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El Salvador: The Case Against Evelyn Hernandez

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TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE

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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.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice's TrialWatch initiative** monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, religious minorities, LGBTQ persons, and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts' compliance with international human rights standards.

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Juliet Sorensen, Clinical Professor of Law at Northwestern University and member of the TrialWatch Experts Panel, assigned this trial a grade of D:

Ms. Hernandez was twice tried for homicide based on an obstetric emergency she suffered while giving birth. Because her retrial entailed violations of international standards that resulted in significant harm, it was given a “D” under the grading methodology included in the Annex.

In particular, violations of prosecutorial ethics and the right to the presumption of innocence forced Ms. Hernandez to spend extra months in prison and undergo another spurious trial. Notwithstanding Ms. Hernandez’s acquittal, the lack of evidence presented by the prosecution and her unjustified detention are of grave concern. Further, the State’s determination to penalize Ms. Hernandez for suffering an obstetric emergency, ignoring alternate explanations and inferring homicidal intent, evinced a reliance on gender stereotypes. This violated Ms. Hernandez’s right to freedom from discrimination.

In July and August 2019, the American Bar Association’s Center for Human Rights monitored the retrial of Evelyn Hernandez in El Salvador as part of the Clooney Foundation for Justice’s TrialWatch initiative. Ms. Hernandez was prosecuted for aggravated homicide based on an obstetric emergency she suffered while giving birth. Although Ms. Hernandez was acquitted, her retrial was marred by due process violations. The prosecution should not have pursued the case given the lack of evidence substantiating the charges. That the authorities extended Ms. Hernandez’s detention (after she had already spent more than two years in prison as the result of a first trial on the same charges) and put her through a second trial violated her right to liberty, her right to the presumption of innocence, her right to freedom from discrimination, and prosecutorial ethics.

Evelyn Beatriz Hernandez Cruz is a 22-year old woman from an impoverished rural community in El Salvador. In April 2016, Ms. Hernandez - then 18 - experienced severe abdominal pain and diarrhea. She sought relief in the latrine and ultimately delivered a child. Ms. Hernandez has stated that she was impregnated as the result of a sexual assault and was unaware of her condition, instead mistaking the symptoms for stomach troubles.

Ms. Hernandez’s mother found Ms. Hernandez unconscious and covered in blood. She was rushed to the hospital for emergency medical services. Health professionals at the

hospital notified the authorities. As a result, Ms. Hernandez was arrested, handcuffed to her hospital bed, and, just several days later, charged with aggravated homicide and transferred to prison to await trial. In July 2017, on the theory that Ms. Hernandez had thrown her living child into the latrine pit upon giving birth, a court in San Salvador sentenced her to 30 years in prison. In October 2017, an appellate court upheld Ms. Hernandez's conviction. In 2018, the Supreme Court of El Salvador annulled the appellate decision on the basis of insufficient evidence and remanded the case to an appellate chamber, which overturned Ms. Hernandez's conviction and ordered a retrial before a different judge.

The present report covers Ms. Hernandez's retrial as well as related investigation and pretrial procedures: it does not address Ms. Hernandez's first trial or the initial investigation. Notwithstanding this bounded scope, it is clear that Ms. Hernandez's rights were violated.

First, the evidence presented during Ms. Hernandez's retrial was grossly inadequate. The only change from the prosecution's original case was a shift in legal theory. That is, rather than arguing that Ms. Hernandez killed the child (a crime of commission), the prosecution argued that Ms. Hernandez had deliberately failed to provide the child with appropriate care after delivery (a crime of omission).

Medical experts, however, found that the child had died from aspiration of foreign materials, a not uncommon occurrence in childbirth and one that could have resulted in the child's death almost immediately after delivery. This means that Ms. Hernandez might have been unable to assist in any event. Further, various witnesses testified that the birth had induced severe bleeding and loss of consciousness. Even if there was a chance the child could have lived, the evidence suggests that Ms. Hernandez was incapable of intervening.

Indeed, this was precisely the reason that the Supreme Court annulled the appellate decision upholding Ms. Hernandez's conviction, finding homicide by commission improbable given her health condition after delivery. Considering that it was equally improbable that Ms. Hernandez could have chosen *not to act* in her condition, the prosecution's pursuit of her retrial contravened best practices on prosecutorial ethics.

Second, the authorities arbitrarily detained Ms. Hernandez between the overturning of her conviction and retrial, violating the American Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR). Once Ms. Hernandez's conviction was overturned by the appellate chamber, there was no justification for keeping her in detention: the pretrial detention objectives deemed legitimate by the UN Human Rights Committee and Inter-American bodies - preventing the destruction of evidence, flight, or recurrence of crime - did not apply. Nonetheless, Ms. Hernandez remained in jail for approximately two months after her conviction was overturned - until the court

presiding over her retrial ordered her release. This groundless extension of what had already been more than two years in prison additionally violated Ms. Hernandez's right to the presumption of innocence.

Finally, Ms. Hernandez's prosecution violated her right to freedom from discrimination, as protected by the American Convention, the ICCPR, and the Convention on the Elimination of Discrimination against Women. As detailed by the Inter-American Commission and Court as well as by the UN Working Group on Arbitrary Detention, discrimination includes when stereotypes infect legal proceedings, leading the authorities to presume guilt and neglect alternate lines of inquiry.

In Ms. Hernandez's case, the prosecution's reliance on stereotypes of motherhood resulted in inattention to exculpatory evidence. The prosecution, for example, ignored evidence regarding the cause of the child's death and Ms. Hernandez's incapacitation at the time of birth, instead insinuating that a good mother would have saved her baby. The prosecution further inferred homicidal intent from Ms. Hernandez's alleged concealment of her pregnancy, again in the face of contradictory evidence. This conduct constituted gender-based discrimination.

More broadly, it is marginalized women who bear the brunt of El Salvador's policy of prosecuting impoverished women for pregnancy complications beyond their control. This policy is in effect, if not by design, discriminatory on the basis of gender and class.

In addressing the court prior to her acquittal, Ms. Hernandez stated: "[I] as[k] for justice, [I am] 22 years old, [I have] many goals ... [I] than[k] the Court."¹ The prosecution's appeal of Ms. Hernandez's acquittal has just been rejected by a Cojutepeque court. While the prosecution now has until June 29 to appeal this decision to El Salvador's Supreme Court, it should decline to do so. Putting Ms. Hernandez through a third trial would be a profound injustice.

¹ Sentencing Court of Cojutepeque, Department of Cuscatlán, August 19, 2019, pg. 4.



A. POLITICAL AND LEGAL CONTEXT

The detention and prosecution of Evelyn Hernandez 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.² While a large percentage of El Salvador's population is impoverished, particularly in rural areas, poverty rates for women surpass those of men.³

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.⁴ 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.⁵ 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.⁶

In the realm of reproductive rights, women likewise face grave risks. El Salvador's laws on reproductive choice and family planning are severely restrictive.⁷ 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].”⁸ In 1999, Article 1 of the Constitution of El Salvador was amended to recognize the right to life from the moment of conception.⁹

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

³ Id.

⁴ 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.

⁵ 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.

⁶ 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>.

⁷ See 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>.

⁸ 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/2019/07/el-salvador-rape-survivor-sentenced-to-30-years-in-jail-under-extreme-anti-abortion-law/>.

⁹ 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.¹⁰ Individuals who assist women in obtaining an abortion face up to five years in prison,¹¹ while health professionals who perform an abortion face up to twelve years.¹² Unsurprisingly, the abortion ban has resulted in an upsurge in illegal abortions, with accompanying health risks.¹³

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.”¹⁴ 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.¹⁵ 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.”¹⁶ 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.¹⁷ The use of “aggravated homicide” charges was justified on the basis of the “relationship between mother and child.”¹⁸ 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.¹⁹ As documented by Amnesty International, “harsh criminal penalties for assisting in or performing abortions, and lack of legal clarity

¹⁰ Penal Code of El Salvador, 1998, Article 133.

¹¹ *Id.* at Article 136.

¹² *Id.* at Article 135.

¹³ 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.

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

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

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

around patient confidentiality ... have resulted in some health professionals and hospital staff reporting women who have had abortions or miscarriages to the police.”²⁰ 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.²¹ 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.”²² 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.²³

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.²⁴ 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.”²⁵ Women on the margins typically lack access to sex education and contraception²⁶ and rely on public hospitals, where health professionals are more likely than those in private clinics to report them to the police.²⁷

Legal Proceedings

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

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

²¹ See Center for Reproductive Rights, “Manuela Toolkit”, pg. 3. Available at https://reproductiverights.org/sites/default/files/documents/GLP_Manuela_Toolkit_English_FINAL.pdf.

²² 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.

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

²⁴ 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.

²⁵ 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.

²⁶ 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.

²⁷ 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.²⁸

Lengthy and arbitrary pretrial detention is likewise a significant problem.²⁹ The Working Group on Arbitrary Detention recently found violations of the right to freedom from arbitrary detention in two cases of alleged aggravated homicide (including Ms. Hernandez's first trial) and one of alleged attempted aggravated homicide in El Salvador, citing a lack of "individualized analysis justifying the need for pretrial detention."³⁰ 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."³¹

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.³² In such proceedings, "negative stereotypes around the concept of the 'bad mother' and the 'murderous mother' are said to prevail."³³ 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

²⁸ 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.

²⁹ 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.

³⁰ 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.

³¹ *Id.* at para. 114.

³² 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.

³³ 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.

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

The assumptions apparent in these arguments not only discriminate based on gender but also undermine the presumption of innocence, a core fair trial right.³⁵ 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.³⁶

As will be discussed below, Ms. Hernandez's case reflects the foregoing patterns: she hailed from a poor rural community and was reliant on the public healthcare system; she suffered an obstetric emergency and sought care at a public hospital; she was reported by health professionals and immediately arrested; she was unjustifiably detained; and she was prosecuted for aggravated homicide despite the dearth of evidence supporting the charges.

B. CASE HISTORY

Evelyn Beatriz Hernandez Cruz is a 22 year old (as of June 2020) female from the small rural community of Cuscatlán in El Salvador.³⁷ As discussed above, in April 2016 Ms. Hernandez - then 18 - experienced severe abdominal pain and diarrhea and ultimately delivered a child.³⁸ She has stated that she was raped and never realized that the assault left her pregnant, instead mistaking the symptoms for stomach troubles.³⁹

³⁴Jocelyn 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.

³⁵ 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.

³⁶ 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.

³⁷ BBC, "Salvadorian Woman Jailed Over Baby's Death Is Freed", February 16, 2019. Available at <https://www.bbc.com/news/world-latin-america-47263743>; The Guardian, "El Salvador Teen Rape Victim Sentenced to 30 Years in Prison After Stillbirth", July 6, 2017. Available at <https://www.theguardian.com/global-development/2017/jul/06/el-salvador-teen-rape-victim-sentenced-30-years-prison-stillbirth>.

³⁸ The Guardian, "El Salvador Rape Victim Who Suffered Stillbirth Faces Murder Retrial", August 14, 2019. Available at <https://www.theguardian.com/global-development/2019/aug/14/el-salvador-rape-victim-who-suffered-stillbirth-faces-murder-retrial-evelyn-beatriz-hernandez-cruz>.

³⁹ BBC, "El Salvador: Evelyn Hernández Cleared Over Baby's Death", August 20, 2019. Available at <https://www.bbc.com/news/world-latin-america-49368632>.

Ms. Hernandez's mother found her unconscious and covered in blood, after which she was taken to the hospital for emergency medical services.⁴⁰ Health professionals at the hospital notified the authorities.⁴¹ Ms. Hernandez was handcuffed to her hospital bed and - just several days later - transferred to prison to await trial.⁴² The authorities initially treated the matter as an abortion case but later pursued aggravated homicide charges.⁴³ Notably, the crime of homicide requires "malice aforethought": in other words, "the knowledge and willingness to perform the conduct."⁴⁴

In July 2017, more than a year after her arrest at the hospital, Ms. Hernandez was sentenced to 30 years in prison. The trial court found that Ms. Hernandez had hidden her pregnancy because she did not want a baby.⁴⁵ Relying on evidence that the child had foreign materials in its lungs and that there was less blood splatter than expected around the latrine, the court further concluded that Ms. Hernandez had given birth outside of the latrine and had then thrown the living child into the pit.⁴⁶ An appeals court upheld the trial court's decision in October 2017.⁴⁷

On September 26, 2018, the Criminal Court of the Supreme Court of Justice annulled the appellate decision upholding Ms. Hernandez's conviction on the basis of insufficient evidence that Ms. Hernandez was capable of even assisting her child - let alone throwing the child into the toilet - given her condition after delivery.⁴⁸ The Supreme Court remanded the case to an appellate chamber, which overturned Ms. Hernandez's conviction and ordered a retrial before a different judge.⁴⁹ Ms. Hernandez remained incarcerated until February 15, 2019, when the lower court granted her request for release pending retrial.⁵⁰

⁴⁰ CNN, "Prosecutors Ask for 40 Years in a Controversial Abortion Trial in El Salvador", August 16, 2019. Available at <https://www.cnn.com/2019/08/15/world/evelyn-hernandez-abortion-retrial-aug-15-intl/index.html>.

⁴¹ Rewire.News, "In El Salvador, Activists Demand Justice for Teenager Imprisoned after Obstetric Complications", July 14, 2017. Available at <https://rewire.news/article/2017/07/14/el-salvador-activists-demand-justice-teenager-imprisoned-obstetric-complications/>. There are conflicting reports about whether doctors or a social worker at the hospital called the authorities.

⁴² See The Guardian, "El Salvador Rape Victim Who Suffered Stillbirth Faces Murder Retrial", August 14, 2019; The Guardian, "El Salvador: I Had a Miscarriage. The Judge Accused Me of Murder", December 17, 2015. Available at https://www.theguardian.com/global-development/video/2015/dec/17/el-salvador-miscarriage-judge-accused-me-murder-anti-abortion-law-video?CMP=embed_video.

⁴³ See BBC, "El Salvador: Evelyn Hernández Cleared Over Baby's Death", August 20, 2019; Rewire.News, "In El Salvador, Activists Demand Justice for Teenager Imprisoned after Obstetric Complications", July 14, 2017.

⁴⁴ Sentencing Court of Cojutepeque, Department of Cuscatlán, Judgment, August 19, 2019, pgs. 33-34.

⁴⁵ See First Criminal Court of the First Section, Department of Cuscatlán, Judgment, December 20, 2018, pg. 14; The Guardian, "El Salvador Teen Rape Victim Sentenced to 30 Years in Prison After Stillbirth", July 6, 2017.

⁴⁶ Id.

⁴⁷ Rewire.News, "Woman Detained After Obstetric Complications Released from Prison in El Salvador", February 15, 2019. Available at <https://rewire.news/article/2019/02/15/woman-detained-after-obstetric-complications-released-from-prison-in-el-salvador/>.

⁴⁸ Criminal Court of the Supreme Court of Justice, September 26, 2018, pg.13.

⁴⁹ Rewire.News, "Woman Detained After Obstetric Complications Released from Prison in El Salvador", February 15, 2019.

⁵⁰ Id.

Ms. Hernandez's retrial was initially scheduled for April 4, 2019⁵¹ but was delayed, commencing on July 15, 2019. Ms. Hernandez declined to testify. As was the case during Ms. Hernandez's first trial, the prosecution argued that she had purposefully hidden her pregnancy and bypassed prenatal care because she did not want the child.⁵² In contrast to its previous position, however, the prosecution's argument on retrial was that Ms. Hernandez had given birth *inside* the latrine and had thereafter purposefully declined to assist the child, making her responsible for the child's death.⁵³

On August 19, 2019, Ms. Hernandez was acquitted by the trial court, which - like the Supreme Court of Justice - found that there was insufficient evidence of guilt.⁵⁴ In September 2019, the prosecution appealed the acquittal. On June 5, 2020, a Cojutepeque court rejected the prosecution's appeal. The prosecution now has until June 29 to appeal the court's decision before El Salvador's Supreme Court.

⁵¹ Rewire.News, "Woman Detained After Obstetric Complications Released from Prison in El Salvador", February 15, 2019.

⁵² See Sentencing Court of Cojutepeque, Department of Cuscatlán Judgment, August 19, 2019, pg. 46.

⁵³ *Id.* To note, in the initial stages of Ms. Hernandez's first trial, the prosecution argued that she had given birth in the latrine. Subsequently, in the later stages of the trial and on appeal, the prosecution argued that she had given birth in a different location and had thereafter thrown her child in the latrine pit.

⁵⁴ Monitor's Notes, August 19, 2019; Sentencing Court of Cojutepeque, Department of Cuscatlán Judgment, August 19, 2019.

METHODOLOGY



A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice's (CFJ) TrialWatch initiative, the American Bar Association's Center for Human Rights deployed monitors from the region to Ms. Hernandez's trial before a criminal court in San Salvador. The monitors were fluent in Spanish and able to understand the proceedings. Prior to the trial, the Center conducted background research, consulted with country experts, and prepared a memorandum for monitors 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 monitors did not experience any impediments in entering the courtroom and were present for hearings on July 15, August 15, August 16, and August 19, 2019.⁵⁵ The monitors 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 monitors' 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 and her co-author Alexandra Tarzikhan 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 retrial failed to conform to fundamental international standards. Ms. Hernandez was unjustifiably detained for two months after her conviction was overturned, in contravention of her right to liberty and the presumption of innocence. The prosecution pursued the case despite insufficient evidence, breaching best practices on prosecutorial ethics. Further, Ms. Hernandez's retrial was propelled by gender stereotypes, violating her right to freedom from discrimination.

The investigative practices employed by the Salvadoran authorities are likewise a source of concern. As mentioned above, hospital staff notified the authorities of Ms. Hernandez's out-of-hospital delivery. Notwithstanding the lack of indication that Ms. Hernandez had suffered anything but an obstetric emergency, she was handcuffed to her bed, subjected to an "abortion protocol" gynecological examination, and soon thereafter transferred to prison. The imposition of such measures on an individual seeking medical services in the wake of a traumatic and physically debilitating incident is alarming.

⁵⁵ Monitors were not present for a hearing on July 26, 2019, which entailed a decision on the timing and modality of the forensic pathologist's testimony.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR);⁵⁶ jurisprudence from the UN Human Rights Committee, tasked with monitoring implementation of the ICCPR; the American Convention on Human Rights;⁵⁷ 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 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, CEDAW in 1981, and the Convention of Belem Do Para in 1995.

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 the ICCPR, an individual “shall [not] be subjected to arbitrary arrest or detention ... [nor] be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”⁵⁸ 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 law as well as elements of reasonableness, necessity and proportionality.”⁵⁹ Not only should pretrial detention be the exception and as short as possible, but detention must be “lawful” (in

⁵⁶ 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”].

⁵⁷ 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”].

⁵⁸ ICCPR, Article 9(1).

⁵⁹ Human Rights Committee, *Izmet Oselik et al v. Turkey*, U.N. Doc. CCPR/C/125/D/2980/2017, May 28, 2019, para. 9.3.

accordance with domestic law) and “reasonable and necessary in all circumstances.”⁶⁰ This means that pretrial detention is appropriate for only a limited number of purposes: to prevent flight, interference with evidence, or the recurrence of serious crime.⁶¹ Notably, unreasonable pretrial detention can also breach the presumption of innocence due to detention’s functional transformation into a punitive measure.⁶²

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.⁶³ Second, pretrial detention must be proportional.⁶⁴ States must ensure “that the measure of procedural coercion [is not] equal to or more harmful for the defendant than the punishment in case of conviction.”⁶⁵ Third, pretrial detention must be necessary.⁶⁶ States must employ the least restrictive measures to ensure that the accused appears at and does not frustrate the proceedings.

When individuals are incarcerated “beyond the limits strictly necessary to ensure” the fulfillment of detention objectives, the presumption of innocence can be violated.⁶⁷ As stated by the Inter-American Commission, “the guarantee of the presumption of innocence becomes increasingly empty and ultimately a mockery when pretrial imprisonment is prolonged unreasonably, since presumption notwithstanding, the severe penalty of deprivation of liberty which is legally reserved for those who have been convicted, is being visited upon someone who is, until and if convicted by the courts, innocent.”⁶⁸

In the present case, Ms. Hernandez’s detention cannot be said to have been reasonable, necessary, or proportional. In September 2018, the Supreme Court annulled the appellate decision upholding her conviction, remanding the case to an

⁶⁰ Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

⁶¹ Human Rights Committee, *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, August 19, 2010, para. 10.4. See also Working Group on Arbitrary Detention, Opinion No. 68/2019, concerning Sara del Rosario Rogel García, Berta Margarita Arana Hernández, and Evelyn Beatriz Hernández Cruz (El Salvador) (advance unedited version), U.N. Doc. A/HRC/WGAD/2019/68, March 4, 2020, paras. 91-97.

⁶² See Human Rights Committee, *Cagas v. Philippines*, U.N. Doc. CCPR/C/73/D/788/1997, October 23, 2001, para. 7.3.

⁶³ 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.

⁶⁴ I/A Ct. H.R., *Barreto Leiva v. Venezuela*, Series C No. 206, November 17, 2009, para. 122.

⁶⁵ *Id.*

⁶⁶ I/A Ct. H.R., *Palamara Iribarne v. Chile*, Series C No. 135, November 22, 2005, paras. 198, 206.

⁶⁷ I/A Ct. H.R., *Barreto Leiva v. Venezuela*, November 17, 2009, Series C No. 206, para. 121; I/A Ct. H.R., *Bayarri v. Argentina*, October 30, 2008, Series C No. 187, para. 69.

⁶⁸ IACHR, *Jorge A. Gimenez v. Argentina*, Case No. 11.245, March 1, 1996, para. 80.

appellate chamber. On December 20, 2018, the appellate chamber overturned Ms. Hernandez's conviction, ordering a new trial. Ms. Hernandez, however, was not released until mid-February 2019. Factors that might justify continued detention, such as the risk of recurrence of crime or interference with evidence, were inapplicable. All evidence in the case had already been gathered and it would have been impossible for Ms. Hernandez to again commit the alleged offense. Further, there was no indication that Ms. Hernandez would flee the jurisdiction. As noted above, Ms. Hernandez is a woman of limited means, with immediate family in El Salvador. As such, her incarceration for almost two months after her conviction was overturned was arbitrary, in contravention of ICCPR and American Convention.

At the point that her conviction was overturned, Ms. Hernandez had already spent more than two years in prison. That her detention was *further* "prolonged unreasonably", well "beyond the limits strictly necessary to ensure" the fulfilment of detention objectives, violated her right to be presumed innocent.

C. VIOLATIONS AT RETRIAL

Right to the Presumption of Innocence

Ms. Hernandez's right to the presumption of innocence was undermined not only by her arbitrary detention, as discussed above, but also by the conduct of her retrial. Article 14(2) of the ICCPR provides that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The presumption of innocence is fundamental to the protection of human rights and, for criminal convictions, requires that the prosecution prove guilt beyond a reasonable doubt.⁶⁹ As such, the prosecution carries the burden of substantiating the charge.⁷⁰

Article 8(2) of the American Convention similarly protects the right to be presumed innocent. As detailed by the Inter-American Court of Human Rights, "in criminal proceedings, the State bears the burden of proof. The accused is not obligated to affirmatively prove his innocence or to provide exculpatory evidence."⁷¹

In the proceedings against Ms. Hernandez, the prosecution argued that she knew she was pregnant and purposely declined prenatal care, allegedly demonstrating her homicidal intent. This theory was central to the prosecution's case. Throughout the trial, witnesses were called to testify to the question of whether Ms. Hernandez was aware of her pregnancy.⁷² These witnesses presented a range of explanations for their views,

⁶⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30.

⁷⁰ *Id.*

⁷¹ I/A Ct. H.R., Zegarra Marín v. Peru, Series C No. 331, February 15, 2017, Non-official Brief. Available at <http://www.corteidh.or.cr/cf/Jurisprudencia2/overview.cfm?doc=1786&lang=en>.

⁷² Monitor's Notes, July 15, 2019.

including “rumors,” Ms. Hernandez’s clothing, and Ms. Hernandez’s paleness.⁷³ Subsequently, at closing arguments, the prosecutor asserted: “It was not proven that Evelyn did not know she was pregnant.”⁷⁴

With respect to what transpired at birth, the prosecution employed similar reasoning. As recounted in the judgment, the prosecution claimed that because defense witnesses who saw Ms. Hernandez unconscious and bleeding did not attend the birth itself, they could not be *certain* that Ms. Hernandez did not purposefully withhold assistance to the child.⁷⁵

These types of argument impermissibly sought to shift the burden of proof to the defense, in contravention of Ms. Hernandez’s right to be presumed innocent. The prosecution must demonstrate the accused’s guilt beyond a reasonable doubt. The defense is not obliged to prove the accused’s innocence.

The prosecution’s apparent disrespect for the presumption of innocence was further evidenced by its pursuit of Ms. Hernandez’s retrial, discussed below.

D. OTHER FAIRNESS CONCERNS

Prosecutorial Ethics

The actions of the prosecution in the proceedings against Ms. Hernandez breached best practices on prosecutorial ethics.

International standards in this regard are clear: prosecutors should terminate proceedings when there is no evidence to support the given charges. The United Nations Guidelines on the Role of Prosecutors, for example, establish that prosecutors should “perform their duties fairly, consistently and expeditiously.”⁷⁶ In particular, the Guidelines stipulate: “prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charges to be unfounded.”⁷⁷ Parallel guidelines issued by the International Association of Prosecutors similarly state that prosecutors should proceed only when a case is “well-founded upon evidence reasonably believed to be reliable” and should decline to prosecute a case “beyond what is indicated by the evidence.”⁷⁸

⁷³ Id.

⁷⁴ Monitor’s Notes, August 16, 2019.

⁷⁵ See Sentencing Court of Cojutepeque, Department of Cuscatlán Judgment, August 19, 2019, pgs. 41, 44.

⁷⁶ United Nations Office of the High Commissioner for Human Rights, United Nations Guidelines on the Role of Prosecutors, 1990, para. 12. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

⁷⁷ Id. at para. 14.

⁷⁸ International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, 1999, Principle 4.2. Available at <https://www.iapassociation.org/getattachment/Resources-Documents/IAP-Standards->

In the present case, the prosecution attempted to prove the crime of aggravated homicide through omission:⁷⁹ namely, “the accused, as the mother of her newborn child, in fact held the position of guarantor and as such was required to fulfil her duty to act or perform in order to prevent the death of her child.”⁸⁰ The prosecution alleged that Ms. Hernandez neglected her duty as a mother by intentionally failing to seek help or provide assistance after giving birth in the latrine, causing the child’s death.⁸¹

The evidence introduced by the prosecution in support of this premise was insufficient. Experts noted that although the child appeared to have been born alive, he had died from aspiration of foreign material (possibly meconium within the amniotic fluid), an issue that commonly arises in childbirth.⁸² Without proper medical care, aspiration of meconium within the amniotic fluid could have resulted in near-immediate death.⁸³ The expert who performed the autopsy, for example, testified that some newborns who undergo meconium aspiration require prompt “intensive care attention.”⁸⁴ As such, Ms. Hernandez might not have been able to assist in any event.

Moreover, even if the child theoretically could have lived, the evidence suggests that Ms. Hernandez was incapable of intervening. According to the doctor who examined Ms. Hernandez at the hospital, it was a “problematic birth” and “the lesions on Ms. Hernandez were bleeding abundantly ... when there is abundant bleeding the patient can faint and lose consciousness.”⁸⁵ A friend of the family further stated that he had arrived at Ms. Hernandez’s house after receiving an emergency call from her mother to find “Evelyn lying on the living room floor having fainted and bleeding a lot.”⁸⁶ A neighbor testified that on the day of the incident, she saw the family friend carrying Ms. Hernandez to a car (for transport to the hospital).⁸⁷ She noted that Ms. Hernandez was wrapped in a blanket, bleeding and unconscious.⁸⁸ In line with the above testimony, it appears that Ms. Hernandez was powerless to help herself, let alone provide assistance to the child.

As stated by the prosecution’s own experts, the other points raised to prove Ms. Hernandez’s guilt - a torn umbilical cord and a bruise on the baby’s head - could all have been caused by a natural birth.⁸⁹ And while the prosecution asserted that Ms.

(1)/IAP_Standards_Oktober2018_FINAL_20180210.pdf.aspx. See also Council of Europe, European Guidelines on Ethics and Conduct for Public Prosecutors, 2005, Section III. Available at <https://rm.coe.int/conference-of-prosecutors-general-of-europe-6th-session-organised-by-t/16807204b5>.

⁷⁹ Monitor’s Notes, July 15, 2019; Monitor’s Notes, August 15, 2019; Monitor’s Notes, August 16, 2019.

⁸⁰ Sentencing Court of Cojutepeque, Department of Cuscatlán, Judgment, August 19, 2019, pg. 47.

⁸¹ Monitor’s Notes, July 15, 2019; Monitor’s Notes, August 15, 2019; Monitor’s Notes, August 16, 2019.

⁸² Monitor’s Notes, July 15, 2019; Monitor’s Notes, August 15, 2019.

⁸³ Id.

⁸⁴ Monitor’s Notes, July 15, 2019.

⁸⁵ Id.; Sentencing Court of Cojutepeque, Department of Cuscatlán, Judgment, August 19, 2019, pgs. 5, 47.

⁸⁶ Monitor’s Notes, August 15, 2019.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ See Monitor’s Notes, July 15, 2019 (testimony of expert who performed the autopsy).

Hernandez's alleged concealment of the pregnancy evinced homicidal intent, it offered no evidence to support this theory - an issue discussed at length below.⁹⁰

In acquitting Ms. Hernandez, the trial court highlighted these deficiencies. With respect to the prosecution's argument about the supposedly "hidden" pregnancy and its demonstration of intent, the court stated that there was "no specific direct or indirect evidentiary element to support [the assertion]."⁹¹ With respect to the delivery, the court was "unconvinced that Evelyn deliberately failed to aid her newborn child in her capacity as a parent."⁹² In the court's words: "it [was] not evident that [Evelyn] had the final control of the referred event ... we are faced with deficient evidence that does not clearly demonstrate the facts."⁹³

Notably, the trial court's reasoning echoed that of the 2018 Supreme Court decision. As stated by the Supreme Court, the prosecution failed to

establish whether the defendant for certain was in a physical and psychological condition to provide the victim with the immediate medical attention required, according to the perinatal pathology. The only elements they have in this regard, point to the fact that after the delivery, the accused suffered vaginal bleeding, that her lack of reaction, weakness and fainting, are signs of low blood pressure.⁹⁴

In light of this decision by the Supreme Court and the overlap between the evidence necessary to prove homicide by commission and the evidence necessary to prove the theory of omission advanced at Ms. Hernandez's retrial, the prosecution "[should not have] continue[d] prosecution, or [should have] ma[d]e every effort to stay proceedings," in accordance with international guidelines.

Right to be Free from Discrimination

Ms. Hernandez's right to equality under the law was violated by the prosecution's conduct. The prosecution relied on gender stereotypes in pursuing her retrial, in contravention of the non-discrimination guarantees established by the American Convention, the ICCPR, and CEDAW.⁹⁵ More broadly, the disproportionate burden borne by disadvantaged women as a result of El Salvador's approach to obstetric emergencies also violates the right to be free from discrimination.

⁹⁰To note, the prosecution presented conflicting evidence about whether Ms. Hernandez even knew about the pregnancy.

⁹¹ Sentencing Court of Cojutepeque, Department of Cuscatlán, Judgment, August 19, 2019, pgs. 41-43.

⁹² Monitor's Notes, August 19, 2019.

⁹³ Sentencing Court of Cojutepeque, Department of Cuscatlán, Judgment, August 19, 2019, pgs. 48, 52.

⁹⁴ Criminal Court of the Supreme Court of Justice, September 26, 2018, pg.13.

⁹⁵ As noted above, this report is focused on Ms. Hernandez's retrial, not on the investigation and prosecution in the original proceedings against her.

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 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.⁹⁶

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.”⁹⁷ Article 5(a) requires States Parties to eliminate prejudices as well as practices based on stereotypes.

The UN Committee on the Elimination of Discrimination against Women has characterized state actors’ use of gender stereotypes in legal proceedings as a breach of

⁹⁶ Convention of Belem Do Para, Article 7. See IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, para. 151.

⁹⁷ CEDAW, Article 2(c)(d)(e)(f).

Article 2 and Article 5(a).⁹⁸ In *Belousova v. Kazakhstan*, for example, the Committee considered a case in which a woman alleged that her employer had sexually harassed her. The authorities failed to adequately investigate the claim. Subsequently, the woman's employer initiated a defamation suit against her.⁹⁹ The Committee noted that the presiding court, which ultimately ruled in favor of the employer, "referred to the fact that [the woman] did not complain about the alleged sexual harassment while she was still employed, but only after her dismissal, as a circumstance rendering her allegation less credible."¹⁰⁰ This reasoning, based in trope, displayed a disregard for the woman's "vulnerable position as a solo female wage earner subordinate to [the alleged perpetrator]."¹⁰¹ Taking these circumstances into account, the Committee found that national institutions' failure to handle the case with the requisite sensitivity - a failure "influenced by stereotypes" - violated Article 2 and Article 5(a).¹⁰²

The Inter-American Commission and Court have identified potential manifestations of gender discrimination within the context of criminal proceedings:

(i) improper assessment of evidence that is based on ideas that generalize social behavior and roles; (ii) the closure of potential lines of investigation into circumstances of the case and identification of the perpetrators; (iii) the lack of exhaustive analysis of the scene of a crime and failures in the collection, documentation, and preservation of evidence, as well as irregularities in forensic medical examinations; (iv) failure to take investigative steps as a result of judgments regarding the social behavior of men and women; (v) tacit assumptions that women are responsible for the facts because of the way they dress, their jobs, their sexual behavior, etc., or convictions based on negative stereotypes of certain groups that invite attribution of criminal responsibility.¹⁰³

In *Manuela and Family v. El Salvador*, a case concerning a woman's conviction for aggravated homicide on the basis of an obstetric emergency, the Commission cited

⁹⁸ See Committee on the Elimination of Discrimination against Women, *V.K. v. Bulgaria*, U.N. Doc. CEDAW/C/49/D/20/2008, September 27, 2011, paras. 9.11-9.12; Committee on the Elimination of Discrimination against Women, *S.T. v. Russia*, U.N. Doc. CEDAW/C/72/D/65/2014, April 8, 2019, paras. 9.6-9.9, 9.11-9.12; Committee on the Elimination of Discrimination against Women, *R.K.B. v. Turkey*, U.N. Doc. CEDAW/C/51/D/28/2010, April 13, 2012, paras. 8.6-8.8. The Committee does not always clearly distinguish between which acts are violations of Article 2 provisions and which acts are violations of Article 5(a).

⁹⁹ Committee on the Elimination of Discrimination against Women, *Belousova v. Kazakhstan*, U.N. Doc. CEDAW/C/61/D/45/2012, August 25, 2015, para. 2.10.

¹⁰⁰ *Id.* at para. 10.10.

¹⁰¹ *Id.*

¹⁰² *Id.* at paras. 10.8-10.10.

¹⁰³ IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, para. 152 (citing supporting caselaw from both the Commission and Court).

several of the above indicators.¹⁰⁴ Specifically, the Commission denounced the authorities' inattention to alternate explanations for the child's death, such as a miscarriage.¹⁰⁵ As recounted by the Commission, the authorities inferred homicidal intent from Manuela's alleged concealment of the pregnancy and the fact that "the pregnancy was the result of infidelity."¹⁰⁶ The convicting court further discounted evidence that Manuela had been incapacitated by the birth, as "maternal instinct" should have prompted her to render assistance.¹⁰⁷

In finding a violation of Article 1(1) of the American Convention and Article 7 of the Convention of Belem Do Para, the Commission stated:

when factual gaps emerged on aspects that were important for determining criminal responsibility, they were filled with the stereotypes. The impact was to establish criminal responsibility, and not in a sense that imposed the presumption of innocence—that is, resolving doubts in favor of the defendant, or at least taking all possible evidentiary steps to objectively address those gaps rather than making the discriminatory assumptions described.¹⁰⁸

The UN Working Group on Arbitrary Detention has likewise examined the issue of discrimination in the context of El Salvador's approach to reproductive rights. In a 2020 Opinion concerning three cases of women convicted of, respectively, aggravated homicide and attempted aggravated homicide on the basis of obstetric emergencies (one of which was Ms. Hernandez's first trial), the Working Group found a violation of Articles 2 and 26 of the ICCPR.¹⁰⁹ According to the Working Group, the deprivation of the women's liberty was

discriminatory on the basis of gender, since it respond[ed] to generalized practices that consider that women, in a grave state of health and under defenseless conditions, should place above their own life the possible life resulting from their pregnancy, even when they are unconscious or vulnerable.¹¹⁰

In particular, the Working Group highlighted the authorities' presumption of "malice aforethought," inferred from the accused's supposed awareness and concealment of their respective pregnancies.¹¹¹

¹⁰⁴ Id. at paras. 152-156.

¹⁰⁵ Id. at paras. 154-156.

¹⁰⁶ Id.

¹⁰⁷ Id. at para. 156.

¹⁰⁸ Id.

¹⁰⁹ 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. 110-116.

¹¹⁰ Id. at para. 110.

¹¹¹ See id. at paras. 111-113.

Discrimination in Ms. Hernandez's Case

Ms. Hernandez's retrial reflected a reliance on gender stereotypes, in contravention of the ICCPR, the American Convention, and CEDAW.

In arguing that Ms. Hernandez had purposefully declined to assist her child, for example, the prosecution cited her alleged concealment of her pregnancy as evidence of malice aforethought. In its closing statement, the prosecution asserted: it is proven that "Evelyn intended to commit a homicide by the hiding of her pregnancy and childbirth for fear that her parents [would] retaliate against her ... she had a boyfriend and hid the relation from her parents ... therefore she planned to murder her child."¹¹² This unsubstantiated ascription of intent mirrors similar conduct condemned by the Inter-American Commission and UN Working Group.

With respect to the delivery, the prosecution jumped to the conclusion that the child would have lived but for Ms. Hernandez's actions, disregarding evidence that Ms. Hernandez was incapacitated after giving birth. As stated in the acquitting judgment:

[t]he prosecution trie[d] to sustain its accusatory thesis of omission based on the deposition of the [aforementioned family friend], who stated that when he arrived between ten and eleven in the morning he only found Evelyn Beatriz and her mother on the floor of the house, falling into omission by not doing what she was obliged to do, constituting this as the first assumption for which Evelyn Beatriz Hernández Cruz must answer for that omissive conduct, which is equivalent to having carried out the action of killing her baby.¹¹³

A woman incapacitated does not a murderer make. Again, the reasoning employed by the prosecution aligns with the approach denounced in *Manuela and Family* as well as in the UN Working Group Opinion, supposing that "women, in a grave state of health and under defenseless conditions, should place above their own life the possible life resulting from their pregnancy, even when they are unconscious or vulnerable, presuming their bad faith."

Consequently, the prosecution's pursuit of Ms. Hernandez, "presuming [her] bad faith" in the face of contradictory evidence and alternate explanations, was discriminatory.

Discrimination in El Salvador's Criminalization of Obstetric Emergencies

More broadly, El Salvador's criminalization of obstetric emergencies is not only unjust in itself but is also discriminatory on the basis of gender and class. The policy of prosecuting

¹¹² Monitor's Notes, August 16, 2019.

¹¹³ Sentencing Court of Cojutepeque, Department of Cuscatlán, Judgment, August 19, 2019, pg. 40.

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:

a normative framework that falls on only one gender and restricts women's rights, in the way that the present case reflects it, [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.¹¹⁴

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.¹¹⁵

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.¹¹⁶

¹¹⁴ 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.

¹¹⁵ 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>.

¹¹⁶ Committee on the Elimination of Discrimination against Women, General Recommendation No. 24, U.N. Doc. A/54/38/Rev.1, 1999, para. 14.

As reflected by Ms. Hernandez’s case, El Salvador’s approach to obstetric emergencies unlawfully 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.

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.¹¹⁷

In *Artavia Murillo v. Costa Rica*, for example, 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.”¹¹⁸ 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.¹¹⁹ 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.¹²⁰

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

¹¹⁷ IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, para. 153 (citing caselaw from the Inter-American Court).

¹¹⁸ I/A Ct. H.R., *Artavia Murillo et al v. Costa Rica*, Series C No. 257, November 28, 2012, paras. 286-287.

¹¹⁹ *Id.* at paras. 303, 317. See also Inter-American Commission, *I.V. v. Bolivia*, Case No. 12.655, August 15, 2014, paras. 132, 160.

¹²⁰ IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, paras. 157-158.

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 circumstances."¹²¹ 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.¹²² 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.¹²³

Women on the margins typically lack access to sex education and contraception.¹²⁴ 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.¹²⁵ 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."¹²⁶

Although the costs borne by socioeconomically disadvantaged women such as Ms. Hernandez 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.

¹²¹ 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.

¹²² 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.

¹²³ 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.

¹²⁴ 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.

¹²⁵ 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.

¹²⁶ 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.

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



TrialWatch Expert Professor Sorensen's Findings:

Notwithstanding Ms. Hernandez's ultimate acquittal, the proceedings against her were marred by an array of violations of the right to due process. More broadly, El Salvador's approach to poor pregnancy outcomes violates other substantive rights protected by international law, including the right to health, the right to privacy, and the right to equality and non-discrimination.

The retrial presented herein reveals a baseless criminal prosecution. As noted by both El Salvador's Supreme Court and the San Salvador court that acquitted Ms. Hernandez, the prosecution's case was severely deficient. That Ms. Hernandez was detained for almost three years and subjected to two trials demonstrates the authorities' lack of respect for the presumption of innocence and reliance on gender stereotypes.

Ms. Hernandez is one of many Salvadoran women who have been prosecuted for aggravated homicide on the basis of obstetric emergencies. Like Ms. Hernandez, these women have typically sought medical services in public hospitals for complications arising from out-of-hospital deliveries. In treating such patients, Salvadoran health professionals commonly notify the police. This practice not only violates the right to privacy and medical ethics but also the right to health. Women are deterred from procuring health care because they fear that confidentiality will be discarded and criminal proceedings initiated.

State action should be limited by the interests of human dignity and should facilitate the effective enjoyment of human rights. Moreover, states should provide the highest attainable standard of health to women, who merit special protection in light of historical discrimination. In criminalizing poor pregnancy outcomes, El Salvador has ignored its obligation to guarantee women's fundamental rights.

As evidenced by Ms. Hernandez's retrial, El Salvador's legal regime has disproportionately affected women who are in vulnerable situations due to poverty, lack of access to education and sexual and reproductive services, and youth. As further captured in this report, a direct consequence of El Salvador's policies is the stigmatization of women, especially the most vulnerable.

Prosecutions such as that of Ms. Hernandez have no place in a society that upholds the rights of its citizens. A third trial would be deeply unjust.

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 pursue 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 such cases and the charging of an accused should be subject to the approval of said task force.
- Courts should take care to 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, 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:  **D**



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,”¹²⁷ 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.

¹²⁷ ICCPR, Article 26.