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# El Salvador: The Case Against Diana

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**TRIALWATCH FAIRNESS REPORT**  
**A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE**

## ABOUT THE AUTHORS

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Staff at the American Bar Association Center for Human Rights helped draft this report. The **American Bar Association** (ABA) is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The **ABA Center for Human Rights** has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries. It is an implementing partner in the Clooney Foundation for Justice's TrialWatch initiative.

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# EXECUTIVE SUMMARY



**Juliet Sorensen, Clinical Professor of Law at Northwestern University and member of the TrialWatch Experts Panel, assigned these proceedings a grade of C:**

Diana was prosecuted for aggravated homicide following an out-of-hospital delivery and obstetric complications. Despite the ultimate dismissal of the charges against her, the proceedings entailed several violations of her due process rights as well as the abuse of other international standards. The authorities arbitrarily detained Diana, prevented her from challenging her detention in person, hindered her communications with counsel, and undermined her ability to prepare her defense. Furthermore, the investigation violated her right to privacy. Finally, Diana was subjected to conditions that violated the ban on cruel, inhuman, and degrading treatment as well as the right to humane treatment, including the denial of adequate medical care and shocking mismanagement of her mental health.

The record and monitors' notes reflect not only the above violations but also that Diana suffered harm as a result. However, because the charges were dismissed at an early stage, the proceedings were given a "C" under the grading methodology found in the Annex.

In June 2019, the American Bar Association's Center for Human Rights monitored criminal proceedings against Diana<sup>1</sup> in El Salvador as part of the Clooney Foundation for Justice's TrialWatch initiative. Diana was prosecuted for aggravated homicide in connection with an out-of-hospital delivery. Although the San Salvador court ultimately dismissed the charges against Diana for lack of evidence, the authorities' conduct throughout the proceedings violated a number of her rights, including the right to liberty, the right to freedom from cruel, inhuman or degrading treatment, and the right to privacy.

Diana is a 31-year old woman from a poor urban community in El Salvador. As documented by mental health professionals, she suffers from psychological issues, including delusions and disordered thinking. On October 31, 2018, Diana gave birth at home, unassisted. The child did not survive and Diana experienced medical complications. She was transported to a public hospital, where she underwent emergency medical procedures.

According to defense counsel, doctors called the police. Investigators arrived soon thereafter, handcuffing Diana to her hospital bed. Two days following her admission to the hospital, Diana was charged with aggravated homicide and transferred to a local jail,

<sup>1</sup> This report uses fictitious names for Diana and her family members.

then onward to a women's prison, where she was detained from November 2018 to late January 2019. From late January to May 2019, the authorities shuttled Diana between the prison and a psychiatric hospital, where she received treatment for depressive episodes.

During this pretrial stage, the authorities repeatedly violated El Salvador's obligations under the American Convention on Human Rights (American Convention) and the International Covenant on Civil and Political Rights (ICCPR). The court's decision to detain Diana pending trial lacked adequate justification. As established by the Human Rights Committee and Inter-American Court and Commission, pretrial detention should be the exception and is only appropriate for limited purposes: to prevent risk of flight, risk of recurrence of crime, and risk of interference with the proceedings. In evaluating the reasonableness and necessity of pretrial detention, courts must undertake an individualized assessment of the accused's situation. Vague pronouncements fail to meet this standard and reference to the severity of the charges and/or punishment is insufficient.

In Diana's case, the presiding court impermissibly relied on the severity of the potential punishment as the basis for its detention order, stating that anyone facing more than three years in prison would inevitably abscond. The court further noted that Diana could attempt to influence a key witness, yet provided no details to substantiate this concern. This vague reasoning contravened the principle that pretrial detention must be supported by an individualized assessment.

At the hearing at which pretrial detention was imposed, Diana was conspicuously absent. According to case documents, there were not enough staff to transport her from the prison to court. As such, the authorities violated not only Diana's right to freedom from arbitrary detention but also her right to appear before a judicial body to challenge her detention.

The authorities likewise appear to have violated Diana's right to adequate time and facilities for the preparation of her defense. The autopsy of the child was conducted on the day of the alleged offense and showed that the cause of death was perinatal asphyxia, a common occurrence during birth. The autopsy found no indication that the child had died from trauma or drowning. As this evidence was beneficial to the defense case, the State was mandated to disclose it under the ICCPR and American Convention. According to defense counsel, however, disclosure was delayed for months. The conduct alleged would have undermined Diana's ability to prepare her defense.

Diana's pretrial treatment raises concerns beyond the realm of due process. As noted above, doctors at the hospital where Diana sought urgent care allegedly notified the police, in line with documented patterns in El Salvador. The reporting of women on the basis of out-of-hospital deliveries and resulting obstetric emergencies violates the right to privacy. In addition, the forensic expert who oversaw Diana's gynecological examination

provided unnecessary details about her sexual history to the authorities. This conduct constituted an additional violation of her right to privacy.

Meanwhile, Diana was repeatedly subjected to maltreatment. Among other things, she was handcuffed just after giving birth - a practice that various international bodies have made clear constitutes cruel, inhuman, or degrading treatment, prohibited by the ICCPR and American Convention. The authorities also failed to provide Diana with the specialized psychiatric care she required, causing significant suffering. The denial of adequate medical care in detention violates the right to humane treatment.

More broadly, it is marginalized women like Diana who bear the brunt of El Salvador's policy of prosecuting impoverished women for pregnancy complications beyond their control. El Salvador's approach is in effect, if not by design, discriminatory on the basis of gender and class. As demonstrated by Diana's case, the consequences can be grave.



## A. POLITICAL AND LEGAL CONTEXT

The detention and prosecution of Diana is consistent with a broader pattern of gender discrimination and due process violations in El Salvador.

### *Gender Inequality and Reproductive Rights*

Gender inequality is a significant problem in El Salvador. Compared to men, women not only have lower levels of education but nearly double the rate of illiteracy.<sup>2</sup> While a large percentage of El Salvador's population is impoverished, particularly in rural areas, poverty rates for women surpass those of men.<sup>3</sup>

According to the UN Special Rapporteur on violence against women, its causes, and consequences, these disparities reflect “deeply rooted patriarchal attitudes” and have “foster[ed]” widespread gender-based violence.<sup>4</sup> A national survey carried out by El Salvador's government in 2017 found that 67 percent of Salvadoran women had experienced some form of violence in their lifetimes, with 40 percent reporting that they had been subjected to sexual violence.<sup>5</sup> According to data collected by the police, the rate of femicide is 13.49 per one hundred thousand women, among the highest in the world.<sup>6</sup>

In the realm of reproductive rights, women likewise face grave risks. El Salvador's laws on reproductive choice and family planning are severely restrictive.<sup>7</sup> Abortion has been illegal under all circumstances in El Salvador since 1998, including “rape, incest, and when the life or health of the pregnant woman or girl is [endangered].”<sup>8</sup> In 1999, Article 1 of the Constitution of El Salvador was amended to recognize the right to life from the moment of conception.<sup>9</sup>

<sup>2</sup> Amnesty International, “On the Brink of Death”, September 25, 2014, pg. 14. Available at <https://www.amnesty.org/download/Documents/4000/amr290032014en.pdf>.

<sup>3</sup> Id.

<sup>4</sup> See Human Rights Council, Report of the Special Rapporteur on violence against women, its causes, and consequences, U.N. Doc. A/HRC/17/26/Add.2, February 14, 2011, paras. 11-13.

<sup>5</sup> Ministry of the Economy and General Office of Statistics and Census, Government of El Salvador, “National Survey on Violence Against Women”, 2017. Available at [https://www.bcr.gob.sv/esp/index.php?option=com\\_k2&view=item&id=1153:redibacen-resultados-de-la-encuesta-nacional-de-violencia-contra-la-mujer-2017&Itemid=168](https://www.bcr.gob.sv/esp/index.php?option=com_k2&view=item&id=1153:redibacen-resultados-de-la-encuesta-nacional-de-violencia-contra-la-mujer-2017&Itemid=168).

<sup>6</sup> U.N. News, “67 Percent of Women Have Suffered Some Type of Violence in El Salvador”, April 17, 2018. Available at <https://news.un.org/es/story/2018/04/1431372>.

<sup>7</sup> Center for Reproductive Rights. “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador's Total Criminalization of Abortion”, 2014. Available at <https://reproductiverights.org/sites/default/files/documents/El-Salvador-CriminalizationOfAbortion-Report.pdf>.

<sup>8</sup> See Amnesty International, “El Salvador: Rape survivor sentenced to 30 years in jail under extreme anti-abortion law”, July 6, 2019. Available at <https://www.amnesty.org/en/latest/news/2017/07/el-salvador-rape-survivor-sentenced-to-30-years-in-jail-under-extreme-anti-abortion-law/>.

<sup>9</sup> Constitution of El Salvador, 1999, Article 1.

Article 133 of El Salvador's Criminal Code imposes a sentence of up to eight years imprisonment on women who obtain an abortion.<sup>10</sup> Individuals who assist women in obtaining an abortion face up to five years in prison,<sup>11</sup> while health professionals who perform an abortion face up to twelve years.<sup>12</sup> Unsurprisingly, the abortion ban has resulted in an upsurge in illegal abortions, with accompanying health risks.<sup>13</sup>

As observed by the UN Working Group on Arbitrary Detention, “[t]he ban on abortion has [also] led to the systematic criminalization of women suffering from obstetric emergencies.”<sup>14</sup> This “criminalization” has been facilitated not only by the legislative amendments enumerated above but also by the framing of obstetric emergency as homicide.

According to a study published in the *Health and Human Rights Journal*, between 1999 and 2017 at least 34 women, many of whom had undergone miscarriages or stillbirths, were convicted of “aggravated homicide” and sentenced to between 4 and 40 years in prison.<sup>15</sup> These prosecutions are particularly common with out-of-hospital deliveries. As described in the study, “[the accused’s] babies appear[ed] to have died before, during, or shortly after a complicated and unattended birth in what, had they been in the hospital, would likely have been ruled a stillbirth.”<sup>16</sup> Despite evidence of obstetric emergency, the authorities alleged that the women had either killed their babies immediately after birth or had failed to adequately assist their newborns.<sup>17</sup> The use of “aggravated homicide” charges was justified on the basis of the “relationship between mother and child.”<sup>18</sup> To note, all subsequent references to “aggravated homicide” in this report concern the alleged killing of a child by his/her mother immediately after birth, not aggravated homicide writ large.

Doctors aided the prosecution in a number of the aggravated homicide cases cited in the *Health and Human Rights Journal* study.<sup>19</sup> As documented by Amnesty International, “harsh criminal penalties for assisting in or performing abortions, and lack of legal clarity

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<sup>10</sup> Penal Code of El Salvador, 1998, Article 133.

<sup>11</sup> *Id.* at Article 136.

<sup>12</sup> *Id.* at Article 135.

<sup>13</sup> See Human Rights Committee, Concluding Observations on the Seventh Periodic Report of El Salvador, U.N. Doc. CCPR/C/SLV/CO/7, May 9, 2018, para. 15; Committee on the Elimination of Discrimination against Women, Concluding Observations on the Combined Eighth and Ninth Periodic Reports of El Salvador, U.N. Doc. CEDAW/C/SLV/CO/8-9, March 9, 2017, para. 38.

<sup>14</sup> 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) (advanced edited version), U.N. Doc. A/HRC/WGAD/2019/68, March 4, 2020, para. 50.

<sup>15</sup> Jocelyn Viterna & Jose Santos Guardado Bautista, “Pregnancy and the 40-Year Prison Sentence: How ‘Abortion Is Murder’ Became Institutionalized in the Salvadoran Judicial System”, *Health and Human Rights Journal*, Harvard University Press, 2017. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473040/>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

around patient confidentiality ... have resulted in some health professionals and hospital staff reporting women who have had abortions or miscarriages to the police.”<sup>20</sup> Health professionals fear that failure to notify the authorities could lead to charges of complicity in abortion under Article 136 of the criminal code or charges of acts of omission under Article 312, which punishes public officials and employees for not reporting criminal offenses.<sup>21</sup> According to the UN Working Group on Arbitrary Detention, “[b]etween 2002 and 2010, 57.36% of the reports registered for abortion came from health professionals.”<sup>22</sup> In such reports, the distinction between an abortion and an obstetric emergency is often elided. Women experiencing reproductive ailments are thus wary of seeking care at public hospitals.<sup>23</sup>

Notably, young women from lower socioeconomic backgrounds have been disproportionately affected by El Salvador’s criminalization of poor pregnancy outcomes, whether through health consequences, imprisonment, or both.<sup>24</sup> In a survey of 129 women prosecuted for abortion or aggravated homicide between 2000 and 2011, local organization *Agrupación Ciudadana para la Despenalización del Aborto Terapéutico, Ético y Eugenésico* found that 68% were between 18 and 25 years old, 82% had little or no income, and most hailed from “rural or marginal urban areas.”<sup>25</sup> Women on the margins typically lack access to sex education and contraception<sup>26</sup> and rely on public hospitals, where health professionals are more likely than those in private clinics to report them to the police.<sup>27</sup>

### *Legal Proceedings*

Criminal proceedings in cases of alleged abortion and alleged aggravated homicide have been marred by discriminatory practices and due process violations.

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<sup>20</sup> Amnesty International, “On the Brink of Death”, September 25, 2014, pg. 33.

<sup>21</sup> See Center for Reproductive Rights, “Manuela Toolkit”, pg. 3. Available at [https://reproductiverights.org/sites/default/files/documents/GLP\\_Manuela\\_Toolkit\\_English\\_FINAL.pdf](https://reproductiverights.org/sites/default/files/documents/GLP_Manuela_Toolkit_English_FINAL.pdf).

<sup>22</sup> 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) (advanced edited version), U.N. Doc. A/HRC/WGAD/2019/68, March 4, 2020, para. 52.

<sup>23</sup> See Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, 2014, pgs. 8, 42.

<sup>24</sup> Id. at pgs. 13-14, 16; Committee on Economic, Social, and Cultural Rights, Concluding Observations on the Combined Third, Fourth, and Fifth Periodic Reports of El Salvador, U.N. Doc. E/C.12/SLV/CO/3-5, June 19, 2014, para. 22.

<sup>25</sup> See 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), U.N. Doc. A/HRC/WGAD/2019/68, March 4, 2020, para. 51; Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, 2014, pgs. 13-14.

<sup>26</sup> See Amnesty International, “On the Brink of Death”, September 25, 2014, pgs. 17-20; Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, 2014, pg. 49.

<sup>27</sup> See Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, 2014, pgs. 14, 42, 49; Amnesty International, “On the Brink of Death”, September 25, 2014, pgs. 7, 31; Human Rights Committee, Concluding Observations on the Seventh Periodic Report of El Salvador, U.N. Doc. CCPR/C/SLV/CO/7, May 9, 2018, para. 15.



Abuses have been documented from the outset of criminal investigations, with authorities handcuffing pregnant women suspected of abortion or aggravated homicide immediately after delivery and in some cases, while receiving medical treatment.<sup>28</sup>

Lengthy and arbitrary pretrial detention is likewise a significant problem.<sup>29</sup> The Working Group on Arbitrary Detention recently found violations of the right to freedom from arbitrary detention in two cases of alleged aggravated homicide and one of alleged attempted aggravated homicide in El Salvador, citing a lack of “individualized analysis justifying the need for pretrial detention.”<sup>30</sup> According to the Working Group, judicial authorities had imposed “custodial measures that [we]re unnecessary, disproportionate, without legitimate ends, and which seem[ed] unreasonable in their implementation.”<sup>31</sup>

Proceedings against women charged with aggravated homicide have also been compromised by gender discrimination. Following a visit to El Salvador, the Special Rapporteur on violence against women, its causes, and consequences documented cases in which women were convicted despite the prosecution’s failure to fulfil its evidentiary burden.<sup>32</sup> In such proceedings, “negative stereotypes around the concept of the ‘bad mother’ and the ‘murderous mother’ are said to prevail.”<sup>33</sup> As noted by the Health and Human Rights Journal study:

Rather than presenting actual evidence, state personnel justified their prosecution decisions by citing how the accused women violated social expectations of motherhood. For example, they argued 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

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<sup>28</sup> See Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, 2014, pgs. 12, 56; 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), U.N. Doc. A/HRC/WGAD/2019/68, March 4, 2020, paras. 52, 101.

<sup>29</sup> See Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, 2014, pgs. 11, 13, 27, 37, 45; 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), U.N. Doc. A/HRC/WGAD/2019/68, March 4, 2020, paras. 91-97; Committee on the Elimination of Discrimination against Women, Concluding Observations on the Combined Eighth and Ninth Periodic Reports of El Salvador, U.N. Doc. CEDAW/C/SLV/CO/8-9, March 9, 2017, paras. 38-39.

<sup>30</sup> 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), U.N. Doc. A/HRC/WGAD/2019/68, March 4, 2020, paras. 91-97.

<sup>31</sup> *Id.* at para. 114.

<sup>32</sup> Human Rights Council, Report of the Special Rapporteur on violence against women, its causes, and consequences”, U.N. Doc. A/HRC/17/26/Add.2, February 14, 2011, para. 68.

<sup>33</sup> OAS, “Conclusions and Observations on the IACHR’s Working Visit to El Salvador”, January 29, 2018. Available at [https://www.oas.org/en/iachr/media\\_center/PReleases/2018/011A.asp](https://www.oas.org/en/iachr/media_center/PReleases/2018/011A.asp).

act to protect their unborn or newborn babies even when suffering a severe medical crisis and losing consciousness.<sup>34</sup>

The assumptions apparent in these arguments not only discriminate based on gender but also undermine the presumption of innocence, a core fair trial right.<sup>35</sup> In monitoring abortion and aggravated homicide trials, international organizations and bodies such as Amnesty International, the Center for Reproductive Rights, and the UN Working Group on Arbitrary Detention have further chronicled violations of the right to be present at critical stages of the proceedings, the right to call and examine witnesses, and the right to counsel.<sup>36</sup>

Diana's case reflects the patterns outlined above: she hailed from a poor community and was reliant on the public healthcare system; she underwent a complicated delivery and sought care at a public hospital; doctors allegedly notified the police; she was immediately arrested and handcuffed notwithstanding limited evidence of guilt; and she was unjustifiably detained.

## **B. CASE HISTORY**

Diana is a 31-year old (as of June 2020) woman from a poor urban community in San Salvador. At the time of the alleged offense, Diana was living with her partner, Manuel.<sup>37</sup> Diana suffers from long-standing mental health issues.<sup>38</sup>

### *The Night of October 31, 2018*

The account that follows was relayed by defense counsel and Diana. Diana shared what happened on the night of the incident with doctors at the admitting hospital as well as with a psychiatrist. At approximately 7 pm on October 31, 2018, Diana felt pain in her lower abdomen and pelvis area - what she assumed were gastrointestinal issues.<sup>39</sup> Around 8

<sup>34</sup> Jocelyn Viterna & Jose Santos Guardado Bautista, "Pregnancy and the 40-Year Prison Sentence: How 'Abortion Is Murder' Became Institutionalized in the Salvadoran Judicial System", Health and Human Rights Journal, Harvard University Press, 2017.

<sup>35</sup> See OAS, "Conclusions and Observations on the IACHR's Working Visit to El Salvador", January 29, 2018; 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), U.N. Doc. A/HRC/WGAD/2019/68, March 4, 2020, paras. 109-116.

<sup>36</sup> Amnesty International, "On the Brink of Death", September 25, 2014, pgs. 37-40; Center for Reproductive Rights, "Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador's Total Criminalization of Abortion", 2014, pgs. 12, 51, 58; 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), U.N. Doc. A/HRC/WGAD/2019/68, March 4, 2020, paras. 87-90.

<sup>37</sup> Agrupación Ciudadana por la Despenalización del Aborto, "Legal Analysis of the case of Diana", 2019, pg. 3.

<sup>38</sup> See id. at pgs. 16-17, 22-23; Legal Medicine Institute "Dr. Roberto Masferrer", Expert Psychiatric Report, March 12, 2019, pgs. 3-5.

<sup>39</sup> Agrupación Ciudadana por la Despenalización del Aborto, "Legal Analysis of the case of Diana", 2019, pg. 3; Legal Medicine Institute "Dr. Roberto Masferrer", Forensic Medical Examination, November 1,

pm, Diana experienced “abundant” vaginal bleeding.<sup>40</sup> In the early hours of November 1, 2018, with the bleeding intensifying, she left her bedroom and went into the bathroom.<sup>41</sup> Feeling “pressure and intense pain,”<sup>42</sup> Diana delivered a baby into the toilet.<sup>43</sup>

Diana has consistently stated that she was unaware she was pregnant.<sup>44</sup> Having delivered her 2 year old son by cesarean section, she did not recognize the signs of labor.<sup>45</sup> She additionally reported not having menstruated since 2017.<sup>46</sup> As such, the delivery left her in shock.<sup>47</sup> Diana is unable to clearly recall what transpired between when she gave birth and the child’s death—and indeed there is evidence, discussed below, to suggest that Diana suffered a psychotic episode during this period.<sup>48</sup>

The account of Diana’s partner, Manuel, confirms Diana’s story with respect to her symptoms and delivery in the bathroom but diverges thereafter. It should be noted that in the leadup to the incident, Diana and Manuel had been having serious marital problems.<sup>49</sup>

Manuel told the police that on the night of October 31, Diana appeared unwell.<sup>50</sup> He thereby left their apartment around 1 to 1:30 am to procure a taxi to take her to the hospital.<sup>51</sup> Upon returning to the apartment without having located a taxi, he found Diana locked in the bathroom.<sup>52</sup> She refused to let him in.<sup>53</sup> Manuel called Diana’s mother and described what was happening.<sup>54</sup> He put the phone on speaker so that Diana could hear

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2018, pg. 2. There are some disparities in Diana’s comments regarding the exact timing of these symptoms.

<sup>40</sup> Legal Medicine Institute “Dr. Roberto Masferrer”, Forensic Medical Examination, November 1, 2018, pg. 2.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.; Agrupación Ciudadana por la Despenalización del Aborto, “Legal Analysis of the case of Diana”, 2019, pg. 3.

<sup>44</sup> Id.

<sup>45</sup> Agrupación Ciudadana por la Despenalización del Aborto, “Legal Analysis of the case of Diana”, 2019, pg. 3.

<sup>46</sup> Legal Medicine Institute “Dr. Roberto Masferrer”, Forensic Medical Examination, November 1, 2018, pg. 2.

<sup>47</sup> See Agrupación Ciudadana por la Despenalización del Aborto, “Legal Analysis of the case of Diana”, 2019, pg. 3.

<sup>48</sup> Diana told doctors at the hospital that she remembered the baby crying but her account was disjointed and in later interviews (discussed below), she stated that she believed that the child was still alive and appeared to have no memory of what had happened.

<sup>49</sup> Investigation interview with Manuel, November 1, 2018. See also Agrupación Ciudadana por la Despenalización del Aborto, “Legal Analysis of the case of Diana”, 2019, pg. 38; Legal Medicine Institute “Dr. Roberto Masferrer”, Forensic Medical Examination, November 1, 2018, pg. 2.

<sup>50</sup> Investigation interview with Manuel, November 1, 2018.

<sup>51</sup> Witness Statement, Manuel, November 1, 2018; Investigation interview with Manuel, November 1, 2018; Attorney General’s Office, Indictment, November 3, 2018.

<sup>52</sup> Investigation interview with Manuel, November 1, 2018; Attorney General’s Office, Indictment, November 3, 2018.

<sup>53</sup> Id.

<sup>54</sup> Id.

her mother.<sup>55</sup> Diana said that she “wanted to die.”<sup>56</sup> At some point during this exchange, Diana’s mother called an ambulance.<sup>57</sup> Manuel called the police.<sup>58</sup>

Subsequently, Manuel heard what he described as the “crying of a newborn” from inside the bathroom, the door of which was still locked.<sup>59</sup> He asked Diana to let him into the bathroom but she again refused.<sup>60</sup> Manuel pleaded with Diana that “the baby was going to die”, to which she allegedly replied: “so let it die.”<sup>61</sup> A short time later, Manuel managed to enter the bathroom.<sup>62</sup> He asked Diana what she had done, to which she did not respond.<sup>63</sup> Manuel claimed that he “found the newborn in the toilet, face-down with her head in the toilet water” and tried to administer emergency care but was unsuccessful.<sup>64</sup> (Note that, as discussed below, medical tests showed no indication that the child had drowned.) When Diana was taken to the hospital by ambulance, Manuel stayed at home with their 2-year old son.<sup>65</sup>

While the facts of what happened that night remain unclear, what *is* clear is that in the early hours of the morning of November 1, 2018, the police - responding to an emergency call - arrived at Diana’s house.<sup>66</sup> The source of the call is not mentioned in the officers’ statements. After the police took Manuel’s statement and viewed the scene at the house, they went to the hospital to arrest Diana on suspicion of homicide.<sup>67</sup>

#### *Arrival at the Hospital, Investigation, and Detention*

At the hospital, Diana underwent surgery to remove remnants of her placenta from her uterus.<sup>68</sup> According to defense counsel, doctors at the hospital called the police.<sup>69</sup> Diana

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<sup>55</sup> Id.

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Attorney General’s Office, Indictment, November 3, 2018; Witness Statement, Manuel, November 1, 2018; Witness Statement, Marco Vincio Acevedo Tobar (police officer), November 1, 2018.

<sup>59</sup> Investigation interview with Manuel, November 1, 2018.

<sup>60</sup> Id.

<sup>61</sup> Investigation Order with Provisional Detention, Ninth Court of Criminal Investigation, November 12, 2018; Investigation interview with Manuel, November 1, 2018. See also Attorney General’s Office, Indictment, November 3, 2018.

<sup>62</sup> Id.

<sup>63</sup> Witness Statement, Manuel, November 1, 2018; Witness Statement, Marco Vincio Acevedo Tobar (police officer), November 1, 2018.

<sup>64</sup> Investigation interview with Manuel, November 1, 2018. See also Attorney General’s Office, Indictment, November 3, 2018.

<sup>65</sup> Witness Statement, Manuel, November 1, 2018; Witness Statement, Marco Vincio Acevedo Tobar, November 1, 2018; Investigation interview with Manuel, November 1, 2018; Witness Statement, Pedro Lopez Ramirez and Edwin Alfredo Quezada (police officers), November 1, 2018.

<sup>66</sup> Witness Statement, Pedro Lopez Ramirez and Edwin Alfredo Quezada (police officers), November 1, 2018; Witness Statement, Marco Vincio Acevedo Tobar (police officer), November 1, 2018.

<sup>67</sup> See id.

<sup>68</sup> Agrupación Ciudadana por la Despenalización del Aborto, “Legal Analysis of the case of Diana”, 2019, pgs. 3-4.

<sup>69</sup> Id. at pg. 21.

was arrested and handcuffed to her hospital bed.<sup>70</sup> That night, a forensic expert examined Diana and asked her questions about what had transpired.<sup>71</sup> On November 3, 2018, the prosecution charged Diana with aggravated homicide. The presiding judge ordered that she be kept in provisional detention until the initial hearing on November 5, 2018.<sup>72</sup> The case file indicates that around the time of this decision, Diana was taken from the hospital to the local jail.<sup>73</sup>

At the pretrial detention hearing on November 5, 2018,<sup>74</sup> Diana was not in attendance. According to the Office of Judicial Security and Protection for the Central Region, the Office lacked the resources to transport her from the jail to the court.<sup>75</sup> Diana's lawyer argued that the proceedings should be dismissed based on insufficient evidence and, in the alternative, requested that the court impose measures other than detention.<sup>76</sup> The court denied both requests, ordering the continuation of Diana's detention.<sup>77</sup>

On November 28, 2018, Diana was transferred to the Ilopango women's prison.<sup>78</sup> In late January, she attempted suicide.<sup>79</sup> On January 26, 2019, she was admitted to the Dr. José Molina Martínez psychiatric hospital for treatment.<sup>80</sup> While there, she was sedated and received electroconvulsive therapy.<sup>81</sup>

On February 1, 2019, Diana's lawyer requested a special hearing for review of her detention measures, asking that Diana's provisional detention be lifted and alternative arrangements be made pending trial.<sup>82</sup> Counsel argued that Diana was grappling with mental health issues and required specialized psychiatric treatment, which she was not receiving at the prison.<sup>83</sup> On February 4, 2019, the court denied counsel's request for a special hearing to review the provisional detention measures, confirming the continuation

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<sup>70</sup> Id at pgs. 3-4.

<sup>71</sup> Legal Medicine Institute "Dr. Roberto Masferrer", Forensic Medical Examination, November 1, 2018, pg. 2.

<sup>72</sup> Detention Order, Twelfth Court of San Salvador, November 3, 2018.

<sup>73</sup> Letter from the Court to the San Salvador Police, Twelfth Court of San Salvador, November 3, 2018.

<sup>74</sup> Minutes of the Initial Hearing, Twelfth Court of San Salvador, November 5, 2018. This is akin to a transcript.

<sup>75</sup> Id.; Letter from the Office of Judicial Security and Protection for the Central Region, November 5, 2018.

<sup>76</sup> Minutes of the Initial Hearing, Twelfth Court of San Salvador, November 5, 2018.

<sup>77</sup> Id. See also Investigation Order with Provisional Detention, Ninth Court of Criminal Investigation, November 12, 2018.

<sup>78</sup> Letter from San Salvador Police, November 28, 2018.

<sup>79</sup> See Agrupación Ciudadana por la Despenalización del Aborto, "Legal Analysis of the case of Diana", 2019, pgs. 21-23.

<sup>80</sup> Id.

<sup>81</sup> Agrupación Ciudadana por la Despenalización del Aborto, "Legal Analysis of the case of Diana", 2019, pgs. 21-23; Dr. Jose Molina Martinez National Psychiatric Hospital, File relating to Authorization and Application of Medical Procedure 'ECT', February 26, 2019.

<sup>82</sup> Application to the Ninth Court of Criminal Investigation, February 1, 2019. At this point, Diana had hired private counsel to represent her.

<sup>83</sup> Id.

of Diana's detention and ordering a psychiatric evaluation.<sup>84</sup> By mid-February, Diana had been transferred back to prison from the psychiatric hospital.

On March 7, 2019, a psychiatric expert examined Diana at the court's behest. The expert noted that Diana was incoherent in her description of the alleged offense and believed that the child was still alive.<sup>85</sup> The expert further concluded that Diana appeared to suffer from a "psychotic type of mental disorder ... present[ing] serious disorders at the level of thought (delirious ideas or false ideas that are poorly structured), affective disposition (inappropriate for the situation experienced), behavior (disorganized behavior without objectives), which represent a serious risk against the subject as well as third parties."<sup>86</sup> Based on these findings, the expert recommended that Diana be transferred to a psychiatric facility.<sup>87</sup> At the end of March, Diana was moved back to the Dr. José Molina Martínez psychiatric hospital.<sup>88</sup>

Diana remained in detention at the hospital until May 9, 2019, when an appeals court amended the pretrial measures. Diana was permitted to continue psychiatric treatment as an outpatient until the beginning of the criminal proceedings.<sup>89</sup>

### *Preliminary Hearing and Evidence*

A preliminary hearing in the case was held on June 19, 2019.<sup>90</sup> At that point, the evidence against Diana was weak. The autopsy report and forensic tests showed that the child had died due to asphyxiation<sup>91</sup> - a leading cause of perinatal deaths worldwide, especially in the absence of quality prenatal care and medical care at delivery. There were no signs of trauma or death by immersion (drowning in the toilet).<sup>92</sup> Correspondingly, a gynecological exam proved only that Diana possessed the characteristics of a woman who had recently given birth.<sup>93</sup>

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

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<sup>84</sup> Detention Order, Ninth Court of Criminal Investigation, February 4, 2019.

<sup>85</sup> See Legal Medicine Institute "Dr. Roberto Masferrer", Expert Psychiatric Report, March 12, 2019, pgs. 2-3.

<sup>86</sup> *Id.* at pg. 5.

<sup>87</sup> *Id.*

<sup>88</sup> See Agrupación Ciudadana por la Despenalización del Aborto, "Legal Analysis of the case of Diana", 2019, pg. 40; Court Response, Ninth Court of Criminal Investigation, March 18, 2019.

<sup>89</sup> *Id.* at pg. 41. At an earlier (unspecified) date, Diana's counsel submitted a first appeal against the court's decision denying review of her provisional detention.

<sup>90</sup> Monitor's Notes, June 19, 2019.

<sup>91</sup> Ninth Court of Criminal Investigation, Writ of Definitive Dismissal, June 19, 2019, pgs. 3-6, 8.

<sup>92</sup> *Id.* at pgs. 3-6, 8.

<sup>93</sup> *Id.* at pgs. 6-7; Legal Medicine Institute "Dr. Roberto Masferrer", Forensic Medical Examination, November 1, 2018.

incapable of understanding her actions.<sup>94</sup> Indeed, during the March 7 interview conducted to determine whether Diana required specialized psychological treatment, Diana displayed a lack of comprehension as to the incident. In her words:

They are accusing me of killing my child and my child is alive, people and their gossip, those who say that I don't pay attention to them, who say to me 'that I killed him,' and I say that he is alive, that they are taking care of him, his grandmother, his uncle, I am always praying ... for nothing, nothing, because they think I am crazy but no; she is really crazy, and so some say but no ... I don't remember the date, I only remember that they took me to the hospital; I had my child in the woman's hospital; they've never put me in jail, now I am just there 'nothing more' ... my child is not dead but rather my family is taking care of him.<sup>95</sup>

The authorities had notice of Diana's mental health condition from the outset of the investigation. A doctor who examined Diana on November 1 stated that Diana's "affective disposition ... d[id] not quite fit" and recommended that an expert evaluate her "awareness and willingness regarding the event."<sup>96</sup> However, seven months later at the June 19 hearing, the prosecution had yet to obtain an expert assessment of this issue.<sup>97</sup>

Given the contradictory evidence outlined above, the authorities' immediate characterization of the incident as homicide is troubling. On arriving at Diana's house on November 1, for example, a police officer heard the prosecution representative state that homicide was "the only thing that could have happened based on the facts."<sup>98</sup> It is unclear whether the prosecution had even received autopsy results or otherwise verified the cause of death when Diana was indicted two days later.<sup>99</sup> The investigation and prosecution continued to proceed in this manner, discounting alternate explanations for the child's death.

At the June 19 hearing, the court highlighted these deficiencies. Dismissing the charges against Diana on the basis of insufficient evidence,<sup>100</sup> the court noted that there were no direct witnesses, that the autopsy report had concluded that the child might have died from natural causes and that, in any event, it was unclear whether Diana was conscious

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<sup>94</sup> See Ninth Court of Criminal Investigation, Writ of Definitive Dismissal, June 19, 2019, pgs. 5-7, 9.

<sup>95</sup> Legal Medicine Institute "Dr. Roberto Masferrer", Expert Psychiatric Report, March 12, 2019, pgs. 2-3.

<sup>96</sup> Legal Medicine Institute "Dr. Roberto Masferrer", Forensic Medical Examination, November 1, 2018, pg. 4.

<sup>97</sup> The defense had requested an assessment but Diana did not show up to the hospital to be examined on the scheduled date. Monitor's Notes, June 19, 2019.

<sup>98</sup> Witness Statement, Marco Vincio Acevedo Tobar (police officer), November 1, 2018.

<sup>99</sup> See Minutes of the Initial Hearing, Twelfth Court of San Salvador, November 5, 2018. The prosecution stated in court that it could not submit the autopsy results due to the fact "that the event occurred in the early hours of Thursday, and that the following Friday was a national holiday, and that they do not work during the weekend."

<sup>100</sup> Monitor's Notes, June 19, 2019.

of her actions given her psychological state.<sup>101</sup> In the court's words, "the elements available [were] not sufficient to establish the probable participation of the defendant in the act."<sup>102</sup>

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<sup>101</sup> Ninth Court of Criminal Investigation, Writ of Definitive Dismissal, June 19, 2019, pgs. 8-9.

<sup>102</sup> *Id.* at pg. 9.



# METHODOLOGY



## A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice's (CFJ) TrialWatch initiative, the ABA Center for Human Rights deployed a monitor from the region to the June 19 proceedings before a criminal court in San Salvador. The monitor was fluent in Spanish and able to understand the proceedings. Prior to the proceedings, the Center conducted background research, consulted with country experts, and prepared a memorandum for the monitor outlining the case's procedural history and the political/legal context in El Salvador.

In advance of the proceedings, the Center notified the court of the observation. The monitor did not experience any impediments in entering the courtroom. The monitor used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendant's fair trial rights were respected. The monitor's TrialWatch App responses and notes were shared with Juliet Sorensen, Clinical Professor of Law at Northwestern's Pritzker School of Law, the founder of Northwestern's Access to Health Project, and the member of the TrialWatch Experts Panel responsible for evaluating the fairness of the trial.

## B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, Professor Sorensen reviewed responses to the standardized questionnaire (collected via the CFJ TrialWatch App), court documents, and notes taken during the proceedings. Professor Sorensen found that the proceedings against Diana failed to confirm to many fundamental standards of fairness and due process that are binding norms of international law, including the right to freedom from arbitrary detention, the right to prepare a defense, the prohibition against cruel, inhuman, and degrading treatment, the right to humane treatment, and the right to privacy. Professor Sorensen further found that Diana suffered harm as a result of these violations.

# ANALYSIS



## A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR);<sup>103</sup> jurisprudence from the UN Human Rights Committee, tasked with monitoring implementation of the ICCPR; the American Convention on Human Rights;<sup>104</sup> jurisprudence from the Inter-American Court of Human Rights (Inter-American Court), tasked with interpreting and enforcing the American Convention; reports and jurisprudence from the Inter-American Commission on Human Rights (IACHR), tasked with monitoring the human rights situation in the Americas, including compliance with the American Convention; the International Covenant on Economic, Social and Cultural Rights (CESCR); jurisprudence from the UN Committee on Economic, Social, and Cultural Rights, tasked with monitoring implementation of the CESCR; the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT); jurisprudence from the UN Committee against Torture, tasked with monitoring implementation of the CAT; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); jurisprudence from the UN Committee on the Elimination of Discrimination against Women, tasked with monitoring implementation of CEDAW; the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (the Convention of Belem Do Para); reports issued by various UN Special Procedures; and widely accepted guidelines that establish best practices in the field of prosecutorial ethics.

El Salvador ratified the ICCPR in 1979, the American Convention in 1978, the CESCR in 1979, CEDAW in 1981, and the Convention of Belem Do Para in 1995. El Salvador acceded to the CAT in 1996.

The report additionally references relevant provisions in the Constitution of El Salvador and the Penal Code of El Salvador.

## B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

### Arbitrary Detention

Under Article 9(1) of the ICCPR, “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.” The UN Human Rights Committee has noted that the concept of “arbitrariness” must be “interpreted broadly, to include elements of inappropriateness, injustice, lack of predictability and due process of

<sup>103</sup> International Covenant on Civil and Political Rights, December 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter “ICCPR”].

<sup>104</sup> American Convention on Human Rights, November 22, 1969, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica [hereinafter “American Convention”].

law as well as elements of reasonableness, necessity and proportionality.”<sup>105</sup> Not only should pretrial detention be the exception and as short as possible, but detention must be “lawful” (in accordance with domestic law) and “reasonable and necessary in all circumstances.”<sup>106</sup> This means that pretrial detention is appropriate for only a limited number of purposes: to prevent flight, interference with evidence, and the recurrence of serious crime.<sup>107</sup>

In evaluating the reasonableness and necessity of pretrial detention, courts must undertake an “individualized determination.”<sup>108</sup> Vague pronouncements fail to meet this standard and reference to the severity of the charges is insufficient.<sup>109</sup> Courts must additionally provide reasons for forgoing possible alternatives, such as bail and monitoring devices.<sup>110</sup>

In the case of *Eligio Cedeno v. Bolivarian Republic of Venezuela*, for example, the trial court imposed pretrial detention on the basis of flight risk, stating that the accused had significant financial resources and owned an airplane.<sup>111</sup> The UN Human Rights Committee concluded that the court’s order relied on “mere assumption” and failed to consider potential non-custodial options.<sup>112</sup> As such, the Committee found that Article 9 had been violated.<sup>113</sup>

Article 7(3) of the American Convention provides that “no one shall be subject to arbitrary arrest or imprisonment.” Case law from the Inter-American Court of Human Rights and the Inter-American Commission has delineated key principles that govern the lawfulness of pretrial detention. First, as likewise stated by the UN Human Rights Committee, pretrial detention should be an exceptional measure, only imposed in situations where there is reasonable suspicion that the defendant will flee or interfere with the proceedings. The default rule is pretrial release.<sup>114</sup> Second, pretrial detention must be proportional.<sup>115</sup> The State must ensure that the “that the measure of procedural coercion [is not] equal to or more harmful for the defendant than the punishment in case of conviction.”<sup>116</sup> Third,

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<sup>105</sup> Human Rights Committee, *Izmet Oselik et al v. Turkey*, U.N. Doc. CCPR/C/125/D/2980/2017, May 28, 2019, para. 9.3.

<sup>106</sup> Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

<sup>107</sup> Human Rights Committee, *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, August 19, 2010, para. 10.4.

<sup>108</sup> Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 2.5.

<sup>112</sup> *Id.* at para. 7.10.

<sup>113</sup> *Id.*

<sup>114</sup> I/A Ct. H.R., *Tibi v. Ecuador*, Series C. No. 114, September 7, 2004, para. 106; IACHR, *Jorge A. Gimenez v. Argentina*, Case No. 11.245, March 1, 1996, para. 84.

<sup>115</sup> I/A Ct. H.R., *Barreto Leiva v. Venezuela*, Series C No. 206, November 17, 2009, para. 122.

<sup>116</sup> *Id.*

pretrial detention must be necessary.<sup>117</sup> The State must employ the least restrictive measures to ensure that the accused appears at and does not frustrate the proceedings.

In *Manuela and Family, Concerning El Salvador*, the Inter-American Commission considered a case involving a Salvadoran woman who - like Diana - was prosecuted for aggravated homicide in connection with childbirth complications.<sup>118</sup> The courts presiding over Manuela's case imposed pretrial detention on the basis of the severity of the crime.<sup>119</sup> In finding a violation of Article 7(3), the Commission emphasized: "the gravity of the crime with which the perpetrator is accused is not ... justification enough for detention."<sup>120</sup> As articulated by the Commission: "any decision to restrict the right to personal liberty through the use of pretrial detention must provide sufficient case-by-case grounds that make it possible to evaluate whether the detention meets the conditions necessary for its application."<sup>121</sup>

Diana's case mirrors that of Manuela. On November 3, 2018, two days after her initial arrest and detention, the presiding court ordered that Diana's detention be continued so as to guarantee her attendance at the initial hearing on November 5, 2018.<sup>122</sup> There is no indication that the court considered the necessity or reasonableness of this measure in deviating from the presumption of pretrial release: the order omits mention of Diana's specific circumstances.<sup>123</sup>

At the subsequent hearing on November 5, 2018, the prosecution applied for continuation of Diana's detention, arguing that in light of the severity of the potential penalty were she to be found guilty, there was a significant risk Diana would try to flee or otherwise evade justice.<sup>124</sup> According to the prosecution, Diana's refusal to let Manuel enter the bathroom and her alleged comment to "let [the baby] die" further demonstrated the risk of flight.<sup>125</sup>

The court accepted the prosecution's arguments and ordered that Diana remain in detention pending trial, stating (i) that the fact that the sentence might be more than three years would cause "any citizen" to flee and (ii) that Diana could obstruct the investigation by pressuring Manuel to retract his statement.<sup>126</sup>

This decision relied on the type of "mere assumption" deemed unlawful by the UN Human Rights Committee and Inter-American system. The prosecution and court failed to

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<sup>117</sup> I/A Ct. H.R., *Palamara Iribarne v. Chile*, Series C No. 135, November 22, 2005, paras. 198, 206.

<sup>118</sup> See IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, paras. 8-12.

<sup>119</sup> *Id.* at para. 99.

<sup>120</sup> *Id.* at para. 95.

<sup>121</sup> *Id.* at para. 96.

<sup>122</sup> Detention Order, Twelfth Court of San Salvador, November 3, 2018.

<sup>123</sup> *Id.*

<sup>124</sup> Minutes of the Initial Hearing, Twelfth Court of San Salvador, November 5, 2018; Attorney General's Office, Indictment, November 3, 2018.

<sup>125</sup> Minutes of the Initial Hearing, Twelfth Court of San Salvador, November 5, 2018.

<sup>126</sup> *Id.* See also Investigation Order with Provisional Detention, Ninth Court of Criminal Investigation, November 12, 2018.

consider Diana's individual circumstances and based their reasoning on the severity of the potential punishment, surmising that any accused would abscond when facing such a situation. In reality, there was little risk of flight: as argued by counsel, Diana was of limited means and suffered from psychiatric issues that would have prevented her from leaving the country.<sup>127</sup> Meanwhile, the court seemingly did not consider the possibility of less restrictive measures, such as house arrest, regular check-ins with the court or a pretrial services officer, and electronic monitoring.

With respect to the risk of interference with evidence, the court did not substantiate its stated concerns, failing to cite any specific indicator that Diana had attempted to or would attempt to sway Manuel.<sup>128</sup> More broadly, there was no other evidence to tarnish or destroy. As such, Diana's incarceration pending trial was arbitrary.

### **Right to Appear Before a Judge/Court**

Article 9(3) of the ICCPR mandates that anyone arrested or detained on a criminal charge be promptly presented before a judge or officer exercising judicial power. Article 9(4) further states that those deprived of their liberty are "entitled to take proceedings before a court" for review of the lawfulness of detention. According to the UN Human Rights Committee, Article 9(3) requires that the accused be "brought to appear physically" before the designated judicial body, particularly for the purposes of an "inquiry" into whether the accused has suffered mistreatment in detention.<sup>129</sup> The Committee has noted that Article 9(4) similarly guarantees the accused the right to appear in person for review of his or her detention.<sup>130</sup>

Articles 7(5) and 7(6) of the American Convention on Human Rights use parallel language with respect to a detained person's right to be brought before a judge or officer exercising judicial power.

In the present case, Diana did not attend her initial pretrial detention hearing.<sup>131</sup> Although she was aware of the hearing, the authorities failed to ensure her presence: the Office of Judicial Security and Protection for the Central Region asserted that it did not have enough staff to transport Diana from jail to the court.<sup>132</sup>

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<sup>127</sup> See Application to the Ninth Court of Criminal Investigation, February 1, 2019.

<sup>128</sup> Minutes of the Initial Hearing, Twelfth Court of San Salvador, November 5, 2018.

<sup>129</sup> Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 34.

<sup>130</sup> *Id.* at para. 42.

<sup>131</sup> Letter from the Office of Judicial Security and Protection for the Central Region, November 5, 2018; Minutes of the Initial Hearing, Twelfth Court of San Salvador, November 5, 2018.

<sup>132</sup> *Id.*

At the hearing, the court imposed pretrial detention notwithstanding defense counsel's request for alternative measures.<sup>133</sup> Thereafter, Diana attempted suicide in detention and was transferred to a psychiatric hospital (as discussed further below). The court might have acquired a better understanding of Diana's precarious mental state and the necessity of alternative measures if she had appeared in person.

In depriving Diana of her right to be present at her detention hearing, the authorities violated Articles 9(3) and 9(4) of the ICCPR and Articles 7(5) and 7(6) of the American Convention.

## **Right to Communicate with Counsel**

Article 14(3)(b) of the ICCPR entitles every person accused of a crime "to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." An analogous right is enshrined in Article 8(2)(c) and (d) of the American Convention on Human Rights. As explained by the UN Human Rights Committee, this guarantee "requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications."<sup>134</sup> In *Siragev v. Uzbekistan*, the Committee found that the defendant's Article 14(3)(b) right had been violated because he was prevented from seeing his lawyer while in detention.<sup>135</sup>

In the present case, 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.<sup>136</sup> On those occasions that the lawyers *were* able to meet with Diana, defense counsel alleges that she was so heavily sedated that it was difficult to discuss strategy and prepare an effective defense.<sup>137</sup>

These accounts of obstruction of Diana's consultations with 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.

## **Right to Prepare a Defense**

Article 14(3)(b) of the ICCPR requires that every defendant "have adequate time and facilities for the preparation of his defense." The Human Rights Committee has

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<sup>133</sup> Minutes of the Initial Hearing, Twelfth Court of San Salvador, November 5, 2018. See also Investigation Order with Provisional Detention, Ninth Court of Criminal Investigation, November 12, 2018.

<sup>134</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 34.

<sup>135</sup> Human Rights Committee, *Siragev v. Uzbekistan*, U.N. Doc. CCPR/C/85/D/907/2000, November 1, 2005, para 6.3.

<sup>136</sup> Monitor's Notes, June 19, 2019 (interview with defense counsel).

<sup>137</sup> *Id.*

established that adequate facilities must include access to documents and other evidence that the prosecution plans to offer in court, including all exculpatory materials.<sup>138</sup> The Committee has defined “exculpatory materials” not only as evidence demonstrating an accused’s innocence but also as evidence that “could assist the defense.”<sup>139</sup> Non-disclosure is only justified in limited circumstances, such as national security.<sup>140</sup>

Article 8(2)(c) of the American Convention entitles an accused to “adequate time and means for the preparation of his defense.” Under Article 8(2)(c), defendants must be provided access to “the record of the case and the evidence gathered against him.”<sup>141</sup> As stated by the Inter-American Court, the State must “guarantee the intervention of the accused in the analysis of the evidence.”<sup>142</sup>

In the present case, the defense was denied access to a key piece of evidence: the autopsy report. The autopsy was conducted as part of the investigation on November 1, the day of the alleged offense.<sup>143</sup> It showed that the child had died from perinatal asphyxia and that there were no signs of death by trauma or death by immersion.<sup>144</sup> These findings undermined the prosecution’s theory that Diana had harmed her child. As such, the report, if not proof of Diana’s innocence, would have benefited the defense case. Nonetheless, according to defense counsel, the defense did not receive the autopsy findings until early May, approximately six months after the autopsy was conducted.<sup>145</sup> As recounted by counsel, there were no reasons provided for non-disclosure. Given the importance of the autopsy to the defense case, the conduct alleged would violate Article 14(3)(b) of the ICCPR and Article 8(2)(c) of the American Convention.

## **C. OTHER FAIRNESS CONCERNS**

### **Right to Privacy**

According to defense counsel, doctors at the hospital where Diana sought care reported her to the police soon after her arrival.<sup>146</sup>

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<sup>138</sup> Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 33.

<sup>139</sup> *Id.*

<sup>140</sup> See Human Rights Committee, *Mansour Ahani v. Canada*. U.N. Doc. CCPR/C/80/D/1051/2002, June 2004, para. 10.5.

<sup>141</sup> I/A Ct. H.R., *Barreto Leiva v. Venezuela*, Series C No. 206, November 17, 2009, para. 54. See also *id.* at paras. 49-57.

<sup>142</sup> *Id.*

<sup>143</sup> Ninth Court of Criminal Investigation, *Writ of Definitive Dismissal*, June 19, 2019, pg. 3.

<sup>144</sup> *Id.* at pgs. 3, 6, 8.

<sup>145</sup> It is unclear why the autopsy findings were not relayed to defense. In early May, the defense did not receive a physical copy of the report but was present for a court session where the relevant expert read the findings aloud.

<sup>146</sup> *Agrupación Ciudadana por la Despenalización del Aborto*, “Legal Analysis of the case of Diana”, 2019, pg. 21.

Under Article 11 of the American Convention, “no one may be the object of arbitrary or abusive interference with his private life, his family, [or] his home ... Everyone has the right to the protection of the law against such interference or attacks.” Article 17 of the ICCPR also protects against “arbitrary or unlawful interference with [one’s] privacy, family, home or correspondence.”

The UN Human Rights Committee has clarified that Article 17’s prohibition on “arbitrary interference” extends to “interference provided for under the law,” because “even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances.”<sup>147</sup> As stated by the Committee, examples of “[State failure to] respect women’s privacy” include “[w]here States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion.”<sup>148</sup> Consequently, the Committee has raised concern about violations of Article 17 in El Salvador, where “women treated in public hospitals are being reported by medical or administrative staff for the offence of abortion.”<sup>149</sup> The Committee’s reasoning would necessarily apply to the reporting of obstetric emergencies following out-of-hospital deliveries.

The Inter-American Commission and Court have reached similar conclusions.<sup>150</sup> Most recently, in the aforementioned case of *Manuela and Family, Concerning El Salvador*, doctors reported the accused to the authorities after she sought care for complications arising from an out-of-hospital delivery. The Commission employed a five-prong test to assess the legitimacy of the restriction on Manuela’s privacy:

- (i) the legality of the restriction—that is, if it is established in law both formally and in practice; (ii) the existence of a legitimate aim; (iii) suitability—that is, if the measure has a logical connection to the aim pursued; (iv) necessity—that is, determination of whether other alternatives exist that would be less restrictive and equally suitable; and (v) strict proportionality—that is, balancing the interests in question against the degree of sacrifice.<sup>151</sup>

The Commission found that the State’s actions failed the baseline “legality” prong of the test due to inconsistencies in doctors’ reporting obligations:<sup>152</sup> as noted above, Articles 136 and 312 of the Criminal Code seemingly compel doctors to notify the authorities of

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<sup>147</sup> Human Rights Committee, General Comment No. 16, April 8, 1998, para. 4.

<sup>148</sup> Human Rights Committee, General Comment No. 28, U.N. Doc. CCPR/C/21/Rev.1/Add.10, March 29, 2000, para. 20.

<sup>149</sup> Human Rights Committee, Concluding Observations on the Seventh Periodic Report of El Salvador, U.N. Doc. CCPR/C/SLV/CO/7, May 9, 2018, para. 15.

<sup>150</sup> IACHR, *I.V. v. Bolivia*, Case No. 12.655, August 15, 2014, paras. 147-149, 152; *I/A Ct. H.R., Artavia Murillo et al v. Costa Rica*, Series C No. 257, November 28, 2012, para. 143.

<sup>151</sup> IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, para. 132.

<sup>152</sup> *Id.* at para. 133.



any suspected abortion, while the Criminal Procedure Code as well as Health Code provide exceptions for information gleaned in the context of doctor-patient confidentiality.<sup>153</sup> It is unclear how the two interact. The Commission cited further confusion over the “procedure that a doctor [should] 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”:

that the failure to adequately regulate medical confidentiality and obstetric emergencies in a way that details the exceptions to it and that properly weighs the interests and rights in question in this context could cause doctors to automatically report patients who have had obstetric emergencies on the mere suspicion that (for example) they sought an abortion due to fear that they could suffer a criminal or disciplinary sanction, thereby completely erasing the rights protected by professional confidentiality.<sup>154</sup>

As such, the Commission determined that the State’s interference with privacy in Manuela’s case was not “established in law,” meaning that her right to privacy was violated.<sup>155</sup>

The Commission additionally examined whether the hospital’s provision of information to the authorities complied with the “suitability” prong of the privacy test: if the “measure ha[d] a logical connection to the aim pursued.” While the restriction on Manuela’s privacy could be said to possess the legitimate aim of combating crime, the report sent to the prosecution contained details not only about Manuela’s condition as it related to the alleged offense but also about her sexual history and the presence of sexually transmitted diseases.<sup>156</sup> Given the irrelevance of such information to the administration of justice, the Commission concluded that the authorities had violated the suitability requirement.<sup>157</sup>

In Diana’s case, the circumstances regarding the hospital’s alleged notification of the police are unclear.<sup>158</sup> Had doctors notified the police on the basis of the out-of-hospital delivery and resulting complications, this would have fallen afoul of the Commission framework. At the time of Diana’s prosecution, health professionals’ reporting obligations with respect to obstetric emergencies remained unsettled: there were still contradictions between the Criminal Code and other legislation and it had yet to be clarified how doctors “[should] determine whether an obstetric emergency could be the result of the commission of a crime—the result of a natural versus intentional miscarriage.”

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<sup>153</sup> See Amnesty International, “On the Brink of Death”, September 25, 2014, pg. 33.

<sup>154</sup> IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, para. 134.

<sup>155</sup> *Id.* at para. 135.

<sup>156</sup> *Id.* at paras. 131, 136.

<sup>157</sup> *Id.* at para. 136.

<sup>158</sup> It is unclear whether doctors notified the police on the basis of the obstetric emergency and/or on the basis of comments made by Diana.

Consequently, any such restriction on Diana's privacy, as in Manuela's case, was not "established in law," in contravention of the legality standard.

As was also true 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.<sup>159</sup> This information was unrelated to the alleged offense and thereby contravened the suitability standard and, more broadly, Article 11 of the American Convention.

Turning to the ICCPR, the Human Rights Committee has condemned "legal dut[ies] [imposed] upon doctors and other health personnel to report cases of women who have undergone abortion" as a violation of Article 17. In El Salvador, the obligation to report potential abortions has expanded into a practice of notifying the police of women seeking care following complicated out-of-hospital deliveries. Assuming such was the case with Diana, this would have violated her right to privacy.<sup>160</sup>

### *Medical Examination*

The same day that Diana arrived at the hospital, she was subjected to a gynecological examination as part of the investigation.<sup>161</sup> During the examination, Diana was asked questions about what had happened to the child.<sup>162</sup> At the preliminary hearing on June 19, defense counsel stated that non-medical personnel had participated in Diana's examination.<sup>163</sup> It is unclear, however, whether these individuals were present for Diana's gynecological inspection or were present only to authorize the procedure, ask follow-up questions, and/or obtain relevant documents. The examination report, finding that tears in Diana's vaginal area were consistent with an out-of-hospital birth, fails to provide clarity on this matter, stating: "[t]he patient [was] interviewed in front of police officers of visual

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<sup>159</sup> Legal Medicine Institute "Dr. Roberto Masferrer", Forensic Medical Examination, November 1, 2018, pgs. 2-3.

<sup>160</sup> As documented by international bodies, maintaining doctor-patient confidentiality is vitally important in the realm of sexual and reproductive healthcare. The Inter-American Commission, for example, has highlighted the damage that can be done in this context, stating: "issues related to sexuality and reproduction are extremely sensitive, and thus the fear that confidentiality will not be respected can have the effect of women not seeking the medical care they need." IACHR, "Access to information on reproductive health from a human rights perspective", November 22, 2011, para. 81. The Committee on the Elimination of Discrimination against Women has similarly noted: "[w]hile lack of respect for the confidentiality of patients will affect both men and women, it may deter women from seeking advice and treatment and thereby adversely affect their health and well-being. Women will be less willing, for that reason, to seek medical care for diseases of the genital tract, for contraception or for incomplete abortion and in cases where they have suffered sexual or physical violence." Committee on the Elimination of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention, 1999, para. 12(d). See also United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. E/CN.4/2004/49, February 16, 2004, para. 40. As such, that Diana was allegedly reported to the police while seeking care for an obstetric emergency is of particular concern.

<sup>161</sup> Legal Medicine Institute "Dr. Roberto Masferrer", Forensic Medical Examination, November 1, 2018.

<sup>162</sup> Id.

<sup>163</sup> Monitor's Notes, June 19.

inspections, the investigative police officer of the case, the prosecutor of the case and the judge who requested the respective expert opinions.”<sup>164</sup>

The presence of non-medical personnel during medical examinations implicates the right to privacy. In *V.R.P. and V.R.C. v. Nicaragua*, for example, the Inter-American Commission held that the presence of “persons unrelated to the medical procedure, such as a judge and a prosecutor” during the gynecological examination of a rape victim violated the right to privacy.<sup>165</sup> The UN Committee against Torture has correspondingly raised concerns about the “presence of police officers during medical examinations of persons in police custody.”<sup>166</sup>

In the present case, if non-medical personnel acting in their investigative capacity attended Diana’s gynecological examination, this would amount to a violation of her right to privacy.

### **Prohibition against Cruel, Inhuman, or Degrading Treatment**

The practice of handcuffing or shackling pregnant prisoners prior to, during, or after giving birth - as occurred in the present case - can constitute cruel, inhuman, or degrading treatment.

Article 7 of the ICCPR states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 5(2) of the American Convention contains parallel language. Article 16 of Convention against Torture proscribes “acts of cruel, inhuman or degrading treatment or punishment,” mandating that States take action to prevent such abuses.

The Special Rapporteur on violence against women, its causes and consequences has stated that “the use of ... instruments [of restraint during and after labor] violates international standards and may be said to constitute cruel and unusual practices,”<sup>167</sup> urging the “adoption of legislation banning the use of restraints on pregnant women, including during labor or delivery, unless there are overwhelming security concerns that cannot be handled by any other method.”<sup>168</sup>

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<sup>164</sup> Legal Medicine Institute “Dr. Roberto Masferrer”, Forensic Medical Examination, November 1, 2018, pg. 2.

<sup>165</sup> IACHR, *V.R.P. and V.R.C. v. Nicaragua*, Case 12.690, February 11, 2009, paras. 12, 110-111, 128.

<sup>166</sup> Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. Doc. CAT/C/AUT/CO/3, December 15, 2005, para. 13; Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. Doc. CAT/C/TUR/CO/3, January 20, 2011, para. 11.

<sup>167</sup> Economic and Social Council, Report of the Special Rapporteur on violence against women, its causes and consequences, U.N. Doc. E/CN.4/1999/68/Add.2, January 4, 1999, paras. 53-54.

<sup>168</sup> Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, U.N. Doc. A/HRC/17/26/Add.5, June 6, 2011, pg. 29.

The UN Committee against Torture has likewise called attention to “the treatment of detained women ... including gender-based humiliation and incidents of shackling of women detainees during childbirth.”<sup>169</sup> The UN Human Rights Committee<sup>170</sup> and the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have echoed these concerns.<sup>171</sup> Notably, 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.”<sup>172</sup>

In the present case, Diana was handcuffed to her bed following a difficult delivery and curettage procedure.<sup>173</sup> She spent two days in the hospital in these restraints. Given the above analysis by treaty bodies and UN Special Procedures, the authorities’ conduct amounted to cruel, inhuman, or degrading treatment.

## Right to Humane Treatment

Article 10 of the ICCPR requires States to treat all persons deprived of their liberty “with humanity and with respect for the inherent dignity of the human person.” The provision “imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant.”<sup>174</sup> Consequently, the Committee has observed that inadequate medical care in prisons can violate Article 10(1).<sup>175</sup>

Article 5(1) of the American Convention imposes a positive obligation on States to respect individuals’ “physical, mental, and moral integrity.” In *García-Asto and Ramírez-Rojas v. Peru*, the Inter-American Court of Human Rights concluded that under Article 5(1), States must provide detainees with adequate medical treatment.<sup>176</sup>

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<sup>169</sup> Committee against Torture, Conclusions and Recommendations: United States of America, U.N. Doc. CAT/C/USA/C/2, July 25, 2006, para. 33.

<sup>170</sup> Human Rights Committee, Concluding Observations: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, December 18, 2006, para. 33.

<sup>171</sup> Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, U.N. Doc. A/HRC/7/3, January 15, 2008, para. 41.

<sup>172</sup> 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.

<sup>173</sup> See Agrupación Ciudadana por la Despenalización del Aborto, “Legal Analysis of the case of Diana”, 2019, pgs. 3-4.

<sup>174</sup> Human Rights Committee, General Comment No. 21, U.N. Doc. HRI/GEN/1/Rev.1, April 10, 1992, para. 3.

<sup>175</sup> See Human Rights Committee, *Pinto v. Trinidad and Tobago*, U.N. Doc. CCPR/C/39/D/232/1987, August 21, 1990, para. 12.7; Human Rights Committee, *Kelly v. Jamaica*, U.N. Doc. CCPR/C/41/D/253/1987, April 10, 1991, para. 5.7; Human Rights Committee, *Raul Sendic Antonaccio v. Uruguay*, U.N. Doc. CCPR/C/14/D/63/1979, October 28, 1981, paras. 16.1-16.2, 20; Human Rights Committee, *Sannikov v. Belarus*, U.N. Doc. CCPR/C/122/D/2212/2012, April 6, 2018, paras. 6.2-6.3.

<sup>176</sup> I/A Ct. H.R., *García-Asto and Ramírez-Rojas v. Peru*, Series C No. 137, November 25, 2005, paras. 226-229.

In the present case, Diana was detained for several months without receiving the psychiatric treatment she required given her documented mental health problems, causing significant suffering.<sup>177</sup> The trajectory of these events is laid out below.

Diana's psychological issues were evident from the outset of the investigation. The forensic expert who examined her on November 1, 2018, the day of the alleged offense, stated that her "affective disposition ... [did] not quite fit" and recommended further evaluation.<sup>178</sup> Subsequently, at the initial hearing on November 5, 2018, Diana's request to be released pending trial was denied. At the end of January 2019, having already spent two months at Ilopango Women's Prison, Diana attempted suicide.<sup>179</sup> She was then transferred to a psychiatric hospital for two weeks of treatment: a temporary measure.<sup>180</sup> During this time she was administered electroconvulsive therapy.

In February 2019, defense counsel submitted a motion arguing that Diana was not receiving necessary psychiatric support in prison (as noted above, her stay at the hospital was temporary) and requesting that she be released from custodial detention with continuing outpatient care at the psychiatric hospital.<sup>181</sup> The judge rejected this request.<sup>182</sup>

Although treating doctors at the psychiatric hospital stated that Diana was suffering from significant depressive episodes and at risk for suicide,<sup>183</sup> Diana was transferred back to prison in mid to late February.<sup>184</sup> A psychiatric evaluation ordered by the investigative court, conducted on March 7, found that Diana was in the throes of "serious disorders at the level of thought" and was a danger to herself, recommending that she be transferred back to the psychiatric hospital.<sup>185</sup> At the end of March, Diana was moved into custody at the psychiatric hospital.<sup>186</sup> In May 2019, an appellate court finally revoked Diana's detention and authorized outpatient treatment.<sup>187</sup>

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<sup>177</sup> See Application to the Ninth Court of Criminal Investigation, February 1, 2019.

<sup>178</sup> Legal Medicine Institute "Dr. Roberto Masferrer", Forensic Medical Examination, November 1, 2018, pg. 4.

<sup>179</sup> Agrupación Ciudadana por la Despenalización del Aborto, "Legal Analysis of the case of Diana", 2019, pgs. 21-23.

<sup>180</sup> Id.; Dr. Jose Molina Martinez National Psychiatric Hospital, File relating to Authorization and Application of Medical Procedure 'ECT', February 26, 2019.

<sup>181</sup> Application to the Ninth Court of Criminal Investigation, February 1, 2019.

<sup>182</sup> Detention Order, Ninth Court of Criminal Investigation, February 4, 2019.

<sup>183</sup> Agrupación Ciudadana por la Despenalización del Aborto, "Legal Analysis of the case of Diana", 2019, pgs. 14-17; Dr. Jose Molina Martinez National Psychiatric Hospital, File relating to Authorization and Application of Medical Procedure 'ECT', February 26, 2019.

<sup>184</sup> See Agrupación Ciudadana por la Despenalización del Aborto, "Legal Analysis of the case of Diana", 2019, pg. 36.

<sup>185</sup> Legal Medicine Institute "Dr. Roberto Masferrer", Expert Psychiatric Report, March 12, 2019.

<sup>186</sup> See Agrupación Ciudadana por la Despenalización del Aborto, "Legal Analysis of the case of Diana", 2019, pg. 40; Court Response, Ninth Court of Criminal Investigation, March 18, 2019.

<sup>187</sup> Agrupación Ciudadana por la Despenalización del Aborto, "Legal Analysis of the case of Diana", 2019, pg. 41.

As demonstrated above, warnings regarding Diana’s mental health were not taken seriously, resulting in her being shuttled between the prison and psychiatric hospital until a final decision to release her was made in May. The denial of the specialized psychological treatment she required amounted to a violation of Article 10 of the ICCPR and Article 5 of the American Convention.

## **Electroconvulsive Therapy and Consent**

The administration of electroconvulsive therapy (ECT) to Diana may have violated international standards on consent.

As stated by the Special Rapporteur on Torture, “medical treatments of an intrusive and irreversible nature, when they lack a therapeutic purpose, or aim at correcting or alleviating a disability, [can] constitute torture and ill-treatment if enforced or administered without the free and informed consent of the person concerned.”<sup>188</sup>

In *Ximenes Lopez v. Brazil*, the Inter-American Court of Human Rights, drawing on international guidelines on psychiatric care, considered a case in which a patient at a mental health hospital had died from maltreatment. As stated by the court, individuals with mental health conditions who enter institutions for treatment are particularly vulnerable to abuse.<sup>189</sup> Consequently, with respect to “any health treatment administered to persons with mental illness,” “the assumption that persons with mental illness are capable of expressing their will, which should be respected by both the medical staff and the authorities, should prevail.”<sup>190</sup> According to the Court, “patients’ inability to give their consent [must be] proven”:<sup>191</sup> only thereafter can the next of kin, legal representatives, or pertinent authorities be designated proxies for the purposes of consent.<sup>192</sup>

The Inter-American Commission on Human Rights has likewise addressed these issues. In evaluating a case in Bolivia in which a woman was sterilized without her consent, the Commission discussed the international standards applicable to consent to healthcare. As stated by the Commission, “the international community has recognized informed consent as an active and ongoing process that seeks to ensure that no treatment is performed without the agreement of the patient and without his or her having been duly informed of its effects, risks, and consequences.”<sup>193</sup> When “the surgical patient belongs to a population group that has traditionally been subject to exclusion or discrimination, as

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<sup>188</sup> United Nations General Assembly, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/63/175, July 28, 2008, para. 47. See also Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC/22/53, February 1, 2013, para. 89.

<sup>189</sup> I/A Court H.R., *Ximenes Lopes v. Brazil*, Series C No. 149, July 4, 2006, para. 129.

<sup>190</sup> *Id.* at para. 130.

<sup>191</sup> *Id.* at paras. 128-130.

<sup>192</sup> *Id.* at para. 130.

<sup>193</sup> IACHR, *I.V. v. Bolivia*, Case No. 12.655, August 15, 2014, para. 116.

is the case of women,” “the more rigorous the controls [must be] for ensuring the patient’s free and informed consent.”<sup>194</sup>

During her stay at the psychiatric hospital, Diana received ECT as part of her treatment for depression.<sup>195</sup> There is limited information about the circumstances under which ECT was determined to be the right therapy for Diana. As documented in the hospital records, consent to administer ECT was granted by Diana’s mother and not Diana herself (Diana’s mother also signed a form declaring that she had been informed of the risks of the side effects of her daughter’s treatment).<sup>196</sup> According to Diana and her attorney, the ECT has left her with no memory of being pregnant or her delivery.<sup>197</sup>

It is unclear whether an assessment of Diana’s capacity to consent to ECT was undertaken. The lack of such an assessment would be inconsistent with international standards on consent. It would be particularly troubling given that Diana, a woman suffering from mental health issues, “belongs to a population group that has traditionally been subject to exclusion or discrimination.”

## Right to be Free from Discrimination

### *Legal Standards*

Article 1 of the American Convention provides: “States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belem Do Para) specifically proscribes discrimination on the basis of gender. Article 6(b) stipulates that the “right of

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<sup>194</sup> Id. at para. 123.

<sup>195</sup> Dr. Jose Molina Martinez National Psychiatric Hospital, File relating to Authorization and Application of Medical Procedure ‘ECT’, February 26, 2019; Monitor’s Notes, June 19, 2019 (interview with defense counsel). When administered without anaesthesia, muscle relaxant or oxygenation (its “unmodified” form), ECT can “inflict severe pain and suffering and often leads to medical consequences, including bone, ligament and spinal fractures, cognitive deficits, and possible loss of memory.” United Nations General Assembly, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/63/175, July 28, 2008, para. 61. As such, the UN Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment has stated that unmodified ECT “may constitute torture or ill-treatment.” Id. In this vein, the Special Rapporteur, the World Health Organization, the Council of Europe, and the Pan American Health Organization have all recommended that States stop employing the unmodified form of ECT, deeming it “[un]acceptable.” Id at para. 61, fn. 31; World Health Organization, “Resource Book on Mental Health, Human Rights, and Legislation”, 2005, pg. 64; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Eighth General Report on the Committee’s Activities, August 31, 2008, para. 39. Diana’s hospital charts indicate that ECT without muscle relaxant was administered in four out of eight treatments. If the hospital administered ECT in its unmodified form, this would violate the ban against cruel, inhuman, and degrading treatment.

<sup>196</sup> Id. at pg. 2.

<sup>197</sup> Monitor’s Notes, June 19, 2019 (interview with Diana, defense counsel).

every women to be free from violence” encompasses “[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.” Under Article 7 of the Convention States are required to take appropriate measures to eliminate such patterns and practices.<sup>198</sup>

The ICCPR contains parallel guarantees. Article 2 mandates that States Parties treat all individuals equally, regardless of distinctions such as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 3 requires States Parties to “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,” while Article 26 provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) complements the right to equality set forth in the ICCPR. Article 2 obliges States to eliminate discriminatory practices by, among other things, “establish[ing] legal protection of the rights of women on an equal basis with men and ... ensur[ing] through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”; “refrain[ing] from engaging in any act or practice of discrimination against women and ... ensur[ing] that public authorities and institutions shall act in conformity with this obligation”; “tak[ing] all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”; and “tak[ing] all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”<sup>199</sup> Article 5(a) requires States Parties to eliminate prejudices as well as practices based on stereotypes.

### *Discrimination in El Salvador’s Criminalization of Obstetric Emergencies*

El Salvador’s approach to obstetric emergencies is not only unjust in itself but is also discriminatory on the basis of gender and class. As noted above, the prosecution pursued the case against Diana without sufficient evidence that the incident was a homicide and not an obstetric emergency, in line with documented patterns in such cases. The policy of prosecuting women who seek medical care following out-of-hospital deliveries punishes women for healthcare that only they need and particularly impacts women of lower socio-economic status, who have limited access to sex education and healthcare.

As stated by the UN Working Group on Arbitrary Detention:

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<sup>198</sup> Convention of Belem Do Para, Article 7. See IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, para. 151.

<sup>199</sup> CEDAW, Article 2(c)(d)(e)(f).



a normative framework that falls on only one gender and restricts women's rights ... [is] discriminatory. For the Working Group, a law, sentence, or public policy that restricts the right to personal liberty by criminalizing conduct that is related to the consequences of a lack of access to and enjoyment of the highest attainable standard of health, obstetric violence, or that criminalizes the exercise of women's reproductive rights, should be considered *prima facie* discriminatory.<sup>200</sup>

Inter-American bodies have likewise held that the right to be protected from discrimination encompasses the right to health services that only women require. According to the Inter-American Commission, for example, countries

have a fundamental obligation to ensure timely and adequate access to health services that only women, female adolescents, and girls need because of their sex/gender and reproductive function, free from all forms of discrimination and violence, in accordance with existing international commitments on gender equality.<sup>201</sup>

The UN Committee on the Elimination of Discrimination against Women has further commented on the criminalization of women for reproductive issues. In the Committee's words,

[t]he obligation to respect rights requires States parties to refrain from obstructing action taken by women in pursuit of their health goals ... barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.<sup>202</sup>

El Salvador's approach to obstetric emergencies effectively criminalizes medical procedures "only needed by women" and "punish[es] women who undergo those procedures." Women seeking care in the wake of out-of-hospital deliveries find themselves betrayed by their doctors, subjected to investigation, handcuffed to their hospital beds, marooned in pretrial detention, and staring down decades-long prison sentences. The destructive impact of this reality on women's access to health has yet to be fully untangled.

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<sup>200</sup> 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), U.N. Doc. A/HRC/WGAD/2019/68, March 4, 2020, para. 114.

<sup>201</sup> Inter-American Commission, "IACHR Urges All States to Adopt Comprehensive, Immediate Measures to Respect and Protect Women's Sexual and Reproductive Rights", October 23, 2017. Available at <https://mailchi.mp/dist/iachr-urges-all-states-to-adopt-comprehensive-immediate-measures-to-respect-and-protect-womens-sexual-and-reproductive-rights?e=07a43d57e2>.

<sup>202</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 24, U.N. Doc. A/54/38/Rev.1, 1999, para. 14.

The criminalization of obstetric emergencies additionally discriminates against women of lower socio-economic classes, in contravention of the American Convention and ICCPR. The Inter-American Commission and Court have noted

the intersectionality of discrimination, meaning a simultaneous intersection or concurrence of multiple causes of discrimination that, as a result of interaction and synergy, produces a specific form of discrimination with combined effects that transform the lived experience for the individual affected.<sup>203</sup>

In *Artavia Murillo v. Costa Rica*, the Inter-American Court evaluated Costa Rica's ban on *in vitro* fertilization (IVF), stating: 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."<sup>204</sup> The Court concluded that Costa Rica's IVF ban had disproportionately affected not only women but also "the infertile couples who did not have the financial resources to undergo IVF abroad," violating Article 1(1) of the Convention.<sup>205</sup> Likewise, in *Manuela and Family v. El Salvador*, the Inter-American Commission found violations of the right to non-discrimination on the basis of both gender and class, stating:

Manuela was a poor, young, illiterate woman, and there are also indications that gender stereotypes were applied to Manuela in the way she was treated by different authorities in this case, which for this Commission cannot be disassociated from her poverty and age, as in practice, their convergence produced a situation of greater vulnerability of being the victim of discrimination particularly associated with it.<sup>206</sup>

The UN Human Rights Committee has reached similar conclusions. In *Mellet v. Ireland*, the Committee considered a case in which a woman with an unviable pregnancy was forced to either carry her fetus to term or seek abortion abroad, with corresponding financial, psychological, and physical costs. The Committee - ruling that Ms. Mellet's inability to obtain an abortion in Ireland constituted gender-based discrimination - noted that the "differential treatment to which the author was subjected in relation to other similarly situated women failed to adequately take into account her socioeconomic

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<sup>203</sup> IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, para. 153 (citing caselaw from the Inter-American Court).

<sup>204</sup> I/A Ct. H.R., *Artavia Murillo et al v. Costa Rica*, Series C No. 257, November 28, 2012, paras. 286-287.

<sup>205</sup> *Id.* at paras. 303, 317. See also Inter-American Commission, *I.V. v. Bolivia*, Case No. 12.655, August 15, 2014, paras. 132, 160.

<sup>206</sup> IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, paras. 157-158.

circumstances.”<sup>207</sup> The Committee’s finding of discrimination was thereby informed by the disproportionate impact of Ireland’s legislation on women from lower socioeconomic backgrounds.

As discussed above, El Salvador’s approach to reproductive rights and health disproportionately affects women of lower socioeconomic status, who are more likely to be prosecuted in connection with obstetric complications.<sup>208</sup> The results of the survey conducted by the *Agrupación Ciudadana* bear repeating: of 129 women prosecuted for abortion or aggravated homicide between 2000 and 2011, 82% had little or no income and most came from rural or marginal areas.<sup>209</sup>

Women on the margins typically lack access to sex education and contraception.<sup>210</sup> Further, due to limited funds and lack of options, they tend to seek care at public hospitals, where the risks of being reported to the police are higher than at private clinics.<sup>211</sup> As noted by the Health and Human Rights Journal study on aggravated homicide trials in El Salvador, “women who are poor, poorly educated, and victimized by violence will be the most vulnerable to prosecution.”<sup>212</sup>

Although the costs borne by socioeconomically disadvantaged women such as Diana may not be the intended result of aggravated homicide prosecutions, they are an ancillary effect of the sort condemned by the Inter-American Commission and Court and the Human Rights Committee.

For the foregoing reasons, El Salvador’s unjust criminalization of obstetric emergencies is discriminatory on the basis of gender and class.

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<sup>207</sup> Human Rights Committee, *Mellet v. Ireland*, U.N. Doc CCPR/C/116/D/2324/2013, June 9, 2016, para. 7.11. See also Committee on the Elimination of Discrimination against Women, *L.C. v. Peru*, U.N. Doc. CEDAW/C/50/D/22/2009, November 4, 2011, paras. 8.10-8.15.

<sup>208</sup> See Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, 2014, pgs. 13-14, 16; Committee on Economic, Social, and Cultural Rights, Concluding Observations on the Combined Third, Fourth, and Fifth Periodic Reports of El Salvador, U.N. Doc. E/C.12/SLV/CO/3-5, June 19, 2014, para. 22.

<sup>209</sup> See Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, 2014, pgs. 13-14; 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), U.N. Doc. A/HRC/WGAD/2019/68, March 4, 2020, para. 51.

<sup>210</sup> See Amnesty International, “On the Brink of Death”, September 25, 2014, pgs. 17-20; Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, 2014, pg. 49.

<sup>211</sup> See Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, 2014, pgs. 14, 42, 49; Amnesty International, “On the Brink of Death”, September 25, 2014, pgs. 7, 31; Human Rights Committee, Concluding Observations on the Seventh Periodic Report of El Salvador, U.N. Doc. CCPR/C/SLV/CO/7, May 9, 2018, para. 15.

<sup>212</sup> Jocelyn Viterna & Jose Santos Guardado Bautista, “Pregnancy and the 40-Year Prison Sentence: How ‘Abortion Is Murder’ Became Institutionalized in the Salvadoran Judicial System”, *Health and Human Rights Journal*, Harvard University Press, 2017.



### **TrialWatch Expert Professor Sorensen's Findings:**

While the dismissal of charges against Diana is encouraging, the proceedings were marred by violations of international law. El Salvador's approach to poor pregnancy outcomes violates the State's obligation to ensure equal protection of its laws to all and to respect, protect, and fulfill the rights to life, health, personal integrity and dignity, and privacy. El Salvador's practices are also a systemic violation of its obligation to provide special protection to women like Diana, who have already been marginalized and neglected by the State.

Following her indictment, Diana was unjustifiably detained for seven months, in contravention of the presumption of pretrial release established by the ICCPR and American Convention. She was subjected to cruel, inhuman, and degrading treatment and denied necessary medical care, resulting in the deterioration of her mental state. The prosecution should have discontinued the case against Diana at an earlier juncture given that the investigation failed to unearth sufficient evidence of homicide.

Obstetric emergencies happen. Healthy, live births cannot be guaranteed by women, doctors, or the State. Despite this reality, El Salvador has created and promoted a legal regime that transforms essential healthcare into the site of criminal investigations by exposing women to prosecution for negative pregnancy outcomes.

The State's failures in this regard violate the right to the highest attainable standard of physical and mental health as guaranteed by the International Covenant on Economic, Social and Cultural Rights, to which El Salvador is a State Party. When women seek medical care for pregnancy complications in public healthcare facilities, they come under scrutiny from their healthcare providers; face the prospect of being reported to the authorities for suspected abortions or homicide; and may experience substantial abuse from their physicians, the very people tasked with protecting their health and physical integrity.

This regime increases the risk of pregnancy complications and negative pregnancy outcomes, exacerbating already grave limitations on women and girls' access to healthcare and impeding the realization of their right to life, personal integrity and dignity, and privacy, in violation of El Salvador's obligations under the American Convention and ICCPR.

Moreover, El Salvador's criminalization of poor pregnancy outcomes disproportionately impacts women who hail from poor socioeconomic backgrounds and have few or no means to protect their rights. This pattern is demonstrated by Diana's case and the fact that most women prosecuted as the result of El Salvador's approach to reproductive rights come from disenfranchised and impoverished communities.

Women like Diana face multiple vulnerabilities. El Salvador has enacted a legal regime that exacerbates those vulnerabilities and further violates their human rights.

## TrialWatch Expert Professor Sorensen's Systemic Recommendations:

El Salvador must take action to meet its obligations under the American Convention and ICCPR.

- Authorities at all levels should ensure that decision-making in cases involving alleged abortion or alleged aggravated homicide is free of gender stereotypes, particularly with respect to intent and alternate explanations of cause of death.
- Prosecutors should bring charges regarding alleged abortion or alleged aggravated homicide only where there is sufficient evidence. Given the issues documented above, the State should create a task force within the Attorney General's Office that is dedicated to evaluating these cases and the charging of an accused should be subject to the approval of said task force.
- Courts should dismiss cases of alleged abortion or alleged aggravated homicide at an early stage where the evidence is inadequate.
- In considering the use of pretrial detention, prosecutors and courts should be governed by the presumption of pretrial release.
- Authorities should ensure that detention measures comply with the right to be free from cruel, inhuman, and degrading treatment and the right to humane treatment, particularly with respect to the handcuffing of pregnant women and the provision of necessary medical assistance.
- El Salvador should revise its legislation and policies to ensure that health professionals are not compelled to report women for poor pregnancy outcomes. Health professionals should be allowed to exercise independent judgement and act in the best interests of their patients without the interference of the State.
- El Salvador should review its legislation and policies to ensure that all women and girls, especially those who are impoverished and live in rural communities, have equal access to comprehensive and confidential healthcare as well as quality sexual and reproductive health education as a part of school curricula.

**GRADE:**

**C**



## GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”<sup>213</sup> and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

### Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

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<sup>213</sup> ICCPR, Article 26.