising Faculty



Alexandra Tarzikhan, Schuette Clinical Fellow
in Health and Human Rights



Meredith Heim, Law Student



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