INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF MANUELA[*] *ET AL. V.* EL SALVADOR

JUDGMENT OF NOVEMBER 2, 2021
(*Preliminary objections, merits, reparations and costs*)

In the case of *Manuela et al. v. El Salvador,*

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:

Elizabeth Odio Benito, President
L. Patricio Pazmiño Freire, Vice President
Eduardo Vio Grossi, Judge
Humberto Antonio Sierra Porto, Judge
Eduardo Ferrer Mac-Gregor Poisot, Judge
Eugenio Raúl Zaffaroni, Judge, and
Ricardo Pérez Manrique, Judge,

also present,

Pablo Saavedra Alessandri, Secretary, and
Romina I. Sijniensky, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 31,32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure" or "the Court's Rules of Procedure"), delivers this judgment structured as follows:

[*] In its Report No. 153/18, the Commission indicated that "[t]he petitioner organizations asked that the name of the alleged victim be kept confidential and that she be identified by the name "Manuela." They also asked that the identity of the alleged victim's family be kept confidential, as well as her medical information. During the processing of the case before the Court, the representatives reiterated this request. Therefore, the Court will refer to the presumed victims as Manuela, and Manuela's mother, father, elder son and younger son.

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On July 29, 2019, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Court the case of *Manuela and family with regard to the Republic of El Salvador* (hereinafter "the State" or "El Salvador"). The Commission indicated that the case related to "a series of violations during the criminal proceedings that culminated in the conviction of the [presumed] victim in this case for the offense of aggravated homicide in the known context of the criminalization of abortion in El Salvador," as well as the violation of professional confidentiality, the medical attention received before and after her deprivation of liberty, and the presumed victim's death in the State's custody. The Commission concluded that the State was responsible for the violation of Manuela's rights to life, personal liberty, judicial guarantees, privacy, equality before the law, judicial protection, and health. In addition, the Commission concluded that El Salvador had violated the rights to judicial guarantees and judicial protection of Manuela's family "as a result of the total failure to investigate and clarify her death in custody."

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

a) Petition. On March 21, 2012, the Center for Reproductive Rights, the Colectiva de Mujeres para el Desarrollo Local and the Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico lodged the initial petition on behalf of the presumed victims.

b) Admissibility Report. On March 18, 2017, the Commission adopted Admissibility Report No. 29/17, in which it concluded that the petition was admissible.

c) Merits Report. On December 7, 2018, the Commission adopted Merits Report No. 153/18, in which it reached a series of conclusions[1] and made several recommendations to the State.

d) Notification to the State. The Merits Report was notified to the State on January 29, 2019, granting it two months to report on compliance with the recommendations. After granting an extension, the Commission indicated that "El Salvador did not present the report on compliance within the time frame established by the Commission, and the Commission has no information on any substantive progress in complying with the recommendations of the Merits Report […]. [Moreover, the State has not] requested an extension."

3. *Submission to the Court.* On July 29, 2019, the Commission submitted all the facts and human rights violations described in the Merits Report to the Court owing to "the need to obtain justice and reparation."[2] The Court notes that more than seven years elapsed between the lodging of the initial petition before the Commission and the submission of the case to the Court.

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[1] The Commission concluded that the State was responsible for the violation of the rights to life, personal liberty, judicial guarantees, privacy, equality before the law, judicial protection, and health established in Articles 4(1), 7(1), 7(2), 7(3), 8(1), 8(2), 8(2)(c), 8(2)(e), 8(2)(h), 11(2), 11(3), 24, 25(1) and 26 of the American Convention in relation to the obligations established in Articles 1(1) and 2 of this instrument, and also Article 7 of the Convention of Belém do Pará.

[2] The Commission appointed Commissioner Margarette May Macaulay and then Executive Secretary Paulo Abrão, as its delegates, and Christian González Chacón, an Executive Secretariat lawyer, acted as legal adviser.

4. *The Commission's requests.* Based on the foregoing, the Inter-American Commission asked the Court to conclude and declare the international responsibility of the State for the violations contained in its Merits Report and to order the State, as measures of reparation, to comply with the recommendations included in that report, which are described and analyzed in Chapter IX of this judgment.

II
PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and the representatives.* The submission of the case was notified to the State and to the representatives of the presumed victims on September 2, 2019.

6. *Brief with pleadings, motions and evidence.* On November 6, 2019, the Colectiva Feminista para el Desarrollo Local of El Salvador and the Center for Reproductive Rights (hereinafter "the representatives") presented their brief with pleadings, motions and evidence (hereinafter "the pleadings and motions brief"), pursuant to Articles 25 and 40 of the Court's Rules of Procedure. The representatives agreed with the Commission's allegations, provided further information on the context of the criminalization of obstetric emergencies in El Salvador, and alleged that the State had also violated Articles 5, 7(4), 7(5), 8(2)(b), 13, 17 and 19 of the Convention. Furthermore, they classified what had happened to Manuela as torture and, therefore, alleged that El Salvador had also violated Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. Lastly, they asked the Court to order the State to adopt various measures of reparation and to reimburse certain costs and expenses.

7. *Answering brief.* On February 18, 2020, the State presented to the Court its brief answering the Commission's submission of the case, and with observations on the pleadings and motions brief (hereinafter "the answering brief"). In this brief, the State presented three preliminary objections, and contested the alleged violations and the requests for measures of reparation submitted by the Commission and the representatives.

8. *Public hearing.* On December 2, 2020, the President of the Court issued an order in which she called the parties and the Commission to a public hearing on the preliminary objections, and eventual merits, reparations and costs.[3] In addition, in this order, one presumed victim[4] and one expert witness proposed by the representatives, and one expert witness proposed by the Commission were called on to provide their statements during the public hearing, and three presumed victims, six witnesses and five expert witnesses were required to present their statements by affidavit. The latter were presented on March 5 and 8, 2021. Furthermore, in this order, the President asked the State to submit certain documentary evidence, which El Salvador forwarded on February 4, 2021. Owing to the exceptional circumstances caused by the Covid-19 pandemic, the public hearing was held by videoconference, as established in the Court's Rules of Procedure, on March 10 and 11, 2021, during the 140th regular session.[5] In the course of this hearing, the Court's judges asked the parties and the Commission to provide certain information and explanations.

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[3] *Cf. Case of Manuela et al. v. El Salvador*. Call to a hearing. Order of the President of the Inter-American Court of Human Rights of December 2, 2020. Available at: http://www.corteidh.or.cr/docs/asuntos/manuela_y_otros_02_12_2020.pdf

[4] In the order, the President required Manuela's mother to appear at the public hearing. On February 18, 2021, the representatives requested a change in how this statement would be provided owing to her health. Consequently, and since the State had asked that this statement be provided in writing, the President agreed to the representatives' request and ordered that Manuela's mother provide her statement by affidavit, accompanied by a video.

[5] At this hearing, there appeared: (a) for the Inter-American Commission: Margarette May Macaulay, Commissioner; Marisol Blanchard, Deputy Executive Secretary; Jorge Meza Flores and Christian González, Advisers;

9. *Amici Curiae.* The Court received 58 *amicus curiae* briefs[6] submitted by: 1) the European Centre for Law and Justice (ECLJ);[7] 2) María Lina Carrera, Gloria Orrego Hoyos and Natalia Saralegui Ferrante;[8] 3) the Fundación Nueva Democracia;[9] 4) the Pasos por la Vida civil association;[10] 5) Lawyers for Life and other organizations;[11] 6) the Asociación Salud y Familia;[12] 7) Crece Por Mi País and other organizations, together with members of the Legislative Assembly of the Republic of Costa Rica;[13] 8) the Asociación para la Promoción de

(b) for the representatives of the presumed victims: Morena Herrera, and Sara García, lawyers of the Colectiva Feminista para el Desarrollo Local of El Salvador, and Catalina Martínez, Carmen Martínez, and Edward Pérez, lawyers from the Center for Reproductive Rights, and (c) for the State of El Salvador: Ana Elizabeth Cubias Medina, Director of Comprehensive Social Development of the Ministry of Foreign Affairs of El Salvador and the State's Agent; Luis Elmer Hernández Hernández, Legal Consultant to the Ministry of Health of El Salvador; Lorena Mercedes González Zura, National Coordinator of the Public Criminal Defense Service of the Office of the Attorney General of the Republic of El Salvador; Carlos Javier Hernández Pérez, Subdirector General of Legal Affairs of the General Directorate of Prisons of El Salvador, and Alfredo Adolfo Romero Díaz, Forensic Physician of the Institute of Forensic Medicine of the Supreme Court of Justice of El Salvador.

6 The State argued that "the *amicus curiae* contain continuous mentions of the supposed effects of the criminal law on abortion; therefore, the Court is again asked to exclude any analysis of the criminal law on abortion in El Salvador from the instant case." The State also indicated that "neither should the Court admit the arguments regarding a supposed violation of Manuela's right to privacy," or the arguments concerning a context of structural discrimination against women, medical confidentiality, the right of women to a life free of obstetric violence, torture and, in general, any "imprecise references" to what happened to Manuela. In this regard, the Court recalls that, according to its Rules of Procedure, the expression *amicus curiae* "refers to the person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding by means of a document or an argument presented at a hearing." Considering that it is not incumbent on the Court to rule on whether or not such briefs are correct or on any requests or petitions they contain, the State's observations do not affect the admissibility of the *amici curiae*, without prejudice to the eventual relevance of such considerations when assessing the information they provide. *Cf. Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2014. Series C No. 282, para. 15, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs.* Judgment of March 26, 2021. Series C No. 423, footnote 5.

7 The brief was signed by Grégor Puppinck and Pablo Nuevo López. It contained considerations on the privacy of health-related information.

8 The brief was signed by María Lina Carrera, Gloria Orrego Hoyos and Natalia Saralegui Ferrante. It contained considerations on the criminalization of women for obstetric events in different countries in the region.

9 The brief was signed by María Camila Ospina Navarro and Juan Pablo Rodríguez Martínez. It contained considerations on the reasons why the Court should not rule on abortion in this case.

10 The brief was signed by María Teresa Angulo Guillermo and Ángel Alfonso Jasso García. It contained considerations on how the prohibition of abortion in El Salvador supported the protection of life, and was constitutional, essential, and pursuant to the Convention.

11 The brief was signed by Michelle Cretella, Teresa Collett, Stefano Gennarini, Aude Mirkovic for Claude de Martel, Nicola Speranza, Sharon Slater, Bob Lalonde, Lord Leomer B. Pomperada, Brian S. Brown, Karolina Pawlowska, Wendy Wixom, Brian Scarnecchia, Catherine Glenn Foster, Thomas Jacobson, Sonnie Ekwowusi, Jean-Marie Le Méné, Julia Regina de Cardenal, Michelle Zacapa, Sérgio Henrique Cabral Sant'Ana, Marjorie Dannenfelser, Charles E. Donovan, Sara I. Larín Hemandez, Ligia Briz, Mario Correa Bascuñán, Gonzalo Ibáñez Santa María, Alfonso Aguilar, Mario Alberto Romo Gutierrez, Eduardo Verástegui, and Ligia De Jesus Castaldi. It contained considerations on why the prohibition of the aggravated homicide of the newborn child in El Salvador is mandatory under international human rights law.

12 The brief was signed by Elvira Méndez Méndez. It contained considerations on the ethical obligations of doctors towards their patients, the treatment of women in situations of obstetric emergency in El Salvador, and the exercise of the medical profession under "institutional coercion" in El Salvador.

13 The brief was signed by Mónica Araya Esquivel, Marcela Piedra, Gerardo Bogantes, Jórge Gómez, Ileana Flores, Víctor Quirós, Gerardo Soto, Florita Rodríguez, Carlos Esquivel, Shirley Díaz, Mariano Murillo, Carmen Chan, Dragos Dolanescu, Erick Rodríguez, Harllan Hoepelman, Ignacio Alpízar, Jonathan Prendas, Marulin Azofeifa, Melvin Núñez, Nidia Céspedes. It contained considerations on how "the petitioner had fabricated cases such as this one in order to generate a movement of disinformation among the population and put pressure on the State of El Salvador to amend its laws that protect life starting at conception."

los Derechos Civiles (PRODECI);[14] 9) Corina Giacomello;[15] 10) the Latin American Consortium against Unsafe Abortion (CLACAI);[16] 11) Álvaro Paul and Felipe Soza;[17] 12) the Center for International Human Rights of the Pritzker School of Law at Northwestern University and the Clooney Foundation for Justice;[18] 13) the Asociación Española de Abogados Cristianos;[19] 14) National Advocates for Pregnant Women;[20] 15) the International Commission of Jurists;[21] 16) Herman Duarte;[22] 17) the "Feminist Criminal Doctrine" research group of the Law School at the Universidad de Buenos Aires;[23] 18) the Latin American Network of Catholics for the Right to Decide;[24] 19) XUMEK, association for the promotion and protection of human rights;[25] 20) the Centro de Bioética, Persona y Familia;[26] 21) Centro de Vida civil association and other

[14] The brief was signed by Miguel Jorge Haslop and Lucas Ezequiel Bilyk. It contained considerations on the legal reporting obligation and professional confidentiality.

[15] The brief was signed by Corina Giacomello. It contained considerations on the problem faced by children and adolescents whose parents are imprisoned, as well as on the incorporation of the best interests of the child and the guarantee of the right to become mothers of women who so wish.

[16] The brief was signed by Susana Chávez Alvarado, Luciana Brito, Gladys Via Huerta, Ma. Eugenia Romero, Maria Isabel Cordero, Teresa Lanza, Rebeca Ramos Duarte, María Mercedes González, Ana Labandera, Julia Carmen Espinoza Bernal, Javiera Canales Aguilera, and Sandra Castañeda Martínez. It contained considerations on the alleged incompatibility of the criminalization of abortion with El Salvador's human rights obligations.

[17] The brief was signed by Álvaro Paúl and Felipe Soza. It contained considerations on the fourth instance formula and its application to the instant case.

[18] The brief was signed by Thomas F. Geraghty, Juliet Sorensen, Alexandra Tarzikhan, Meredith Heim, Stephen Townley, and Susan Wnukowska-Mtonga. It contained considerations on criminal proceedings conducted against two Salvadoran women that were similar to the proceedings against Manuela.

[19] The brief was signed by Polonia Castellano Flórez. It contained considerations clarifying that this case dealt with a case of homicide rather than abortion, and also concerning the report filed by the medical staff and the proceedings conducted against Manuela.

[20] The brief was signed by Paola Bergallo, Andrea Carlise, Rebecca J. Cook, Joanne Csete, Laurel E. Fletcher, Caitlin Gerdts, Betsy Hartmann, Anne Hendrixson, Deena R. Hurwitz, Jocelyn Getgen Kestenbaum, Bert Lockwood, Marta Machado, Benjamin Mason Meier, Michelle Oberman, Francisca Pou-Giménez, Cesare P.R. Romano, Mindy Jane Roseman, Cynthia Soohoo, Jocelyn Virterna, and Alicia Ely Yamin. It contained considerations on the consequences of the criminalization of abortion.

[21] The brief was signed by Livio Zilli. It contained considerations on the right to privacy in relation to personal health information.

[22] The brief was signed by Herman Duarte. It contained considerations on the birth regulation policies in El Salvador.

[23] The brief was signed by Maria Luisa Piqué and Julieta Di Corleto. It contained considerations on the application of the offense of *in flagrante delicto* to an obstetric event.

[24] The brief was signed by Maria José Fontelas Rosado Nunes, Tania Carola Nava Burgoa, Lourdes Rocío Cabañas Giménez, María Teresa Bosio, Martha Flores, Lola Guerra, Paula Sánchez Mejorada, Lisette Genao Duran, Sandra Mazo Cardona, Griselda Mata, and Gladys Vía Huerta. It contained considerations on the obligation to respect, protect and ensure the rights of women, specifically their rights to a decent life, to be free of discrimination, and to health, liberty and due process.

[25] The brief was signed by María de los Ángeles Vásquez, Sofía B. Langelotti, María Ailén Ferraris Michel and Lucas Lecour. It contained considerations on torture and ill-treatment, as well as on the application of a gender perspective in the prosecution of similar cases.

[26] The brief was signed by María Inés Franck and Jorge Nicolás Lafferriere. It contained considerations on the delimitation of this case, abortion, and the inviolability of the right to life.

organisations;[27] 22) Ana María Idárraga and others;[28]23) the Women for Women Foundation;[29] 24) Philip Alston and Leah Motzkin;[30] 25) the Sí a la Vida Foundation and other organisations;[31] 26) Women's Link Worldwide;[32] 27) Kendall Ariana López Peña;[33] 28) Anis - Instituto de Bioética/Cravinas, and the Practical course on human rights and sexual and reproductive rights – Legal Clinic at the Universidade de Brasília;[34] 29) the International Planned Parenthood Federation and other organisations;[35] 30) the Swedish Association for Sexuality Education;[36] 31) members of Congress of the Republic of

[27] The brief was signed by Dorcas Elienai Antezana, Guadalupe Valdez Santos, Edwin Heredia Rojas, Ángelo Ramirez Palma, Juan Velásquez Salazar, Hadhara Brunstein, Olivia López de la Cruz, Tania López, Amalia Villarreal, Jane Caldcleugh, Luis Losada Pescador, José de Jesús Magaña, María Amalia Caballero, Segio Burga Álvarez, Carlota Julia López, Margarita Gnecco, Isis del R. Pérez, Tamoa Vivas, Norma Ivette Laviada, Gustavo Volpe, Ligia Barrascout, Jose Manuel Menegazzo, Carlos Flores, Gabriela Soberanis, Gabriela Urcuyo de Tefel, Maria Alejandra, Muchart, Carlos Emmanuel Fernández Ruiz, Carlos Uriel Amado, Santiago Guevara, Selina Maria Palmieri, Juan Ayala, Aida Lorenzo, Joaquín López, Julio Mendoza, Ligia de Dávila, Geny del Socorro Cáceres, Marcia Lara, Lorea Iturrioz, Enna Rodríguez, María Eugenia Rivera, Pilar Sánchez García, Norma Laviada, Luis Alberto Montañéz, Carim Ambulo, Maria Alejandra Acevedo, Rosario Collado, Valeria Gutiérrez, Acacia Treviño, Maite Muñoz, Patricia Cortés, Harim Nabi, Enrique Hermoso, Clara Vega, Gilberto Rocha, Luis A. Pimentel, Willíngton Zambrano, David Olivera, Debbie Moya, Luis Alfredo Gil Sánchez, María José Brum, Gerardo Grosso, Hugo Orlando Márquez, Ana Laura Benavides, Karol Méndez, José Carlos Gil Sánchez, Orlando Quintero Martínez, Blanca Esther Montero Ferrón, Maria Viviana Zaiek, Edir Hernández Moguel, Laida Álvarez, Jose Pimentel, Angélica E. Romero, Myllene Palacio de Burke, Silka Cecilia Sánchez de González, Andrea Pérez, Jose Luis Lara, Rose Santiago, Lisbeth Hernández, Carlos Herrera, Miguel Parra, Mirtha Cocinero, Miguel Ortigoza, Dannia Rios, Julieth Gómez Bernal, María Luisa Torres de Gill, Gabriela Urcuyo de Tefel, Leandro Flocco, Ana Carolina Rojas, Ricardo Pupo Nogueira Simoes, Arturo Arroyo Roa, Sonia María Crespo, Marco Antonio Díaz López, Elia Gómez, Silvia Pino, Ligia Briz, María Díaz, Ma. José Molina, María García, María Díaz, and María del Socorro Vergara. It contained considerations on the scope of the judicial guarantees presumably violated and its relationship to the rights of the presumed victims.

[28] The brief was signed by Juana Inés Acosta López, Ana María Indárraga, Michelle Infante, and Cristóbal Soto. It contained considerations on the need to reinforce international standards for the protection of pregnant women, as well as on the different levels of analysis required in this case in relation to the definition as a crime, and the prosecution and punishment of certain conducts.

[29] The brief was signed by Soledad Deza. It contained considerations on professional confidentiality and the alleged violation of the rights to privacy, confidentiality, health and life.

[30] The brief was signed by Philip Alston and Leah Motzkin. It contained considerations on the alleged discriminatory nature of the prohibition of abortion, based on gender and financial situation.

[31] The brief was signed by Julia Regina de Cardenal, Mario Rojas, Mercedes Pérez, Edith Martínez Guzmán, Gladys Buitrago de Amaya, and Judy Vásquez. It contained considerations on the alleged procedural fraud committed by the representatives in this case.

[32] The brief was signed by Marcia Aguiluz and Valeria Pedraza. It contained considerations on the impact of the criminalization of abortion on this case and on professional confidentiality.

[33] The brief was signed by Kendall Ariana López Peña. It contained considerations on the alleged implementation of global governance in this case.

[34] The brief was signed by Gabriela Rondon, Amanda Nunes and Luciana Alves Rosário It contained considerations on the criminalization of abortion.

[35] The brief was signed by Giselle Carino, Lita Martínez Alvarado, and Consuelo Bowen. It contained considerations on the relationship between the actions of the health care and judicial services in this case.

[36] The brief was signed by Ingela Holmertz and Wilson De los Reyes Aragón. It contained considerations on the alleged violation of the right to health in the case of Manuela.

Colombia;[37] 32) Amnesty International;[38] 33) the Iniciativa Colectiva 1600s;[39] 34) Latinx Bioethics;[40] 35) Centro de Estudios Legales and Sociales (CELS);[41] 36) Ricardo Bach de Chazal;[42] 37) Max Silva Abbott;[43] 38) Baker & McKenzie SAS and others;[44] 39) the Centro de Apoyo y Protección de los Derechos Humanos SURKUNA;[45] 40) the Human Rights Observatory and the Legal Clinic at the Universidad de Valladolid;[46] 41) Alda Facio Montejo;[47] 42) the International Network for Economic Social and Cultural Rights (ESCR Net);[48] 43) the World Organization against Torture (OMCT) and the Latin America Litigators' Group against Torture;[49] 44) the Due Process of Law Foundation (DPLF);[50] 45) the Gender, Law and Society Research Group and the Human Rights Group at the Universidad Externado de Colombia;[51]

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[37] The brief was signed by Milla Patricia Romero Soto, María del Rosario Guerra, Esperanza Andrade Serrano, Paola Holguín, John Milton Rodríguez, Carlos Felipe Mejía, Santiago Valencia, Jonatan Tamayo Pérez, German Alcides Blanco Álvarez, Edgar Enrique Palacio Mizrahi, Erwin Arias Betancour, Edwin Ballesteros, Margarita María Restrepo, Juan Espinal, Álvaro Hernán Prada, and José Jaime Uscátegui. It contained considerations on the petitioners' alleged disinformation campaign and the cruelty of infanticide.

[38] The brief was signed by Erika Guevara Rosas, and Juan E. Méndez. It contained considerations on the *iura novit curiae* principle and on the alleged obligation to decriminalize abortion.

[39] The brief was signed by Tania Sordo Ruz. It contained considerations on gender stereotyping.

[40] The brief was signed by Joanne C. Suarez, Natalia Acevedo Guerrero, Donna Castelblanco and Katrina Muñoz. It contained considerations on bioethical principles and the provision of reproductive health services.

[41] The brief was signed by Paula Litvachky, Lucía de la Vega, Vanina Escales, Macarena Fernández Hofmann, Andrés López Cabello, Diego Morales, and Erika Schmidhuber Peña. It contained considerations on discrimination, the guarantee of the confidentiality of medical attention, and the disproportionate impact on women and their family when women are deprived of liberty.

[42] The brief was signed by Ricardo Bach de Chazal. It contained considerations on the protection of the right to life in the inter-American system and in El Salvador, and on the illegitimacy of the claims of the representatives and the Commission in this case.

[43] The brief was signed by Max Silva Abbott. It contained considerations on the personhood of every human being and the right to life.

[44] The brief was signed by Carlos Tiffer Sotomayor and Jorge Valencia Arango. It contained considerations on *in flagrante delicto*.

[45] The brief was signed by Ana Cristina Vega. It contained considerations on international human rights standards in relation to the rule of the right to the professional confidentiality of health professionals in relation to criminal prosecutions.

[46] The brief was signed by Teresa del Campo Rodríguez, Carlos Fadrique Aceves, Belén García Gómez, Yaiza Rodríguez Sánchez, Enrique Serrano Sánchez-Cendal, Alejandro de Pablo Serrano, Patricia Tapia Ballesteros, Enrique Martínez Pérez, Ángeles Solanes Corella, and Javier García Medina. It contained considerations on the need for the Court to clarify the scope of medical professional confidentiality, confidentiality and privacy in health care and their implications in relation to the right to privacy and to sexual and reproductive health care.

[47] The brief was signed by Alda Facio Montejo. It contained considerations on the protection of confidential medical information in light of international human rights law, as well as the impact of laws that criminalize access to reproductive health services by the disclosure of information protected by medical professional confidentiality.

[48] The brief was signed by Anya Victoria Delgado, Ishita Dutta, Mandivavarira Mudarikwa, Nasreen Solomons, Valentine Sébile and Fernando Ribeiro Delgado. It contained considerations on the criminalization of obstetric emergencies in El Salvador and on the intersectional discrimination allegedly faced by Manuela and other women in similar situations.

[49] The brief was signed by Helena Sola Martín Melissa Zamora Vieyra. It contained considerations on the right to personal integrity and, in particular, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment from a gender perspective.

[50] The brief was signed by Katya Salazar Luzula and Leonor Arteaga Rubio. It contained considerations on judicial guarantees, including the right to the presumption of innocence and the right to defense.

[51] The brief was signed by María Daniela Díaz Villamil, Jessika Mariana Barragán, Nicole Sofía Méndez, Laura Marcela Angarita Pedraza, Natalia Beltrán Orjuela, and Stephanie López Posso. It contained considerations on the

46) Lawyers without Borders Canada;[52] 47) the Human Rights Commission of Mexico City;[53] 48) the Centro por la Justicia, Democracia e Igualdad (CEJUDI);[54] 49) Mileidy Alvarado Arias, congresswoman of the Republic of Costa Rica;[55] 50) International Academy of Family Lawyers;[56] 51) the Human Rights Clinic at the Universidad de Santa Clara;[57] 52) Synergy – Initiatives for Human Rights and other organizations;[58] 53) the Iniciativa Americana por la Justicia (IAJ) and the Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX);[59] 54) the Equipo Latinoamericano de Justicia y Género (ELA);[60] 55) the Comunidad de Derechos Humanos and other organizations;[61] 56) the International Federation of Gynecology and Obstetrics;[62] 57) Shirley Díaz Mejías, congresswoman of the Republic of Costa Rica,[63] and 58) the Clinic on Litigation before International Systems for the Protection of Human Rights (SELIDH) of the Faculty of Law and Political Science at the Universidad de Antioquia in association with the Bolívar en Falda feminist organization.[64]

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absolute prohibition of abortion, as well as the different manifestations of gender stereotyping, especially with regard to the provision of health care services and the criminal proceedings in this case.

[52] The brief was signed by Lucas Valderas. It contained considerations on the numerous factors of vulnerability that coalesced intersectionally in Manuela's life and how these led to a specific form of discrimination and inequality that resulted in the alleged denial of judicial guarantees and protection.

[53] The brief was signed by Zamir Andrés Fajardo Morales. It contained considerations on the right of women to a life free of obstetric violence.

[54] The brief was signed by María Paula Balam Aguilar and Andrea Guadalupe Tejero Gamboa. It contained considerations on State obligations regarding reproductive health care for women who suffer obstetric emergencies.

[55] The brief was signed by Mileidy Alvarado Arias. It contained considerations on "the legal grounds that invalidate the petition filed" by the representatives, and on the "misleading handling by the petitioners of the information in the judicial case file that was the reason for this complaint against El Salvador."

[56] The brief was signed by Edwin Freedman. It contained considerations on the right to abortion and the case law of the European Court of Human Rights, as well as on the corresponding laws in different jurisdictions.

[57] The brief was signed by Francisco J. Rivera Juaristi and Britton Schwartz. It contained considerations on the right of women, particularly low-income women, to receive satisfactory reproductive and maternal health care without discrimination and their right to privacy in the doctor-patient relationship.

[58] The brief was signed by Mirta Moragas Mereles, Lucía Berro Pizzarossa, Fernando D'elio, Alba Onofrio, Oriana López Uribe, Marisa Viana, Lola Guerra, Ishita Dutta, Umyra Ahmad and Paula Sánchez Mejorada. It contained considerations on the role of gender stereotyping in the discrimination in this case.

[59] The brief was signed by Federico Ariel Vaschetto and Gabriela Oporto Patroni. It contained considerations on sexual and reproductive rights, the inviolability of professional confidentiality, the negative effects of the existence of gender stereotypes, and the quality of health care services in obstetric emergencies.

[60] The brief was signed by Natalia Gherardi. It contained considerations on the importance of a gender perspective in trials and the eradication of gender stereotypes.

[61] The brief was signed by Mónica Bayá Camargo, Tania Nava Burgo, Jhonny López Gallardo, Mónica Novillo, Patricia Brañez, Teresa Alarcón, Lupe Pérez, and Rossy Michael Yucra Crespo. It contained considerations on the rights of women to a decent life, integrity and health, sexual and reproductive rights, judicial guarantees, judicial protection and personal liberty.

[62] The brief was signed by Carlos Fuchtner. It contained considerations on medical care in cases of abortion.

[63] The brief was signed by Shirley Díaz Mejías. It contained considerations on "the theory behind the case presented by El Salvador, emphasizing its position on the rights and protection of the unborn child."

[64] The brief was signed by Valentina Ortiz Aguirre, Alejandro Gómez Restrepo, Mónica López Cárdenas, Doris Astrid Portilla, Lisseth Juliana Betancur Vásquez, Lizbeth Grisales Castro, Juan Pablo León Osorio, Andrea Camila Solarte, Alejandra Zapata López, Jorge Andrés Pinzón Cabezas, Manuel Darío Cardona Quiceno, Mariajosé Mejía García, Sara Arango Restrepo, Adrián Zarate Condori, Nathalia Rodríguez Cabrera, and Sara Méndez Niebles. It contained considerations on the need to examine the case from the perspective of structural and intersectional discrimination and from an eminently feminist point of view noting the limited sexual and reproductive rights that were violated in the case and making progress towards the emancipation of women with control of their bodies and their fertility.

10. *Alleged supervening facts.* On April 8, May 13 and December 23, 2020, the representatives forwarded information on alleged supervening facts.[65]

11. *Final written arguments and observations.* On April 12, 2021, the State, the representatives and the Commission, respectively, forwarded their final written arguments and observations with annexes.

12. *Observations on the annexes to the final written arguments.* On March 14, 2021, the representatives presented their observations on the annexes sent by the State with its final written arguments.

13. *Helpful evidence and information.* On March 12 and September 14, 2021, the President of the Court asked the State and the representatives to submit helpful documentation. This information was forwarded on April 12 and September 27, 2021, respectively.

14. *Deliberation of the case.* The Court began deliberating on this judgment in a virtual session on October 12, 2021.[66]

III
JURISDICTION

15. The Court has jurisdiction to hear this case, pursuant to Article 62(3) of the Convention, because El Salvador has been a State Party to this instrument since June 23, 1978, and accepted the contentious jurisdiction of the Court on June 6, 1995. In addition, the State deposited its instrument ratifying the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará" on January 26, 1996.

IV
PRELIMINARY OBJECTIONS

16. The State filed three preliminary objections.[67] One of them concerned the factual framework of the case. Since this is unrelated to the Court's jurisdiction and the requirements for the admissibility of the case, it does not constitute a preliminary objection.[68] Therefore, it will be analyzed as a preliminary consideration (*infra* paras. 27 to 30). The other objections will be analyzed as follows: (a) the alleged time-barred presentation of the petition, and (b) the Commission's alleged failure to assess the progress made in complying with the Merits Report.

A. Alleged time-barred presentation of the petition

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[65] On April 8, 2020, the representatives forwarded "a decision of the United Nations Working Group on Arbitrary Detention." On May 13, 2020, the representatives reported "acts of vilification, stigmatization and the disclosure of the identity of some of the victims in this case, as well as medical information contained in Manuela's medical records." On December 23, 2020, the representatives provided additional evidence related to the context of the case.

[66] Owing to the exceptional circumstances resulting from the Covid-19 pandemic, this judgment was deliberated on and adopted during the Court's 145th regular session, which was held virtually using technological means in accordance with the Court's Rules of Procedure.

[67] The Court notes that, in its final written arguments, the State alleged the application of the fourth instance formula. However, that allegation was time-barred.

[68] *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400, para. 19.

A.1 Arguments of the parties and the Commission

17. The ***State*** indicated that "the sentence became final on August 26, 2008, and was in effect until her death on April 30, 2010. However, the petition was not lodged before the Commission […] until March 21, 2012, almost four years after the sentence had become final and almost two years after Manuela's death." The State emphasized that the Commission had considered that, in the instant case, the petition had been lodged within a reasonable time, but had "failed to provide the grounds or the reasons for its decision."

18. The ***representatives*** argued that it was contradictory to argue the failure to exhaust domestic remedies before the Commission and, then, allege failure to comply with the time limit of six months to lodge a petition, because this contravened the principle of estoppel. Added to this, in the case of Manuela "the petition was lodged within the six-month time frame established in Article 46(1)(b) of the [Convention], of the notification of the ruling that dismissed the appeal for review of the sentence in 2012. Furthermore, claiming that Manuela should have presented the petition less than 6 months after the final criminal conviction would be contrary to the interests of justice and would have constituted a disproportionate burden on the [presumed] victim."

19. The ***Commission*** indicated that the objection was time-barred because it should have been filed during the initial stages of the admissibility procedure before the Commission. The Commission also underlined that, when applying Article 46(2)(b)) of the American Convention and determining that the petition had been lodged within a reasonable time, it took into account that: "(1) the petition was lodged on March 21, 2012; (2) regarding the facts, it is on record that these occurred on February 27, 2008, and that the victim was convicted to 30 years' imprisonment for the offense of aggravated homicide on August 11, 2008; (3) no ordinary remedy existed that would have permitted contesting the sentence pursuant to Article 8(2)(h). In addition, the victim was unable to benefit from the special remedy of cassation that was available because her defense counsel failed to file this remedy or to advise her or her family that this rather limited remedy existed to contest her sentence, and (4) the [presumed] victim died on April 30, 2010, after suffering from Hodgkin's lymphoma in a context in which a series of violations of her right to health were alleged while she was deprived of liberty, and there was a total failure to clarify her death while in State custody."

A.2 Considerations of the Court

20. The Court has indicated that the conditions for the admissibility of petition (Articles 44 to 46 of the American Convention) constitute a guarantee to ensure that the parties are able to exercise their right to defense during the proceedings,[69] and are of a preclusive nature in cases in which the Commission processes the admissibility and the merits of a case separately.[70] Thus, an objection concerning the alleged failure to comply with the time limit for lodging the petition must be presented explicitly at the admissibility stage of the case.[71]

21. In the instant case, the State's arguments concerning the time-barred nature of the petition were not presented at the appropriate procedural moment; that is, at the admissibility stage of the case. In fact, the Court notes that the State first mentioned the alleged time-barred presentation of the petition in a communication sent to the Inter-American Commission

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[69] *Cf. Case of Grande v. Argentina. Preliminary objections and merits.* Judgment of August 31, 2011. Series C No. 231, para. 56, and *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018. Series C No. 354, para. 124.

[70] *Cf. Case of Grande v. Argentina, supra*, para. 56, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 124.

[71] *Mutatis mutandis, Case of Amrhein et al. v. Costa Rica, supra*, para. 124.

on Human Rights on June 26, 2017.[72] That communication was sent after the issue of Admissibility Report No. 29/17 of March 18, 2017. Therefore, the Court considers that the preliminary objection filed by the State is inadmissible.

B. The Commission's alleged failure to assess the progress made in complying with the Merits Report

B.1 Arguments of the parties and the Commission

22. The ***State*** alleged that the Commission had not complied with the provisions of Article 35 of the Court's Rules of Procedure, because it had failed to indicate that the State had forwarded a report on April 3, 2019, which "contained information on the specific actions taken to expedite the recommendations made in the Merits Report." Therefore, it argued that "the Commission had not complied with the provisions of Article 35 of the Court's Rules of Procedure which establish the requirements for the presentation of a case." The ***representatives*** argued that "the possible failure to comply with Article 35(c) of the Court's Rules of Procedure does not constitute, *per se*, an obstacle to the admissibility of the case" and that, anyway, "El Salvador has not presented any argument to substantiate how the supposed failure to comply with this provision might have affected its defense." The ***Commission*** argued that "the decision to submit a case to the Court forms part of the Commission's sphere of autonomy as established in Article 51 of the American Convention and is taken in strict compliance with Article 35 of the Court's Rules of Procedure." The Commission also argued that: (i) in April 2019, the State presented a report on compliance with the recommendations of the Merits Report and on April 24, 2019, the Commission granted it a three-month extension to move forward in complying with the Merits Report, but when this time frame expired, the State failed to request another extension, and (ii) although the Commission appreciated the State's report of April 2019, this "did not demonstrate substantive progress in complying with the recommendations of the Merits Report".

B.2 Considerations of the Court

23. The Court observes that, when submitting this case, the Commission indicated that it had no "information that any substantive progress has been made in complying with the recommendations of the Merits Report." The President of the Court considered that, when submitted the case, the Commission had met the requirements stipulated in Article 35 of the Court's Rules of Procedure and, consequently, required the Secretariat to notify the submission of the case. Similarly, the Court considers that, when indicating in the letter submitting the case that it had no "information that any substantive progress has been made in complying with the recommendations of the Merits Report," the Commission had met the requirements of Article 35(1)(c) of the Rules of Procedure. Based on these considerations, the Court rejects this preliminary objection.[73]

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[72] The State argued that the judgment convicting Manuela became final in August 2008, and was in effect until April 30, 2010, "however, the petition was lodged before [the] Commission on March 21, 2012, almost four years after the sentence had become final and almost two years after Manuela's death." The State's report of June 26, 2017 (evidence file, folio 611).

[73] *Cf. Case of Urrutia Laubreaux v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of August 27, 2020. Series C No. 409, para. 26.

V
PRELIMINARY CONSIDERATION

A. Arguments of the parties and the Commission

24. The ***State*** argued that "[t]he facts examined by the Commission, based on which it determined the presumed responsibility of the State of El Salvador, are circumscribed to the criminal proceedings against Manuela and her conviction for the offense of aggravated homicide, to her health care, and to her subsequent decease while in the custody of the State." It stressed that the Commission had considered that it would not examine the context of the criminalization of abortion because Manuela was convicted of aggravated homicide. It argued that, despite this, the representatives had included within the context facts relating to the "criminalization of obstetric emergencies in El Salvador." The State argued that those facts did not form part of the factual framework of the case.[74]

25. The ***representatives*** argued that the contextual information that the State sought to exclude from the factual framework corresponded to facts that explained and clarified the facts mentioned in the submission of the case and the Merits Report presented by the Commission. They emphasized that "the Commission itself, in the letter submitting the case, indicated that the instant case should be analyzed 'within the framework of the known context in El Salvador of the criminalization of abortion.'" They also argued that, in the Merits Report, the Commission had: (1) "underlined that the severity of El Salvador's criminal laws meant that 'women are prosecuted for the offense of abortion or for the offense of homicide in proceedings in which different guarantees of due process are violated and pretrial detention is used abusively,'" and (2) "referred to a series of rulings on the way in which the rights of women are not ensured when they seek medical attention." Therefore, they considered that "all the facts recounted in the pleadings and motions brief fall within the factual framework that the Commission submitted to the Court and should be taken into account by the Court when analyzing the case."

26. The ***Commission*** argued that the said information "is related to the section on context in the Merits Report, as well as to the facts of the said decision, and contributes to clarifying or explaining those facts. Furthermore, the Commission considers that […] the said contextual information may be useful to enable the Court: (1) to adequately characterize the facts and assess the international responsibility of the State; (2) understand and assess the evidence, and (3) determine the measures of reparation."

B. Considerations of the Court

27. This Court has established that the factual framework for the proceedings before it is constituted by the facts contained in the Merits Report submitted to the Court's consideration; therefore, it is not admissible to allege new facts that differ from those described in the said report, without prejudice to presenting facts that explain, clarify or reject those that have been mentioned in the report, or that relate to the claims of the petitioner (also called "complementary facts"). The exception to this principle are facts referred to as supervening facts, and these may be forwarded to the court at any stage of the proceedings before judgment has been delivered.[75] Ultimately, it corresponds to the Court to decide, in each

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[74] The Court notes that in its final written arguments, the State requested the exclusion of other facts. However, this request was time-barred.

[75] *Cf. Case of Vera Vera et al. v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of May 19, 2011. Series C No. 226, para. 32, and *Case of Urrutia Laubreaux v. Chile, supra,* para. 39.

case, on the admissibility of arguments concerning the factual framework in order to safeguard the procedural balance between the parties.[76]

28. In this case, a dispute exists regarding the inclusion of various contextual facts by the representatives. In particular, the State has asked that the Court exclude the facts described by the representatives in the section on the "criminalization of obstetric emergencies in El Salvador," "in which they describe obstetric emergencies, the concept and approach; the absolute prohibition of abortion in El Salvador and the *de facto* criminalization of obstetric emergencies; the consequences of the absolute prohibition of abortion and the alleged criminalization of obstetric emergencies on the exercise of the medical profession, and the barriers to access to justice for women criminalized due to suffering obstetric emergencies."

29. The Court notes that, in the section on context of the Merits Report, the Commission indicated that "[g]iven that in this case Manuela was convicted of the crime of homicide," the Commission did not examine further the context of the criminalization of abortion in El Salvador. However, the Commission underscored "[t]he severity of certain criminal laws in El Salvador which meant that, at times, women are prosecuted for the offense of abortion or for the crime of homicide in proceedings in which different due process guarantees are violated and pretrial detention is used abusively." The Commission also included the opinions of the Committee on Economic, Social and Cultural Rights and the Committee for the Elimination of Discrimination against Women concerning the criminalization of abortion and its effects in El Salvador. They mentioned "cases in which women whose health was seriously at risk have turned to the health system and been reported on suspicion of having had an abortion," and "the incarceration of women immediately after visiting a hospital to seek medical attention, because the health care personnel report them for fear of themselves being punished." The Commission also mentioned that it "has expressed its concern owing to possible violations of due process in cases of women who are tried and convicted for offenses related to abortion, including aggravated homicide."

30. Consequently, the Court notes that the Commission's Merits Report includes the criminalization of abortion in El Salvador and the alleged effect of this in cases of obstetric emergencies and infanticide as part of the context of this case. To the extent that the facts included by the representatives are pertinent to explain and clarify the said context and its relationship to this case, the Court will take them into account.

VI
EVIDENCE

A. Admissibility of the documentary evidence

31. The Court received diverse documents presented as evidence by the Commission, the representatives and the State, as well as those requested by the Court or its President as helpful evidence and, as in other cases, it admits these in the understanding that they were presented at the appropriate procedural moment (Article 57 of the Rules of Procedure)[77] and that their admissibility was not contested or challenged.

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[76] *Cf. Case of the "Mapiripán Massacre" v. Colombia. Merits, reparations and costs.* Judgment of September 15, 2005. Series C No. 134, para. 58, and *Case of Valenzuela Ávila v. Guatemala. Merits, reparations and costs*. Judgment of October 11, 2019. Series C No. 386, para. 40.

[77] In general, and according to Article 57(2) of the Rules of Procedure, documentary evidence may be presented together with the brief submitting the case, the pleading and motions brief, or the answering brief, as applicable, and evidence forwarded outside these procedural occasions is inadmissible, subject to the exceptions established in the said Article 57(2) of the Rules of Procedure (namely, *force majeure*, grave impediment) or unless it relates to a supervening fact – in other words, a fact that occurred after the said procedural moments.

B. Admissibility of the statements offered

32. This Court finds it pertinent to admit the statements made by affidavit[78] and during the public hearing,[79] to the extent that they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case.

33. The State asked the Court to exclude from its analysis the "brief submitted by Dr. Ortiz on April 9, 2021, because it was time-barred." It argued that the fact that this brief was time-barred had had "a disproportionate impact on the State's right to defense because it had not be granted adequate time to contest the evidence."

34. In this regard, the Court recalls that the President's order required those called on to provide expert opinions during the hearing to provide a written version of their opinion by March 4, 2021, at the latest, if they considered this appropriate.[80] On April 9, 2021, expert witness Guillermo Antonio Ortiz Avendaño forwarded a written version of his opinion. The Court notes that Mr. Ortiz did not justify the belated presentation of the written version of his opinion, and neither did the representatives submit any reasons for the delay. Consequently, the Court considers that the written version of the expert opinion of Guillermo Ortiz was time-barred and is therefore inadmissible and will only consider the opinion that he rendered during the public hearing.

VII
FACTS

A. Factual framework

35. In 1998, a new Criminal Code entered into force in El Salvador which eliminated the grounds for non-punishable abortion,[81] and also the classification as mitigated homicide for

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[78] *Cf.* Affidavit made by Manuela's mother on March 5, 2021 (evidence file, folios 3789 to 3794); affidavit made by Manuela's father on February 26, 2021 (evidence file, folios 3796 to 3801); affidavit made by Manuela's elder son on February 26, 2021 (evidence file, folios 3803 to 3805); affidavit made by Manuela's younger son on February 26, 2021 (evidence file, folios 3806 to 3807); affidavit made by María Teresa Rivera on February 23, 2021 (evidence file, folios 3809 to 3811); affidavit made by María Marina Pérez on February 26, 2021 (evidence file, folios 3813 to 3815); affidavit made by Johana Iris Rosa Gutiérrez on February 22, 2021 (evidence file, folios 3817 to 3819); affidavit made by Ena Vinda Munguía on February 22, 2021 (evidence file, folios 3820 to 3822); affidavit made by Alba Lorena Rodríguez on February 24, 2021 (evidence file, folios 3823 to 3825); affidavit made by Teodora del Carmen Vásquez on March 3, 2021 (evidence file, folios 3827 to 3829); expert opinion provided by affidavit by José Mario Nájera Ochoa on March 5, 2021 (evidence file, folios 3830 to 3857); expert opinion provided by affidavit by Verónica Undurraga on March 5, 2021 (evidence file, folios 3859 to 3891); expert opinion provided by David Ernesto Morales Cruz on March 4, 2021 (evidence file, folios 3893 to 3986); expert opinion provided by Alba Evelyn Cortez on March 5, 2021 (evidence file, folios 3988 to 4008), and expert opinion provided by Oscar A. Cabrera on March 6, 2021 (evidence file, folios 4015 to 4050).

[79] *Cf.* Statements made by Guillermo Antonio Ortiz Avendaño and Laura Clérico, during the public hearing held in this case, and written version of the expert opinion of Laura Clérico of March 10, 2021 (evidence file, folios 4050 to 4111).

[80] *Cf. Case of Manuela et al. v. El Salvador*. Call to a hearing. Order of the President of the Inter-American Court of Human Rights of December 2, 2020, first operative paragraph.

[81] Article 169 of the 1973 Criminal Code established that: "The following are non-punishable: (1) Culpable self-induced abortion or attempted abortion; (2) Abortion performed by a doctor to save the life of the mother, if there is no other suitable measure, and performed with the consent of the woman and following a prior medical opinion. If the women should be a minor, incapable or unable to give her consent, the consent of her spouse, legal representative or a close relative shall be necessary; (3) The abortion performed by a doctor, when it is presumed that the pregnancy is the result of a crime of rape and it shall be performed with the woman's consent, and (4) Abortion performed by a doctor with the woman's consent when the purpose is to avoid a probable severe deformity of the fetus." Legislative Assembly of the Republic of El Salvador. Criminal Code, Legislative Decree No. 270 of February 13, 1973, article 169. Available at: https://oig.cepal.org/sites/default/files/1973_decreto270_codigopenal_el_salvador.pdf

cases in which a "mother kills her child during the delivery or within the following seventy-two hours."[82]

36. In this regard, the 1998 Criminal Code establishes:

> Article 128. Simple homicide. Anyone who kills another person shall be sentenced to fifteen to twenty years' imprisonment.
>
> Article 129. Aggravated homicide. Aggravated homicide is considered to be homicide committed in any of the following circumstances:
>
> 1) Forebears or descendants […]. The sentence shall be thirty to fifty years' imprisonment. […]
>
> Article 133. Self-induced and consented abortion. Anyone who causes an abortion with the consent of the woman or the woman who causes her own abortion or consents to another person performing this, shall be sentenced to two to eight years' imprisonment.
>
> Article 134. Anyone who causes an abortion, without the consent of the woman, shall be sentenced to four to ten years' imprisonment. Anyone who performs an abortion, after obtaining the woman's consent by violence or deceit shall receive the same sentence.
>
> Article 135. Aggravated abortion. If the abortion is committed by a doctor, pharmacist, or persons who perform auxiliary activities in the said professions when they engage in this practice, they shall be sentenced to six to twelve years' imprisonment. In addition, they shall be sentenced to special disqualification from the exercise of their profession or activity for the same period.
>
> Article 136. Inducement of, or assistance for, abortion. Anyone who induces a woman to abort or provides her with the financial or other means so that she may have an abortion shall be sentenced to two to five years' imprisonment.
>
> If the person who induces or provides assistance for the abortion is the progenitor, the sentence shall be increased by a third of the maximum sentence indicated in the preceding paragraph.
>
> Article 137. Culpable abortion. Anyone who culpably causes an abortion shall be sentenced to six months' to two years' imprisonment. Self-induced culpable abortion and attempts at this by the pregnant woman shall not be punishable.[83]

37. Subsequently, in 1999, the Legislative Assembly adopted an amendment to article 1 of the Constitution of El Salvador establishing the recognition as a human person of "every human being from the moment of conception."[84]

38. Regarding professional secrecy, the Health Code establishes:

> Article 37. Professional secrecy is an obligation derived from the very essence of the profession. Public interest, patient safety, family honor and professional respectability require this secrecy; therefore, anything seen, heard or discovered in the exercise of the profession must be maintained confidential.

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[82] Article 155 of the 1973 Criminal Code established that "the mother who kills her child during the delivery or within the following seventy-two hours, in a state of violent emotion made excusable by the circumstances, shall be sentenced to one to four years' imprisonment." Legislative Assembly of the Republic of El Salvador. Criminal Code, Legislative Decree No. 270 of February 13, 1973, article 155. Available at: https://oig.cepal.org/sites/default/files/1973_decreto270codigopenal_el_salvador.pdf

[83] Criminal Code of El Salvador. Legislative Decree No. 1030 of April 26, 1997, articles 128, 129, 133, 135, 136, and 137. Available at: https://www.asamblea.gob.sv/sites/default/files/documents/decretos/C0AB56F8-AF37-4F25-AD90-08AE401C0BA7.pdf

[84] Constitution of the Republic of El Salvador, Legislative Decree No. 38 of 1983, amended on February 16, 1999, by Decree No. 1451. Available at: https://www.asamblea.gob.sv/sites/default/files/documents/decretos/B93EEAF8-C2CE-47FD-804E-74489D7AAF1B.pdf

> Article 38. Professional secrecy takes two forms: (a) The formal explicit secret, textually entrusted by the patient to the professional, and (b) The implicit secrecy that results from the relationship between the patient and the professional. Professional secrecy is inviolable, except in the case that, maintaining it, would violate the laws in force or when it must be revealed in an expert opinion or to notify infectious or contagious diseases to the health authorities.[85]

39. Additionally, article 187 of the Criminal Code establishes the offense of revealing a professional secret as follows: "anyone who reveals a secret imposed on him due to his profession or occupation, shall be sentenced to six months' to two years' imprisonment and special disqualification from his profession or occupation of from one to two years."[86] Similarly, the Code of Criminal Procedure in force at the time of the events, established that:

> The following are prohibited from revealing facts they have become aware of owing to their status, occupation or profession, under penalty of nullity: ministers of a church with legal personality, lawyers, notaries public, physicians, pharmacists and obstetricians, in accordance with professional secrecy, and public officials with regard to State secrets. However, such persons may not refuse to testify when the person concerned releases them from the obligation to keep a secret. If the witness erroneously cites that obligation with regard to one of the acts included in this article, he shall be questioned.[87]

40. Nevertheless, the laws also established the reporting obligation of "physicians, pharmacists, nurses and other persons who exercise health-related professions, who become aware […] [of actionable offenses] while providing the care required by their profession, unless the knowledge they acquire is protected by professional secrecy."[88] In addition, the Criminal Code established a fine for the "public official or employee, law enforcement agent or public authority who, in the exercise of his functions or due to them, becomes aware that a punishable act has been perpetrated and fails to report this to the competent official within twenty-four hours. […] The same punishment shall be imposed on the head or person in charge of a hospital, clinic or other similar public or private establishment, who fails to inform the competent official within eight hours that an injured person has been admitted, in cases in which it is reasonable to consider that the injuries originated from an offense."[89]

B. Factual context

41. In its Merits Report, the Commission included information on the criminalization of abortion in El Salvador and the alleged effect that this has had in cases of obstetric emergencies and infanticide. Even though the criminal laws on abortion were not applied in this case, the Court notes that this information relates to the alleged criminalization of women who have suffered obstetric emergencies in El Salvador.[90] Therefore, taking into account the

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[85] Health Code of El Salvador. Legislative Decree No. 955 of 1988, articles 37 and 38. Available at: http://asp.health.gob.sv/regulacion/pdf/ley/codigo_de_health.pdf

[86] Criminal Code of El Salvador, Legislative Decree No. 1030 of 1997, article 187. Available at: https://www.oas.org/dil/esp/Codigo_Penal_El_Salvador.pdf

[87] Code of Criminal Procedure of El Salvador, Legislative Decree No. 776 of 1996, article 187. Available at: http://www.oas.org/juridico/spanish/mesicic3_slv_procesal.pdf

[88] Code of Criminal Procedure of El Salvador, Legislative Decree No. 776 of 1996, article 232.2. Available at: http://www.oas.org/juridico/spanish/mesicic3_slv_procesal.pdf

[89] Criminal Code of El Salvador, Legislative Decree No. 1030 of 1997, article 312. Available at: https://www.oas.org/dil/esp/Codigo_Penal_El_Salvador.pdf

[90] For the purposes of this judgment, it is useful to consider the definition of obstetric emergency provided by expert witness Guillermo Ortiz, who indicated that "obstetric emergencies are those situations suffered by the woman or the fetus that require immediate attention; to the contrary, she or the fetus may suffer irreparable harm to their health and even die. This may happen at any moment of the pregnancy, at either the outset, the middle or the end." *Cf.* Expert opinion provided by Guillermo Antonio Ortiz Avendaño during the public hearing held in this case.

arguments of the parties and the Commission, the Court will examine that relationship in this section and take it into account when analyzing this specific case.

42. In this regard, the Court notes that, within the universal system for the protection of human rights, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee for the Elimination of Discrimination against Women (hereinafter also "CEDAW") have indicated that, since the entry into force of the absolute criminalization of abortion in El Salvador, women who have suffered miscarriages and other obstetric emergencies have been criminalized.[91]

43. In many cases, the women were not convicted of abortion but rather of aggravated homicide,[92] for which the sentence is from 30 to 50 years' imprisonment. On this point, CEDAW has expressed its concern at "the disproportionate criminal penalties applied […] to women who have had a miscarriage."[93]

44. The Committee on Economic, Social and Cultural Rights has underscored that, in some cases, there had been no regard for due process.[94] Moreover, expert witness David Ernesto Morales Cruz indicated that, typically, investigations are aimed at trying to convict the women without examining the possibility that, for example, the death could be due to an obstetric emergency. He also indicated that, in those cases, it was customary that the public defender did not present evidence and had little or no contact with the accused.[95]

45. It was also frequent that, in cases that were subsequently judicialized for abortion or for aggravated homicide, "women treated in public hospitals are being reported by medical or administrative staff."[96] In some cases, "women are reported to the authorities" "by health

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[91] *Cf.* Human Rights Committee. Concluding observations on the seventh periodic report of El Salvador*.* CCPR/C/SLV/CO/7 of May 9, 2018, para. 15; United Nations Committee on Economic, Social and Cultural Rights. Concluding observations on the combined third, fourth and fifth periodic reports of El Salvador, E/C.12/SLV/CO/3-5 of June 19, 2014, para. 22, and Committee for the Elimination of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of El Salvador, CEDAW/C/SLV/CO/8-9 of March 9, 2017, para. 38. See also, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo: Follow-up mission to El Salvador, A/HRC/17/26/Add.2 of February 14, 2011, para. 68, and Statement of the United Nations High Commissioner for Human Rights Zeid Ra'ad Al Hussein at the end of his mission to El Salvador, November 17, 2017. Available at: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22412&LangID=E

[92] *Cf.* Human Rights Committee. Concluding observations on the seventh periodic report of El Salvador*.* CCPR/C/SLV/CO/7 of May 9, 2018, para. 15; Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo: Follow-up mission to El Salvador, A/HRC/17/26/Add.2 of February 14, 2011, para. 68, and Statement of the United Nations High Commissioner for Human Rights Zeid Ra'ad Al Hussein at the end of his mission to El Salvador, November 17, 2017. Available at: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22412&LangID=E

[93] Committee for the Elimination of Discrimination against Women. Concluding observations on the combined eighth and ninth periodic reports of El Salvador, CEDAW/C/SLV/CO/8-9, of March 9, 2017, para. 38 (a).

[94] *Cf.* United Nations Committee on Economic, Social and Cultural Rights, Concluding observations on the combined third, fourth and fifth periodic reports of El Salvador, E/C.12/SLV/CO/3-5, June 19, 2014, para. 22.

[95] *Cf.* Expert opinion provided by David Ernesto Morales Cruz on March 4, 2021 (evidence file, folios 3940, 3941 and 3942). See also, Viterna J. and Santos J. *Análisis independiente de la Discriminación Sistemática de Género en el Proceso Judicial de El Salvador contra las 17 Mujeres Acusadas del Homicidio Agravado de sus Recién Nacidos,* November 17, 2014, Available at: https://scholar.harvard.edu/files/viterna/files/viterna_guardado_2014_white_paper_spanish.pdf

[96] Human Rights Committee. Concluding observations on the seventh periodic report of El Salvador*,* CCPR/C/SLV/CO/7 of May 9, 2018, para. 15; 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) A/HRC/WGAD/2019/68 of March 4, 2020, para. 101, and Feusier, O. *Pasado y presente del delito de aborto in El Salvador.* Universidad Centroamericana José Simeón Cañas (UCA): Legal Research Department, 2012. p. 57. Available at: http://www.uca.edu.sv/deptos/ccjj/media/archivo/95bbb4_pasadoypresentedeldelitodeabortoenelsalvador.pdf

personnel who fear punishment."[97] A report published in the American Journal of Public Health revealed that, between 1998 and 2003, 80% of obstetric gynecologists in El Salvador believed that reporting obstetric emergencies was compulsory in all cases.[98]

46. Lastly, the Court notes that most of the women prosecuted for such facts had few if any financial resources,[99] came from rural or marginalized urban areas[100] and had little schooling.[101] In addition, many of them were detained and handcuffed while receiving medical care.[102]

C. Manuela and her family unit

47. Manuela was born on August 5, 1977.[103] She married when she was 20 years of age, and then had two children. Shortly after her second son was born, her husband left for the United States and nothing more was heard of him. Manuela lived with her mother, her father, her sister and her two sons in the village of Las Mezas, municipality of Cacaopera, department of Morazán, El Salvador.[104] Neither Manuela nor her parents knew how to read or write.[105]

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97 *Cf.* Committee for the Elimination of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of El Salvador, CEDAW/C/SLV/CO/8-9, para. 38.

98 *Cf.* McNaughton, H., Mitchell, E., Hernandez, E., Padilla, K., & Blandon, M. Patient Privacy and Conflicting Legal and Ethical Obligations in El Salvador: Reporting of Unlawful Abortions. American Journal of Public Health: Health Policy and Ethics. Vol 96, No. 11. 2006. Available at: https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2005.071720

99 *Cf.* 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) A/HRC/WGAD/2019/68, on March 4, 2020, paras. 100 and 101; Statement of the United Nations High Commissioner for Human Rights Zeid Ra'ad Al Hussein at the end of his mission to El Salvador, November 17, 2017. Available at: https://www.ohchr.org/en/NewsEvents/Pages /DisplayNews.aspx?NewsID=22412&LangID=E; expert opinion provided by David Ernesto Morales Cruz on March 4, 2021 (evidence file, folio 3940). See also, affidavit made by María Teresa Rivera on February 23, 2021 (evidence file, folio 3809); affidavit made by María Marina Pérez on February 26, 2021 (evidence file, folio 3813); affidavit made by Johana Iris Rosa Gutiérrez on February 22, 2021 (evidence file, folio 3817), and affidavit made by Teodora del Carmen Vásquez on March 3, 2021 (evidence file, folio 3827).

100 *Cf.* 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), A/HRC/WGAD/2019/68 of March 4, 2020, paras. 100 and 101, and expert opinion provided by David Ernesto Morales Cruz on March 4, 2021 (evidence file, folio 3940). See also, affidavit made by María Teresa Rivera on February 23, 2021 (evidence file, folio 3809), and affidavit made by Teodora del Carmen Vásquez on March 3, 2021 (evidence file, folio 3827).

101 *Cf.* Expert opinion provided by David Ernesto Morales Cruz on March 4, 2021 (evidence file, folio 3940). *See also,* Affidavit made by María Marina Pérez on February 26, 2021 (evidence file, folio 3813); affidavit made by Alva Lorena Rodríguez on February 24, 2021 (evidence file, folio 3823), and affidavit made by Teodora del Carmen Vásquez on March 3, 2021 (evidence file, folio 3827).

102 *Cf.* 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), A/HRC/WGAD/2019/68, March 4, 2020, para. 101.

103 *Cf.* San Francisco Gotera National Hospital. Perinatal medical record of March 27, 2008 (evidence file, folio 3160).

104 *Cf.* Emergency record dated February 27, 2008 (evidence file, folio 3164); Affidavit made by Manuela's mother on September 3, 2017 (evidence file, folio 2281), and Record of the interview of Manuela's sister on February 28, 2008 (evidence file, folios 1803 and 1804).

105 *Cf.* Psychological appraisal of Manuela by the Institute of Forensic Medicine of April 25, 2008 (evidence file, folio 103); Affidavit made by Manuela's father on September 3, 2017 (evidence file, folio 2288), and Interview of Manuela's mother by the representatives on February 26, 2021 (evidence file, folder of audiovisual material, minute 2:11).

48. On August 24, 2006, Manuela went to the Cacaopera Health Unit because she was suffering from a headache, nausea, pain in the pit of her stomach and tiredness.[106] She was diagnosed with acute gastritis.[107] On May 14, 2007, Manuela visited the unit again due to headaches and it was recorded that she had what "appeared to be a painful lump behind her ear"; she was diagnosed with cervical adenitis and was prescribed analgesics.[108] Manuela then developed several lumps in her neck, which were visible and caused her pain; therefore, she had further appointments in June and August 2007 and was then diagnosed with right neck lymphadenopathy and referred to the San Francisco Gotera National Hospital.[109] The case file does not reveal whether the presumed victim went to that hospital or whether she received treatment there.

D. Manuela's pregnancy

49. In February 2008, Manuela was pregnant; however, there is no information with regard to how many weeks pregnant she was at that time.[110]

50. On February 26, 2008, Manuela was washing clothes in the river with her elder son, when she fell heavily and injured her pelvic area;[111] this resulted in pelvic girdle pain which increased in intensity and duration and led to transvaginal bleeding.[112]

51. According to Manuela's mother, on February 27, 2008, her daughter was lying in bed in her room because she felt ill. At around midday, she went to her daughter's room and found her pale, bleeding from the vagina, sweating and unconscious. Manuela's father took his daughter to the San Francisco Gotera Hospital.[113]

E. The medical treatment of the obstetric emergency

52. On February 27, 2008, at 3:25 p.m., Manuela was admitted to the emergency department of the San Francisco Gotera National Hospital, where she was seen at 4 p.m.[114]

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106 *Cf.* Identification document from the medical record of August 24, 2006 (evidence file, folios 1812 to 1814 and 5176), and Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folio 186).

107 *Cf.* Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folio 186).

108 *Cf.* Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folio 186), and Medical record of Manuela from March to June 2007 (evidence file, folios 5179 to 5181).

109 *Cf.* Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folios 186 and 187); Manuela's medical record of June 6, 2007 (evidence file, folios 5180 and 5181); Sworn statement of Manuela's mother on September 3, 2017 (evidence file, folio 2281), and Sworn statement of Manuela's father on September 3, 2017 (evidence file, folio 2288).

110 *Cf.* Record of interview of Manuela's mother on February 28, 2008 (evidence file, folios 1822 and 1823).

111 *Cf.* Emergency record of February 27, 2008 (evidence file, folio 16); Sworn statement of Manuela's father on September 3, 2017 (evidence file, folio 2288), and Sworn statement of Manuela's mother on September 3, 2017 (evidence file, folio 2281).

112 *Cf.* Emergency record of February 27, 2008 (evidence file, folio 16).

113 Sworn statement of Manuela's mother on September 3, 2017 (evidence file, folio 2281); Sworn statement of Manuela's father on September 3, 2017 (evidence file, folio 2288), and Record of interview of Manuela's mother on February 28, 2008 (evidence file, folio 1822). Similarly, Record of the interview of Manuela's sister of February 28, 2008 (evidence file, folios 1803 and 1804).

114 *Cf.* Record of the interview of the treating physician on February 28, 2008 (evidence file, folio 24).

The hospital records show that the preoperative diagnosis was "delivery outside the hospital, retained placenta and perineal tear."[115]

53. The emergency record for the day Manuela was admitted to the San Francisco Gotera Hospital, notes that she was admitted due to abortion.[116] This document states that it reproduces a verbatim quote from Manuela indicating: "I don't know if it fell to the floor or if the umbilical cord broke, or if my mother cut it. My sister says that my mother cut the cord and buried the baby; my sister told me that the baby was born dead." It also recorded that the patient was uncooperative when she was questioned and that she was advised that the prosecution service would be notified.[117]

54. At 7 p.m. on February 27, 2008, the "complete calcified placenta" was extracted from Manuela, a curettage was performed, and her "perineal tear" was sutured."[118]

55. In the report that the hospital sent to the prosecution service, the medical staff noted, among other matters, that Manuela had "high blood pressure" and that she had lost around "300 [cubic centimeters]" of blood, so that a blood transfusion was recommended.[119] It was concluded that:

> This is a case of patient who gave birth outside a hospital apparently to a premature infant, although the placenta showed signs of maturity; she also had high blood pressure and an important loss of blood so that she was classified with severe postpartum preeclampsia plus anemia owing to loss of blood.[120]

56. The report does not mention the lumps on Manuela's neck.

F. The criminal prosecution of Manuela

57. On February 27, 2008, the physician who had treated the presumed victim filed a complaint against Manuela with the Complaint Reception Unit, Subregional Prosecution Service of Morazán, and this initiated the criminal proceedings that are described below.[121]

58. On February 28, 2008, the police questioned the physician concerning her report. In her statement, she indicated the reasons why she alerted the prosecution service to Manuela's situation:

> The information provided by the patient did not match the clinical picture, because the patient was treated for abortion and, when examining her […] about 40 centimeters of the umbilical cord could be observed, which was cut cleanly, and also a perineal tear […]; the patient's calcified placenta was observed, and this corresponded to nine months.[122]

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115 Record of evolution following anesthesia of the San Francisco Gotera National Hospital of February 27, 2008 (evidence file, folio 2), and record of admittance and departure (evidence file, folio 17).

116 *Cf.* Emergency record of February 27, 2008 (evidence file, folio 16).

117 *Cf.* Emergency record of February 27, 2008 (evidence file, folio 16).

118 Communication issued by the director of the San Francisco Gotera National Hospital on February 29, 2008 (evidence file, folio 58).

119 Communication issued by the director of the San Francisco Gotera National Hospital on February 29, 2008 (evidence file, folio 58).

120 Communication issued by the director of the San Francisco Gotera National Hospital on February 29, 2008 (evidence file, folio 59).

121 Note addressed to the prosecution service dated February 27, 2008 (evidence file, folio 22).

122 Record of interview of the treating physician of February 28, 2008 (evidence file, folios 24 and 25).

59. The principal investigator also interviewed Manuela.[123] In addition, that same day, at 9 a.m., a forensic physician examined the presumed victim's genital area, and recorded the following:

> Umbilical cord […] with a clean cut, not ruptured. Based on the foregoing, the patient gave birth outside a hospital, if not full-term at least very nearly, and with signs of [preeclampsia] (hypertensive disease of pregnancy).[124]

60. On the same date, the Magistrate's Court of Cacaopera authorized the entry and search of the house where Manuela and her family lived.[125] At 11:30 a.m. the house was inspected. The record of this procedure indicates that the body of a newborn was found inside a septic tank;[126] this was examined by the forensic physician who indicated that it was:

> A full-term newborn, without any sign that the cord was ruptured and without any apparent genetic defect, […] a male child, covered with excreta and myasis (worms) and with the time of death approximately twenty-four hours previously; cause of death to be determined by a forensic autopsy; the body was therefore transferred to the forensic institute in the city of San Miguel.[127]

61. At 5 p.m., the Institute of Forensic Medicine performed an autopsy on the corpse and recorded that the newborn had been dead for approximately 30 to 32 hours.[128]

62. The case file also includes a statement by Manuela's father, in which he indicated that he "felt ashamed because [his daughter's] husband is […] in the United States, but […] his daughter told him that she got pregnant from another man" and that "he was sorry for his daughter, but this would never have made her get rid of the child."[129] This statement bears a fingerprint because the presumed victim's father does not know how to read or write.

63. Subsequently, Manuela's father indicated that the police "put pressure on him and made him sign a piece of paper" and "threatened him until placed his fingerprint."[130] The case file does not contain any report or inquiry into the authenticity of the father's statement.

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123 Record of interview of February 29, 2008 (evidence file, folios 51 and 52). See also, Sworn statement of Manuela's father of September 3, 2017 (evidence file, folio 2288).

124 Report of forensic autopsy by the Institute of Forensic Medicine on February 28, 2008 (evidence file, folio 37).

125 *Cf.* Request for entry and search warrant of February 28, 2008 (evidence file, folio 27), and Decision of the Magistrate's Court of Cacaopera of February 28, 2008 (evidence file, folio 29).

126 The representatives argued that there is insufficient evidence to conclude that the fetus was alive. It is not incumbent on the Court to determine that possibility. To make this judgment easier to read, the Court will use the term newborn, without this implying any determination on whether or not the fetus was alive when born.

127 Record of inspection of February 28, 2008 (evidence file, folio 33).

128 In addition, the autopsy indicates that: "[r]emoval of the umbilical cord at its base can be observed, and excreta was extracted from the nose and mouth. The corpse was at a stage of accelerated putrefaction owing to the fecal material, the heat of the tank, and the humidity. Internally, it was found that excreta obstructed the upper airway, the optic dosimasia revealed total expansion of both lungs in the thoracic cavity; the hydrostatic docimasia was positive for air, which shows that the infant was born alive and breathed. The cause of its death was mechanical asphyxia due to obstruction of the upper airway with excreta, and severe umbilical hemorrhage." Autopsy of February 28, 2008 (evidence file, folio 39).

129 Record of statement by Manuela's father of February 28, 2008 (evidence file, folios 44 and 45).

130 Sworn statement by Manuela's father on February 26, 2021 (evidence file, folio 3797). See also, Interview of Manuela's mother by the representatives on February 26, 2021 (evidence file, folder of audiovisual material, minute 6:05 to 6:22), and expert appraisal of the psychological impact on the members of Manuela's family of July 17, 2012 (evidence file, folio 1559).

G. The presumed victim's detention and subsequent investigation procedures

64. The presumed victim was detained on February 28, 2008, while receiving medical care in the Maternity Ward of the San Francisco Gotera National Hospital. The record of the arrest indicates that Manuela was detained *in flagrante delicto* "for the crime of the murder of her newborn son, an act that occurred on February 27 at 12:30 p.m. in the septic tank of her house."[131] The record indicates that Manuela refused to sign it.[132] According to her father, Manuela was handcuffed to the bed where she lay.[133]

65. The same day, the presumed victim was appointed a public defender. The police record appointing the defender indicates that "if the detainee is unable to sign her name, she must place her fingerprint." However, this document lacks either the signature or the impression of Manuela's finger.[134]

66. On February 29, 2008, the head of the Women and Children's Unit of the Morazán Prosecution Service asked the director of the San Francisco Gotera National Hospital to provide a copy of Manuela's medical record and informed him that "due to the investigations conducted to date, it had been determined […] that […] she had indeed committed an offense and that, as a result, she has now been detained."[135]

67. Subsequently, the director of this hospital sent a transcript of Manuela's medical record for the day on which she was given emergency treatment, which also included a section on her personal background in relation to her sexual and reproductive life.[136]

68. On February 29, 2008, the Prosecutor General issued an order requiring a formal investigation with the provisional detention of Manuela for the crime of the aggravated homicide of a newborn.[137] He indicated that the detention was necessary "to ensure that this case does not remain unpunished and that the normal outcome of the proceedings is not frustrated, because the existing evidence leads to the presumption that the accused may evade the action of justice by flight, and it should also be recalled that the [Code of Criminal Procedure] makes it very clear that pretrial detention is the only appropriate measure for this type of crime."[138]

69. On March 2, 2008, at 11:30 a.m., the Magistrate's Court of Cacaopera ordered the detention of Manuela "for the statutory term of the inquiry" and called an initial hearing for the following day at 11 a.m.[139] That same afternoon, Manuela was notified of the order.[140]

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131 *Cf.* Record of arrest of February 28, 2008 (evidence file, folio 47).

132 *Cf.* Record of arrest of February 28, 2008 (evidence file, folio 47).

133 *Cf.* Sworn statement of Manuela's father on September 3, 2017 (evidence file, folio 2288), and Sworn statement of Manuela's father on February 26, 2021 (evidence file, folio 3797).

134 *Cf.* Police record of appointment of a public defender of February 28, 2008 (evidence file, folio 49).

135 Women and Children's Unit of the Morazán Prosecution Service. Collaboration request of February 29, 2008 (evidence file, folio 55).

136 *Cf.* Communication issued by the director of the San Francisco Gotera National Hospital of February 29, 2008 (evidence file, folios 57 to 59).

137 *Cf.* Office of the Prosecutor General. Request for a formal investigation with provisional detention of February 29, 2008 (evidence file, folio 67).

138 *Cf.* Office of the Prosecutor General. Request for a formal investigation with provisional detention of February 29, 2008 (evidence file, folio 66).

139 *Cf.* Decision of the Magistrate's Court of Cacaopera, department of Morazán, of March 2, 2008 (evidence file, folio 69).

140 *Cf.* Record prior to the statement by the detained defendant of March 2, 2008 (evidence file, folio 1835).

70. On March 3, 2008, the first hearing of the criminal proceedings was held before the Magistrate's Court of Cacaopera, department of Morazán. The presumed victim was not present because "she had not been taken to the court by agents of the Section for the Transfer of Defendants of the Eastern Zone of San Miguel, due to lack of personnel."[141] During the hearing, the prosecution ratified the request that a formal investigation be ordered with the pretrial detention of the presumed victim. Manuela's defense counsel indicated that he did not agree with this request because Manuela was unaware of how long she had been pregnant and "the result of the autopsy of the newborn was not yet [available], and it [was] not known if it was born alive or dead, because [Manuela] allege[d] that she felt the need to defecate and she went to the toilet and perhaps that was where she had delivered the baby; in other words, there is a possibility that it was a miscarriage and not a homicide."[142] The lawyer indicated that "it can be established that an offense existed […] but a doubt exists regarding criminal participation," and therefore requested that a formal investigation be ordered without pretrial detention.[143]

71. The court considered that there were "sufficient indications to be able to order the formal investigation with pretrial detention, because […] the existence of the crime had been established, as well as the probable participation of the defendant."[144] The court indicated that:

> […] the pretrial detention of [Manuela] is appropriate in order to safeguard the investigation into the truth of the facts, […] added to this, it is presumed that the said defendant will try to evade the punishment imposed on the crime committed, and she may obstruct the specific investigation measures by removing, hiding and even threatening witnesses; in addition, the said crime committed by the defendant against her newborn son has caused public alarm among the villagers of Las Mesas […] who condemn this unacceptable act executed by [the presumed victim].[145]

72. The court also indicated that from "the evidence collected to date, it is certain that the deceased newborn child was the son of the defendant […]; therefore, it is established that the said defendant intended to hide and destroy the product of conception, because she was able to hide her pregnancy very well, without her family members perceiving it."[146] In addition, it indicated that her detention would continue in the maternity ward where she was receiving medical care.[147]

73. On March 6, 2008, the Second Trial Court of San Francisco Gotera issued the formal order to open the preliminary proceedings against Manuela for the offense of aggravated homicide, called for a preliminary hearing, and ratified the precautionary measure of pretrial detention.[148] The same day, Manuela was discharged from hospital and taken to the cells of

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[141] *Cf.* Magistrate's Court of Cacaopera, department of Morazán. Record of initial hearing on March 3, 2008 (evidence file, folio 72).

[142] *Cf.* Magistrate's Court of Cacaopera, department of Morazán. Record of initial hearing on March 3, 2008 (evidence file, folio 74).

[143] *Cf.* Magistrate's Court of Cacaopera, department of Morazán. Record of initial hearing on March 3, 2008 (evidence file, folio 75).

[144] *Cf.* Magistrate's Court of Cacaopera, department of Morazán. Record of initial hearing on March 3, 2008 (evidence file, folio 75).

[145] *Cf.* Magistrate's Court of Cacaopera, department of Morazán. Record of initial hearing on March 3, 2008 (evidence file, folio 81).

[146] *Cf.* Magistrate's Court of Cacaopera, department of Morazán. Record of initial hearing on March 3, 2008 (evidence file, folio 82).

[147] *Cf.* Magistrate's Court of Cacaopera, department of Morazán. Record of initial hearing on March 3, 2008 (evidence file, folio 83).

[148] *Cf.* Second Trial Court of San Francisco Gotera. Order of March 6, 2008 (evidence file, folio 1868).

the Morazán National Civil Police Station, where she remained confined until her transfer to the prison in San Miguel.[149]

74. On April 11, 2008, a death certification was issued for the newborn child recording that he had died from "asphyxiation due to obstruction of respiratory tract" on February 28, 2018, at 2 p.m. in the village of Las Mesas and that "he lived for two days."[150]

75. On April 25, 2008, at the request of the prosecution, the Institute of Forensic Medicine performed a psychological appraisal of Manuela's mental health, concluding that the presumed victim did not present symptoms "of a mental disorder or other physical or mental incapacity that [would] prevent her from understanding the unlawful nature of her acts."[151].

76. On June 5, 2008, a hearing to review the presumed victim's pretrial detention was held before the Second Trial Court of San Francisco Gotera, Morazán, at which Manuela was represented by another defense counsel in substitution of the defense counsel assigned to her.[152] On that occasion, the court considered that the circumstances that originated the adoption of the precautionary measure subsisted and, therefore, decided that the pretrial detention should continue.[153]

H. Manuela's trial

77. The preliminary hearing was held at 9 a.m. on July 7, 2008.[154] Thirty minutes before it began, Manuela's defense counsel asked to be substituted, because he had another hearing in a different court.[155]

78. During the hearing, the Second Court of San Francisco Gotera issued an order to proceed to a trial and ratified the presumed victim's pretrial detention, indicating that:

> The severity of the punishment she would face if found guilty during the trial could cause her to flee or to obstruct the collection of evidence if she were to be released. In the opinion of the undersigned, in this case deprivation of liberty is the only precautionary measure capable, necessary and sufficient to ensure the presence [of the defendant] at the trial and its results, and thus achieve the purpose of the criminal proceedings.[156]

79. The court indicated that it could be "determined that the defendant disposed of her youngest son by throwing him in the septic tank"[157] and, therefore, it was possible "to reach

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149 *Cf.* Morazán National Civil Police Station. Communication addressed to the Second Trial Judge on March 7, 2008 (evidence file, folio 1870).

150 Cacaopera municipal town hall. Death certificate of April 11, 2008 (evidence file, folio 1000).

151 *Cf.* Institute of Forensic Medicine. Protocol of psychological appraisal of Manuela on April 25, 2008 (evidence file, folio 105).

152 *Cf.* Acceptance of legal representation by the Second Trial Court on June 5, 2008 (evidence file, folio 107), and Record of hearing to review a precautionary measure of June 5, 2008 (evidence file, folio 109).

153 *Cf.* Record of hearing to review a precautionary measure of June 5, 2008 (evidence file, folio 110).

154 *Cf.* Second Trial Court of San Francisco Gotera, Morazán. Record of hearing of July 7, 2008 (evidence file, folio 132).

155 *Cf.* Request of Manuela's defense to the Second Trial Court of San Francisco de Gotera of July 7, 2008, asking that Manuela's public defender be substituted (evidence file, folio 1939) and Communication issued by the Second Trial Court of San Francisco de Gotera at 8:30 a.m. on July 7, 2008 (evidence file, folio 1940).

156 *Cf.* Second Trial Court of San Francisco Gotera, Morazán. Ruling of July 7, 2008 (evidence file, folios 140 and 141).

157 *Cf.* Second Trial Court of San Francisco Gotera, Morazán. Ruling of July 7, 2008 (evidence file, folio 137).

the conclusion of the positive probability that the defendant is the author of the offense of the aggravated homicide of her newborn child […].”[158]

80. On July 23, 2008, a psychiatric appraisal of the presumed victim was added to the case file. During the appraisal, she gave the following account of the facts:

> During my pregnancy, I fell and the baby came early; I was expecting it in April and the only bad thing I did was go to the toilet and it fell into the tank. I was helped up in a bad way; they took me to the hospital and I cannot remember what happened then; I can't remember what my family did there. This happened at the end of February, around the 27th; they say that I am guilty, but God known that it is not like that.[159]

81. On July 31, 2008, the public hearing of the trial against Manuela was held.[160] During this procedure, the doctor who had performed the autopsy on the newborn ratified his report and expanded this indicating that, according to optic and hydrostatic docimasia tests "the child could have lived approximately ten to fifteen minutes because he was full-term."[161] He also stated that "it was not possible to refer to it as a miscarriage, because, medically, a miscarriage is any birth of less than twenty weeks; in other words, it is considered that less than five months is a miscarriage and this case relates to a full-term pregnancy of the complete nine months."[162]

82. Although the testimony of Manuela's mother had been offered, she did not make a statement during the public hearing because, at that time, Manuela's defense counsel asked that it be dispensed with at Manuela's request.[163] The public defender requested her acquittal considering that, even though "the existence of the offense had been demonstrated," the circumstances surrounding it were unclear.[164]

I. Guilty verdict

83. On August 11, 2008, the Trial Court of San Francisco Gotera sentenced the presumed victim to 30 years' imprisonment for the crime of aggravated homicide.[165] The court considered that: (1) the newborn had lived for between ten and fifteen minutes and had died due to mechanical asphyxia due to obstruction of the upper airways by the "excreta into which he was thrown"; (2) the newborn "had independent life and legal existence"; (3) "a precise causal relationship existed in the act owing to the immediate temporal sequence between the action of disposing of the newborn to deprive him of his life and the result obtained, which

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158 *Cf.* Second Trial Court of San Francisco Gotera, Morazán. Ruling of July 7, 2008 (evidence file, folios 137 and 138).

159 Institute of Forensic Medicine, psychiatric appraisal of July 23, 2008 (evidence file, folio 143).

160 Trial Court of San Francisco Gotera, department of Morazán. Judgment of August 11, 2008 (evidence file, folio 148).

161 Trial Court of San Francisco Gotera, department of Morazán. Judgment of August 11, 2008 (evidence file, folio 150).

162 Trial Court of San Francisco Gotera, department of Morazán. Judgment of August 11, 2008 (evidence file, folios 150 and 151).

163 *Cf.* Record of preliminary hearing of the Second Trial Court of San Francisco Gotera, Morazán, on July 7, 2008 (evidence file, folio 133); Record of the public hearing of the Trial Court of San Francisco Gotera, department of Morazán, on July 31, 2008 (evidence file, folio 5371); Judgment delivered by the Trial Court of San Francisco Gotera, department of Morazán, on August 11, 2008 (evidence file, folios 146 to 168), and Sworn statement of Manuela's mother of September 3, 2017 (evidence file, folio 2283).

164 *Cf.* Record of the public hearing of the Trial Court of San Francisco Gotera, department of Morazán, on July 31, 2008 (evidence file, folio 5371).

165 Judgment handed down by the Trial Court of San Francisco Gotera, department of Morazán, on August 11, 2008 (evidence file, folio 168).

was his death"; (4) the deceased was Manuela's son, and (5) "by giving several versions that were logically and medically inconsistent and implausible, the defendant has suggested to the judge the possible reasons she had to try and hide the act she committed; first, she was aware of her pregnancy and that it was the result of infidelity because she was married; therefore, being able to choose between having the baby, taking care of it, feeding it and living for it as any biological mother would do, she chose a conduct that was anti-nature and against the laws to which we are all subject, and thus she waited until she had given birth to the baby to then dispose of him, throwing him in the septic tank." The court also indicated that:

> Furthermore, when reviewing the different versions that the defendant gave to the different persons who interviewed her, such as, "that she was unaware of everything and perhaps the baby had come with the pain or with the diarrhea, and that she had fainted, or in the worst case that, in this situation of unconsciousness, it was someone else who had thrown the baby into the septic tank"; these statements are unbelievable and even improbable under the rules of acceptable human understanding, because the maternal instinct is to protect the child, and, generally, any complication in the delivery results in seeking immediate medical help or, at the very least, the help of close family members, not depriving a newborn of its life. However, in this case the defendant, in her efforts to dispose of the product of her pregnancy following the birth – because it was the result of infidelity – and given the paternal irresponsibility noted by her biological father, with full awareness, seeing the baby alive, deliberately sought the appropriate means and place to make it disappear, thus taking from her child […] the opportunity to live […] and, in this case, it is all the more reprehensible that this was an act of a mother towards her own child.[166]

84. When determining the sentence, the court indicated that "there is no legal reason that would justify a mother killing a child and, above all, a defenseless newborn, and it has been proved during the proceedings that the only reason that the defendant had was to avoid public censure or rejection by her husband for her infidelity"[167] and that "[i]t is evident that the defendant has a very low level of education, growing up in the countryside, in a place with traditional standards; however, this situation does not justify such criminal behavior by the defendant; however, these factors are taken into account to impose the minimum punishment established for the crime that has been proved."[168]

85. The judgment became final on August 26, 2008, because no appeal was filed against it.[169]

J. Situation of the presumed victim's health while deprived of liberty

86. For most of the time that Manuela was in prison, she was confined in the San Miguel Prison.[170]

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166 Judgment handed down by the Trial Court of San Francisco Gotera, department of Morazán, on August 11, 2008 (evidence file, folios 160, 164 and 165).

167 Judgment handed down by the Trial Court of San Francisco Gotera, department of Morazán, on August 11, 2008 (evidence file, folio 166).

168 Judgment handed down by the Trial Court of San Francisco Gotera, department of Morazán, on August 11, 2008 (evidence file, folio 167).

169 *Cf.* Notification of the final judgment to the director of the San Miguel Prison for Serving Sentences on August 26, 2008 (evidence file, folio 170).

170 According to the information in the case file, Manuela was in this prison from February 28, 2008, until her transfer, on September 10, 2009, to the Women's Rehabilitation Center of Ilopango. *Cf.* Comparison of the dates of medical appointments between the logs and the medical record of the Rosales Hospital (evidence file, folio 3786); Magistrate's Court of Cacaopera, department of Morazán, ruling of March 2, 2008 (evidence file, folio 69); communication of the Trial Judge of San Francisco Gotera, department of Morazán, addressed to the director of the

87. On February 6, 2009, Manuela was referred to the Rosales National Hospital. The hospital recorded that Manuela had a "one-year history of the appearance of a lump in the left side of her neck and that, in the last three months, she had lost approximately 30 pounds in weight, and suffered from high temperatures and jaundice."[171] On February 12, she was diagnosed with nodular sclerosis Hodgkin's lymphoma.[172] Chemotherapy was prescribed and she underwent this treatment over the following months.[173]

88. On September 10, 2009, Manuela was transferred to the Women's Rehabilitation Center of Ilopango to facilitate her treatment.[174] On January 10, 2010, the presumed victim was admitted to the Prisoners' Ward of the Rosales National Hospital where she died on April 30, 2010.[175]

K. Subsequent judicial remedies

89. In 2011, the representatives: (i) asked for an investigation of the fact that Manuela had never accepted to be represented by the public defender assigned to her;[176] (ii) requested Manuela's file from the hospital where she had died, which was refused;[177] (iii) filed a remedy of complaint against the Women's Rehabilitation Center of Ilopango owing to the failure to transfer Manuela to chemotherapy sessions in April and November 2009,[178] which was declared inadmissible,[179] and (iv) filed an appeal for review against the judgment convicting Manuela.[180]

90. On January 22, 2012, the Trial Court of San Francisco Gotera declared the appeal for review inadmissible, indicating that the evidence used by the trial court had "reasonably and legitimately convinced us of the offense, and the direct connection of the defendant to its perpetration."[181]

San Miguel Prison of August 26, 2008 (evidence file, folio 170), and communication of the director of the San Miguel Prison of September 9, 2009 (evidence file, folio 3313).

171 *Cf.* Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folio 190).

172 *Cf.* Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folio 191).

173 See, for example, Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folio 191); Rosales National Hospital. Chemotherapy protocol No. 283009 (evidence file, folios 2553 and 2554).

174 *Cf.* Communication of the director of the San Miguel Prison of September 9, 2009 (evidence file, folio 3313), and Sworn statement of María Marina Pérez Martínez on September 3, 2017 (evidence file, folio 2295).

175 *Cf.* Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folio 191).

176 *Cf.* Request for an investigation filed with the Prosecutor General on October 27, 2011 (evidence file, folios 2143 and 2144); Request for an investigation filed with the Attorney General on October 27, 2011 (evidence file, folios 2145 and 2146).

177 *Cf.* Request presented to the Rosales National Hospital on November 17, 2011 (evidence file, folio 2140), and Communication of the Rosales National Hospital of November 17, 2011 (evidence file, folio 2141).

178 *Cf.* Remedy of complaint against the Women's Rehabilitation Center of Ilopango (evidence file, folio 196).

179 The court indicated that the action to hear the judicial complaint had a statute of limitation of 15 working days from the date on which the fact had occurred. *Cf.* Ruling of November 11, 2011 (evidence file, folio 200).

180 *Cf.* Appeal for review filed on December 20, 2011 (evidence file, folio 2148).

181 *Cf.* Trial Court of San Francisco Gotera. Judgment of January 22, 2012 (evidence file, folios 2154 to 2156).

VIII
MERITS

91. In the instant case, there is no dispute regarding the facts that Manuela was pregnant, gave birth and suffered from preeclampsia, a complication of pregnancy which, as it constitutes a serious health risk, should be characterized as an obstetric emergency.

92. What is in dispute is the State's alleged responsibility for the detention, prosecution and conviction of the presumed victim for aggravated homicide following the obstetric emergency that she suffered, and also for the medical care that the presumed victim received, and the alleged violation of professional secrecy by the medical staff who attended her. Bearing in mind that this case does not refer to the occurrence of a therapeutic abortion, the context established above will only be taken into account to the extent that it relates to the purpose of the dispute.

93. Based on the arguments of the parties and the Commission, in the instant case, the Court will examine: (1) the rights to personal liberty and presumption of innocence, in relation to the obligations to respect rights and to adopt domestic legal provisions; (2) the rights to judicial guarantees, personal integrity and equality before the law, in relation to the obligations to respect rights without discrimination and to adopt domestic legal provisions; (3) the rights to life, personal integrity, health, privacy, and equality before the law, in relation to the obligation to respect rights without discrimination and to adopt domestic legal provisions and (4) the right to personal integrity of the family members, in relation to the obligation to respect rights.

VIII-1
RIGHTS TO PERSONAL LIBERTY[182] AND PRESUMPTION OF INNOCENCE[183] IN RELATION TO THE OBLIGATIONS TO RESPECT RIGHTS[184] AND TO ADOPT DOMESTIC LEGAL PROVISIONS[185]

A. Arguments of the parties and the Commission

94. The ***Commission*** argued that the initial detention of the presumed victim was unlawful because it was not in keeping with *in flagrante delicto*. It also considered that the pretrial detention of Manuela "was arbitrary from the outset and disregarded the principle of presumption of innocence" because the judicial decisions that imposed this presumed that, owing to the gravity of the crime, the presumed victim might obstruct the proceedings. It stressed that "article 294 of the Code of Criminal Procedure of El Salvador explicitly established that, in a case of aggravated homicide, pretrial detention cannot be replaced by any other measure." In addition, it underlined that the presumed victim had no effective judicial remedy to contest the fact that her pretrial detention "contravened the Convention."

95. The ***representatives*** argued that "Manuela's detention was unlawful and arbitrary because: (a) she was detained by application of a presumption of *in flagrante delicto* which is contrary to the object and purpose of the treaty; (b) she was not informed of the reasons for her detention and the charges against her; (c) her pretrial detention was ordered based on a legal presumption of guilt; (d) her criminal trial was conducted in contravention of judicial guarantees and judicial protection, and (e) the laws applied were contrary to the principle of

182 Article 7 of the Convention.

183 Article 8(2) of the Convention.

184 Article 1(1) of the Convention.

185 Article 2 of the Convention.

the legality of criminal proceedings." They emphasized that the pretrial detention ordered against the presumed victim was based on the court's presumption of guilt and also argued that the presumed victim had no remedy to contest the imposition of pretrial detention.

96. The ***State*** pointed out that the initial detention was in keeping with the Code of Criminal Procedure. Regarding the arbitrary nature of the pretrial detention, El Salvador argued that the judges who intervened in the case, "first, considered that the crime of homicide had been established and, second, had sufficient evidence to reasonably consider the 'positive probability of the defendant's participation' in this, without the presumption of innocence in her favor having been adversely affected to date.

B. Considerations of the Court

97. The Court has maintained that the essential content of Article 7 of the American Convention is the protection of the liberty of the individual against any arbitrary or unlawful interference by the State.[186] This article contains two very different types of regulations, one general and the other specific. The general aspect is found in the first paragraph: "[e]very person has the right to personal liberty and security." While the specific aspect is composed of a series of guarantees that protect the right not to be deprived of liberty unlawfully (Article 7(2)) or arbitrarily (Article 7(3)), to be informed of the reasons for the detention and the charges (Article 7(4)), to judicial control of the deprivation of liberty and the reasonableness of the time of pretrial detention (Article 7(5)), to contest the lawfulness of the detention (Article 7(6)) and not to be detained for debt (Article 7(7)). Any violation of paragraphs 2 to 7 of Article 7 of the Convention will necessarily result in the violation of Article 7(1).[187]

98. In the instant case, a series of violations of personal liberty have been alleged. The Court only has sufficient evidence to examine the arguments concerning the presumed victim's pretrial detention.

99. According to this Court's case law, pretrial detention is the most severe measure that can be applied to anyone charged with an offense. Consequently, it should only be applied exceptionally.[188] To ensure that a precautionary measure that restricts liberty is not arbitrary, it is necessary that: (i) substantive presumptions exist relating to an unlawful act and to the connection of the defendant to that act; (ii) the measure that restricts liberty complies with the four elements of the "proportionality test"; in other words, the purpose of the measure must be legitimate (compatible with the American Convention),[189] appropriate to comply with the purpose sought, necessary, and strictly proportionate,[190] and (iii) the decision imposing

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186 *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of June 7, 2003. Series C No. 99, para. 84, and *Case of Acosta Martínez et al. v. Argentina. Merits, reparations and costs.* Judgment of August 31, 2020. Series C No. 410, para. 76.

187 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Preliminary objection, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 54, and *Case of Acosta Martínez et al. v. Argentina, supra,* para. 76.

188 *Cf. Case of the "Juvenile Re-education Institute v. Paraguay. Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112, para. 228, and *Case of Villarroel Merino et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of August 24, 2021. Series C No. 430, para. 83.

189 *Cf. Case of Servellón García et al. v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of September 21, 2006. Series C No. 152, para. 89, and *Case of Villarroel Merino et al. v. Ecuador, supra*, para. 87.

190 *Cf. Case of Palamara Iribarne v. Chile. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 197, and *Case of Villarroel Merino et al. v. Ecuador, supra*, para. 87.

such measures must include sufficient reasoning to permit an assessment of whether they are in keeping with the aforementioned conditions.[191]

100. With regard to the first element of the proportionality test – that is, the purpose of the measure that restricts liberty – the Court has indicated that a measure of this nature should only be imposed to satisfy a legitimate purpose, namely: that the accused will not impede the development of the proceedings or evade the action of justice.[192] It has also stressed that procedural risk cannot be presumed, but must be verified in each case, based on the true and objective circumstances of the specific case.[193] This is based on Articles 7(3), 7(5) and 8(2) of the Convention.

101. In addition, the Court has considered that any restriction of liberty which does not include sufficient reasoning that permits an assessment of whether it is in keeping with the foregoing conditions will be arbitrary. The judicial decision must be justified and indicate, clearly and with reasons, the existence of sufficient evidence that proves the unlawful conduct of the person concerned;[194] this safeguards the presumption of innocence.[195] Moreover, the personal characteristics of the supposed offender and the gravity of the offense he or she is charged with are not, in themselves, sufficient justification for pretrial detention.[196]

102. At the time of the events, the Code of Criminal Procedure of El Salvador stipulated:

> Article 292. To order the pretrial detention of the accused, the following requirements must be met: (1) that the existence of an act defined as an offense has been proved and that there is sufficient evidence to maintain, reasonably, that the accused is the probable perpetrator or participant, and (2) that the punishment for the offense is more than three years' imprisonment, or that, even if the punishment is less than this, the judge considers that pretrial detention is necessary, based on the circumstances of the act, the public alarm that its perpetration has caused or the frequency with which similar acts are committed, or if the accused is subject to another precautionary measure.
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> […]
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> Article 294. Notwithstanding the provisions of the two preceding articles, and even if the offense warranted a greater punishment that the one indicated in paragraph 2 of article 292 of this Code, when the accused is not subject to other precautionary measures and it is reasonable to believe that he will not try to evade the action of justice, and also that the offense has not caused public alarm, pretrial detention may be substituted by another precautionary measure. Pretrial detention cannot be replaced with any other measure in the following crimes: homicide, aggravated homicide, kidnapping, offenses against sexual liberty, aggravated theft, extortion, fraud against the public purse, aggravated civil disorder, the sale of persons, people smuggling, people trafficking, offenses established in

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191 *Cf. Case of García Asto and Ramírez Rojas v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 25, 2005. Series C No. 137, para. 128, and *Case of Villarroel Merino et al. v. Ecuador, supra*, para. 87.

192 *Cf. Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 77, and *Case of Villarroel Merino et al. v. Ecuador, supra*, para. 88.

193 *Cf. Case of Amrhein et al. v. Costa Rica, supra*, para. 357, and *Case of Villarroel Merino et al. v. Ecuador, supra*, para. 88.

194 *Cf. Case of Herrera Espinoza et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2016. Series C No. 316, para. 143, and *Case of Villarroel Merino et al. v. Ecuador, supra*, para. 91.

195 *Cf. Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2009. Series C No. 207, para. 144, and *Case of Villarroel Merino et al. v. Ecuador, supra*, para. 91.

196 *Cf. Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of October 30, 2008. Series C No. 187, para. 74, and *Case of Villarroel Merino et al. v. Ecuador, supra*, para. 91.

> the Law regulating Drug-related Activities and the offenses established in the Law against Asset- and Money-Laundering.[197]

103. The Court notes that, according to the law, in order to order pretrial detention, it was sufficient that the judge indicate that "there is sufficient evidence to maintain, reasonably, that the accused is the probable perpetrator or participant" in an offense and that the punishment applicable to that offense was more than three years' imprisonment or that, even if the punishment was less, the judge considered pretrial detention necessary, among other reasons, owing to "the public alarm that its perpetration has caused." Thus, the judge was not required to analyze or justify whether or not the procedural purposes of the detention were met during the proceedings, or its appropriateness, necessity and proportionality, in accordance with the obligations derived from the American Convention (*supra* para. 100). To the contrary, the law presumed that pretrial detention was necessary, and it was only possible not to order this when "it is reasonable to believe that [the accused] will not try to evade the action of justice, and also that the offense has not caused public alarm."

104. In addition, article 294 of the Code of Criminal Procedure of El Salvador prohibited the substitution of pretrial detention when the proceedings referred to several crimes, including homicide and aggravated homicide. This automatic determination of pretrial detention based on the type of offense being criminally prosecuted is contrary to the aforementioned standards (*supra* paras. 99 to 101), which require proving, in each specific case, that the detention is strictly necessary and designed to ensure that the accused will not impede the development of the proceedings or evade the action of justice.[198]

105. In application of the said provisions, on March 3, 2008, the pretrial detention of Manuela was ordered, considering that "the existence of the crime has been established, and also the probable participation in it of the defendant" and taking into account the nature of the crime. The decision also indicated that:

> It is presumed that the said defendant will try to evade the punishment imposed on the crime committed, and she may obstruct the specific investigation measures by removing, hiding and even threatening the witnesses; in addition, the said crime committed by the defendant against her newborn son has caused public alarm within the villagers of Las Mesas […] who condemn this unacceptable act executed by [the presumed victim].[199]

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[197] *Cf.* Code of Criminal Procedure of El Salvador, Legislative Decree No. 776 of 1996, articles 292 and 294. Available at: http://www.oas.org/juridico/spanish/mesicic3_slv_procesal.pdf The Court notes that the Code of Criminal Procedure was amended in 2009. However, the text of these articles remained the same, except as regards the reference to public alarm in the previous article 292. Currently, article 329 of the Code establishes that: "To order the pretrial detention of the accused, the following requirements must be met: (1) That there is sufficient evidence to maintain, reasonably, the existence of a offense and the probable participation of the accused; (2) that the punishment for the offense is more than three years' imprisonment, or that, even if the punishment is less than this, the judge considers that pretrial detention is necessary, based on the circumstances of the act, or if the accused is subject to another precautionary measure." Article 331 establishes that: "Notwithstanding the provisions of the two preceding articles, and even if the offense warranted a greater punishment than three years, when the accused is not subject to other precautionary measures and it is reasonable to believe that he will not try to evade the action of justice, another precautionary measure may be ordered. Pretrial detention cannot be replaced with any other measure in the following crimes: homicide, aggravated homicide, kidnapping, offenses against sexual liberty, aggravated theft, extorsion, fraud against the public purse, the sale of persons, people smuggling, people trafficking, civil disorders, offenses established in the Law regulating Drug-related Activities and the offenses established in the Law against Asset- and Money-Laundering. Code of Criminal Procedure of El Salvador, Legislative Decree No. 733 of 2009, articles 329 and 331. Available at https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117_072931433_archivo_documento_legislativo.pdf

[198] *Cf. Case of Herrera Espinoza et al. v. Ecuador, supra*, para. 149, and *Case of Carranza Alarcón v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of February 3, 2020. Series C No. 399, para. 78.

[199] *Cf.* Record of the first hearing of the criminal trial against Manuela on March 3, 2008 (evidence file, folios 75 and 81).

106. Even though the decision mentions the possibility that Manuela could obstruct the proceedings, this possibility is not substantiated by true and objective circumstances in her specific case. The Court recalls that procedural risk cannot be presumed, but must be verified in each case, based on the true and objective circumstances of the specific case.[200] Thus, to respect the presumption of innocence, when ordering measures that restrict liberty the existence of the said requirements stipulated by the Convention must be justified and proved, clearly and with reasons, in each specific case.[201] In addition, the mention of the public alarm that the occurrence of the presumed crime allegedly caused is contrary to the rationale behind precautionary measures because it does not refer to the particular circumstances of the person who has been accused, but to subjective and political assessments, which should not form part of the substantiation of an order of pretrial detention. Since the decision to order pretrial detention was not grounded on objective circumstances that proved the procedural risk in this case, this detention was contrary to the American Convention.

107. This Court also notes that the pretrial detention of Manuela was reviewed on June 5, 2008.[202] However, in cases of aggravated homicide, the laws prevented substituting the measure. In addition, when examining the pertinence of the measure, the court merely considered that the circumstances that gave rise to the adoption of the precautionary measure subsisted and therefore referred back to the reasons included in the decision of March 3, 2008, in its statement of reasons.[203] In this regard, the Court recalls that pretrial detention should not be continued when the reasons for its adoption no longer subsist. When examining the pertinence of continuing them, the domestic authorities must provide sufficient grounds that make it clear why the restriction of liberty should be continued[204] and, to ensure that it does not become an arbitrary deprivation of liberty pursuant to Article 7(3) of the American Convention, it must be founded on the need to ensure that the detainee will not impede the efficient development of the investigations or evade the action of justice.[205] Consequently, the failure to analyze the need for continuing the pretrial detention constituted a violation of the American Convention.

108. Furthermore, Article 2 of the Convention indicates the duty of the States Parties to the Convention to adapt their domestic laws to the obligations derived from the Convention. In this regard, the Court has indicated that:

> If the States, pursuant to Article 2 of the American Convention, have a positive obligation to adopt the legislative measures required to guarantee the exercise of the rights recognized in the Convention, it follows that they must also refrain from both promulgating laws that disregard or impede the free exercise of those rights, and eliminating or modifying existing laws that protect them. To the contrary, they violate Article 2 of the Convention.[206]

109. In the instant case, the regulation of pretrial detention that was applied did not require the judge to examine whether or not the procedural purposes of detention were met, or its

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200 *Cf. Case of Amrhein et al. v. Costa Rica, supra*, para. 357, and *Case of Villarroel Merino et al. v. Ecuador, supra*, para. 88.

201 *Cf. Case of Palamara Iribarne v. Chile, supra*, para. 198, and *Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, para. 159.

202 *Cf.* Record of hearing to review a precautionary measure of June 5, 2008 (evidence file, folio 110).

203 *Cf.* Record of hearing to review a precautionary measure of June 5, 2008 (evidence file, folio 110).

204 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 107, and *Case of J. v. Peru, supra*, para. 163.

205 *Cf. Case of Bayarri v. Argentina, supra*, para. 74, and *Case of J. v. Peru, supra*, para. 163.

206 *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 113, and *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 14, 2019. Series C No. 387, para. 63.

appropriateness, necessity or proportionality. To the contrary, the laws established mandatory detention for certain types of crime and allowed the judge to take into account factors that were external to the person accused, such as the public alarm that the perpetration of the crime may have caused, or the frequency with which similar acts were committed. These considerations are based on general preventive or special preventive purposes, which could be attributed to the punishment, and this Court has considered that they do not constitute valid grounds for pretrial detention.[207]

110. Therefore, the Court concludes that the order of pretrial detention issued against Manuela and its continuation following review was arbitrary in violation of Articles 7(1) and 7(3) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of the Convention, because the order was issued without a statement of reasons that explained the need for it, and it was substantiated by provisions that were contrary to the Convention establishing the admissibility of automatic pretrial detention, as indicated (*supra* para. 104).

111. Additionally, the Court has pointed out that an order for arbitrary pretrial detention may result in a violation of the presumption of innocence (*supra* para. 101). The principle of presumption of innocence is established in Article 8(2) of the American Convention. This Court has established that, in order to respect the presumption of innocence, when ordering measures that restrict liberty, in each specific case the State must substantiate and prove, clearly and with reasons, the existence of the aforementioned requirements stipulated by the Convention (*supra* para. 101).

112. Taking into account that the order of pretrial detention against the presumed victim was arbitrary because it did not contain a reasoned and objective legal justification for its admissibility, and also its duration of more than five months without its pertinence having been duly reviewed by the judicial authorities, the Court declares that El Salvador violated Manuela's right to the presumption of innocence established in Article 8(2) of the American Convention, in relation to Articles 1(1) and 2 of this instrument.

VIII-2
RIGHTS TO JUDICIAL GUARANTEES,[208] PERSONAL INTEGRITY[209] AND EQUALITY BEFORE THE LAW,[210] IN RELATION TO THE OBLIGATIONS TO RESPECT RIGHTS WITHOUT DISCRIMINATION[211] AND TO ADOPT DOMESTIC LEGAL PROVISIONS[212]

A. Arguments of the parties and the Commission

113. First, the ***Commission*** argued that "the manifest omissions of her defense counsel meant that Manuela did not have access to the judicial remedies available to challenge the human rights violations that took place during the initial investigative steps or to challenge the guilty verdict." Specifically, the Commission pointed out the following alleged flaws: (i) the presumed victim did not have a defense counsel during the initial procedures conducted on February 28 and 29, 2008; (ii) there is no record that the presumed victim was notified of the appointment of her defense counsel on February 28, 2008; (iii) the defense counsel presented minimum evidence, merely offering the testimony of Manuela's mother, and (iv)

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207 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 103, and *Case of Villarroel Merino et al. v. Ecuador, supra*, para. 83.

208 Article 8 of the Convention.

209 Article 5 of the Convention.

210 Article 24 of the Convention.

211 Article 1(1) of the Convention.

212 Article 2 of the Convention.

the defense counsel failed to question certain inconsistencies in the case file. In addition, Manuela's defense counsel failed to contest the guilty verdict by filing a remedy of cassation, or to inform her or her family about the possibility of doing this, and this meant that the presumed victim was unable to access the available judicial remedies. Second, the Commission considered that the State had violated the right to appeal the judgment, because the remedy of cassation "did not allow a wide-ranging control of factual, evidentiary and legal issues"; therefore, it did not have the "minimum characteristics required by Article 8(2)(h) of the Convention."

114. The Commission also argued that the State was responsible for the violation of the duty to provide a statement of reasons, the presumption of innocence and the principle of equality and non-discrimination owing to the application of gender stereotypes during the investigation and the criminal trial. Such stereotyping was revealed: (i) by the initial investigation of the case, and by the judge who ordered the formal opening of the proceedings by presuming the presumed victim's guilt, and (ii) in the judgment convicting her to prove the presumed victim's motives. The Commission also stressed that "Manuela was a poor, illiterate young woman" and that "the stereotypes applied during the criminal trial cannot be disassociated from her poverty and reproductive age because, in the practice, their convergence produced a situation of greater vulnerability to being a victim of a specific type of discrimination."

115. The ***representatives*** argued that the criminal trial was conducted in violation of judicial guarantees and judicial protection because: (i) the minimum conditions for the rigorous determination of Manuela's criminal responsibility were not provided; (ii) Manuela gave a statement before she was notified of the charges brought against her; (iii) she did not have a suitable State-appointed defense counsel, in violation of the right to adequate time to prepare her defense, to communicate freely and privately with her legal counsel, and to have a public defender; iv) there was no effective remedy available to appeal the first instance judgment, and (v) Manuela was never heard at her trial, she did not have the opportunity to make a statement and to give her version of the facts to the judges who heard her case because she was prevented from doing so by the public defender on call that she had for the hearings.

116. They also underscored that the forensic evidence used to convict Manuela did not take into account: (i) Manuela's serious preeclampsia at the time of the birth, which could have caused the death of the fetus; (ii) that "the autopsy of the fetus did not provide data that the lower airways were completely obstructed, sufficiently to indicate asphyxia"; (iii) that the hydrostatic docimasia test was used to determine whether the fetus was born alive and, already at the time of the events, it was considered that this was of no use to confirm whether a fetus had breathed; (iv) "the possibility that a precipitated or preterm delivery had occurred, which frequently causes the death of the fetus as a result of the tumultuous number of contractions without periods of relaxation, which prevents the uterine blood flow and therefore the oxygenation of the fetus," and (v) the possibility that the fetus had accidentally fallen into the toilet causing its death. They also emphasized the possibility that the premature birth had been the result of the Hodgkin's lymphoma, which was a possible complication. In addition, they argued that all the treatment that Manuela received from the State had a discriminatory impact because: (i) during the hearing at which Manuela was convicted, the forensic physician who performed the autopsy of the fetus answered the questions based on the stereotype of "the superhuman sacrifices of maternity" according to which "Manuela should have overcome her fainting spell, her situation of preeclampsia, etc. to try, by all means, to save a fetus," and (ii) stereotypes provided the grounds for initiating a trial, determining criminal responsibility, and the guilty verdict.

117. The ***State*** argued that: (i) Manuela had never been questioned without receiving prior notification of the charges against her and it had "only wanted to verify the situation reported by the medical staff"; (ii) in the record drawn up by the Cacaopera magistrate, the presumed

victim "was notified of the reason for her detention and Manuela received a clear and precise explanation of the facts for which she was being prosecuted;" (iii) the presumed victim was appointed a public defender on February 28, 2008; (iv) Manuela's defense was "reasonable" and "Manuela was not present at the initial hearing because she had not been transferred to the court by the Section for the Transfer of Defendants of the Eastern Zone of San Miguel, due to lack of personnel"; (v) at the preliminary investigation stage, "all the evidentiary procedures were conducted in the presence of the public defender"; (vi) during the special hearing to review measures, the defense counsel asked for "the review of the extreme measure of pretrial detention and its substitution by any other measure"; (vii) Manuela's failure to make a statement during the trial is explained by the fact that "this formed part of the defense's strategy in favor of Manuela," and (viii) at the time the criminal trial was held "there was no remedy that allowed a comprehensive review of a guilty verdict in a criminal trial," but "the assertion that the defender did not inform Manuela that remedies existed was not proved during the criminal proceedings." The State also indicated that the judicial decisions were duly reasoned. Lastly, it stressed that, "when delivering the judgment on the merits of this case, the evidence provided to the court was assessed completely and comprehensively, without filling in factual gaps with stereotypes, because circumstances were proved that led the court to determine with positive certainty the existence of the crime and the criminal participation."

B. Considerations of the Court

118. The Court has indicated that the right to due process refers to the series of requirements that must be met in the procedural instances to ensure that individuals are able to adequately defend their rights vis-à-vis any act of the State adopted by any public authority, whether administrative, legislative or judicial, that could impair them.[213] The right to defense, especially in criminal proceedings, is a central component of due process and, necessarily, it must be possible to exercise this from the moment a person is accused of being the possible perpetrator of, or participant in, an unlawful act, and only ends when the proceedings are concluded, including, if applicable, the stage of execution of the sentence.[214]

119. In this case, a series of violations of judicial guarantees has been alleged. The Court only has sufficient evidence to examine: (1) the right to defense; (2) the use of gender stereotypes and judicial guarantees, and (3) the sentence imposed on Manuela.

B.1 The right to defense

120. The right to defense obliges the State to treat the individual, at all times, as a true subject of the proceedings, in the broadest sense of this concept, and not merely as an object of the proceedings.[215] The right to defense has two aspects during criminal proceedings; on the one hand, the right to a substantive defense through the actions taken by the defendant, and its principal feature is the possibility of playing an active role in the hearings and procedures and providing a freely-given statement regarding the acts with which he has been charged and, on the other hand, through a professional defense by a legal practitioner, who acts as an adviser to the defendant concerning his rights and obligations, and ensures, *inter*

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213 *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 71, and *Case of Casa Nina v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2020. Series C No. 419, para. 88.

214 *Cf. Case of Barreto Leiva v. Venezuela. Merits, reparations and costs.* Judgment of November 17, 2009. Series C No. 206, para. 29, and *Case of Grijalva Bueno v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of June 3, 2021. Series C No. 426, para. 100.

215 *Cf. Case of Barreto Leiva v. Venezuela, supra*, para. 29, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 10, 2019. Series C No. 385, para. 151.

alia, a detailed control of legality in the production of evidence.[216] The American Convention provides specific guarantees for the exercise of both the right to a substantive defense – for example, by the right of the accused to adequate time and means for the preparation of his defense (Article 8(2)(c)), the right not to be compelled to be a witness against himself (Article 8(2)(g)) and the conditions under which a confession may be valid (Article 8(3)) – and also to a professional defense, as described below.[217]

121. The Convention regulates the guarantees for a professional defense, such as the right to be assisted by legal counsel (Article 8(2)(d) and (e)). This right is violated when it is not ensured that the legal counsel is able to take part and assist the accused in the principal acts of the proceedings; for example, if the defendant's statement is received without the assistance of his/her defense counsel.[218]

122. Although the law includes different alternatives for mechanisms to ensure this right, when the individual who requires legal assistance has no resources, this must necessarily be provided by the State free of charge.[219] However, the Court has considered that the appointment of a public defender merely to comply with a procedural formality is tantamount to not having a professional defense, so that it is imperative that this defense counsel acts diligently in order to protect the procedural guarantees of the accused and thus avoid a violation of their rights[220] and a breakdown in the relationship of trust. To this end, the institution of public defense, as the means by which the State ensures the essential right of every person accused of an offense to be assisted by defense counsel, must have sufficient guarantees to ensure its effective action with "equality of arms" with the prosecution. The Court has recognized that, to comply with this obligation, the State must take all appropriate measures,[221] including having suitable and qualified defenders who are able to act with functional autonomy.

123. In El Salvador, the constitutional mandate to ensure to "[a]nyone who is accused of an offense, […] all the guarantees necessary for their defense"[222] is implemented by means of the professional assistance provided by the Public Defenders' Unit.[223] The Public Defenders' Unit is part of the Office of the Attorney General and can be considered an organ of the State; therefore, its actions should be considered acts of the State in the sense accorded to this by

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216 *Cf. Case of Barreto Leiva v. Venezuela, supra,* para. 61, and *Case of Grijalva Bueno v. Ecuador, supra*, para. 100.

217 *Cf. Case of Ruano Torres et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 5, 2015. Series C No. 303, para. 153.

218 *Cf. Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, paras. 193, 194 and 196, and *Case of Montesinos Mejía v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of January 27, 2020. Series C No. 398, para. 191.

219 *Cf. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a and 46.2.b, American Convention on Human Rights,* Advisory Opinion OC-11/90, August 10, 1990. Series A No. 11, para. 25, and *Case of Ruano Torres et al. v. El Salvador, supra*, para. 155.

220 *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 155, and *Case of Girón et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 15, 2019. Series C No. 390, para. 101.

221 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 159, and *Case of Girón et al. v. Guatemala, supra*, para. 101.

222 Article 12 of the Constitution of the Republic of El Salvador.

223 *Case of Ruano Torres et al. v. El Salvador, supra*, para. 160. Article 33 of the Organic Law of the Office of the Attorney General of the Republic of El Salvador stipulates that: "[t]he function of the Public Defenders' Unit is to exercise the professional defense of the individual liberty of adults and children who are accused of committing a criminal offense." Organic Law of the Office of the Attorney General of the Republic of El Salvador, Legislative Decree No. 775 of December 3, 2008, article 33.

the articles on Responsibility of States for Internationally Wrongful Acts drawn up by the International Law Commission.[224]

124. The Court notes that public defenders conducted Manuela's defense during the criminal proceedings, which concluded with the delivery of a guilty verdict. Even though public defense corresponds to a State function or public service, in all cases public defenders should have the necessary autonomy to exercise their advisory functions in accordance with their best professional criteria and based on the defendant's interests. Therefore, the Court finds that the State cannot be considered responsible for all the failings of the public defender, given the independence of the profession and the professional criteria of the defense lawyer.[225]

125. Taking this into account, the Court has considered that, in order to analyze whether the State has possibly violated the right to defense, it has to assess whether the act or omission of the public defender constituted inexcusable negligence or an evident shortcoming in the exercise of the defense that had, or could have had, a decisive negative impact on the interests of the defendant. A non-crucial discrepancy with the defense strategy or with the result of a trial will not be sufficient to have an impact on the right to defense.[226]

126. In the instant case, when making a comprehensive assessment of the actions of the public defender, the Court verified, first, that the public defender asked to be substituted thirty minutes before the preliminary hearing because he had another hearing in a different court.[227] The Code of Criminal Procedure of El Salvador in force at the time of the facts established that, during the preliminary hearing, the evidence offered by the parties was produced and they were given time to substantiate their claims.[228] Following the preliminary hearing, the judge could order, *inter alia*, that the accused be sent to trial, a stay of proceedings, or the application of prosecutorial discretion.[229] This Court notes that, during the preliminary hearing of the case, the professional defender only presented arguments concerning a formal error in the statements offered by the prosecution. Contrary to the prosecution, the defense did not mention Manuela's supposed criminal responsibility in his arguments or, for example, request a stay of proceedings.[230] Consequently, during the preliminary hearing, the professional defense of Manuela was inadequate, and this could have been the result of the substitute of Manuela's defense counsel a mere 30 minutes before the start of that hearing, and the consequent absence of communication between the defender and the defendant in such a short period of time.

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224 *Case of Ruano Torres et al. v. El Salvador, supra*, para. 160. *See also,* United Nations General Assembly, *Responsibility of States for Internationally Wrongful Acts*, A/RES/56/83, January 28, 2002.

225 *Case of Ruano Torres et al. v. El Salvador, supra*, para. 164, and *Case of Girón et al. v. Guatemala, supra*, para. 100.

226 *Case of Ruano Torres et al. v. El Salvador, supra*, paras. 163, 164 and 166.

227 *Cf.* Request submitted by Mario Sergio Crespín Cartagena to the Second Trial Court of San Francisco de Gotera on July 7, 2008, asking for the substitution of Manuela's public defender (evidence file, folio 1939); Communication issued by the Second Trial Court of San Francisco de Gotera accepting the substitution, of July 7, 2008 (evidence file, folio 1940), and Record of the hearing by the Second Trial Court of San Francisco Gotera, Morazán of July 7, 2008 (evidence file, folio 132).

228 *Cf.* Code of Criminal Procedure of El Salvador, Legislative Decree No. 776 of 1996, article 319. Available at: http://www.oas.org/juridico/spanish/mesicic3_slv_procesal.pdf

229 *Cf.* Code of Criminal Procedure of El Salvador, Legislative Decree No. 776 of 1996, article 320. Available at: http://www.oas.org/juridico/spanish/mesicic3_slv_procesal.pdf

230 Record of the preliminary hearing of the Second Trial Court of San Francisco Gotera, Morazán, of July 7, 2008 (evidence file, folios 133 and 134).

127. Second, the Court emphasizes that the only evidence offered by the defense was the testimony of Manuela's mother, and this was subsequently withdrawn.[231] The defense did not offer evidence that could prove that what happened to the newborn could have been an accident; for example, ask for an examination of the state of Manuela's health, the impact of the preeclampsia and the visible lumps in Manuela's neck. Furthermore, the defense failed to request that other evidence be obtained to confirm that the newborn had been born alive. On this point, it should be noted that the expert opinion of Dr. José Mario Naje was presented to the Inter-American Court and he pointed out that the test performed on the newborn during the autopsy was not conclusive as to whether or not it was a live birth, because the possibility that putrefaction had caused the lung tissue to float had not been ruled out.[232]

128. The Court recalls that the defense counsel should prevent harm to the rights of the person represented and, therefore, should support his arguments by offering rebuttal evidence.[233] The negative consequences of the minimal evidentiary activity employed by the defense in this case was increased by the decision not to offer Manuela's statement to the court. Although this could be a valid litigation strategy to avoid the defendant testifying, in this case, where the defense failed to offer rebuttal evidence, the waiver of Manuela's statement and the statement of her mother that was originally offered signified accepting the truth of the facts as set out by the prosecution and, consequently, that Manuela was faced with a sentence of at least 30 years. Therefore, the failure to offer evidence and the waiver of Manuela's testimony prevented the court from assessing her version of the facts and reveals that the defense failed to defend her interests adequately.

129. Lastly, the Court notes that the public defender did not file any appeal against the sentence (*supra* para. 85). It notes that the appeal for cassation was available and also the appeal for review, in which some of the inconsistencies indicated in this judgment could have been argued.

130. The Court considers that this shows that the actions of the public defender harmed Manuela's rights and interests, leaving her defenseless, which constituted a violation of the essential right to be assisted by legal counsel. In addition, in this case, Manuela's substantive right to defense was also violated because she was prevented from defending her interests. Based on the foregoing, the Court concludes that the State is responsible for the violation of Articles 8(2)(d) and 8(2)(e) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Manuela.

B.2 The use of gender stereotypes and judicial guarantees

131. Article 8(1) of the Convention establishes that every person has the right to be tried by an impartial court. The guarantee of impartiality requires that the judge acting in a specific dispute approach the facts of the case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality.[234] This guarantee means that the members of the court must not have any direct interest, preconceived position, or preference for either of the parties; that they are not involved in the dispute, and that they inspire the necessary confidence in

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[231] Record of the preliminary hearing of the Second Trial Court of San Francisco Gotera, Morazán, of July 7, 2008 (evidence file, folio 133).

[232] *Cf.* Expert opinion provided by affidavit by José Mario Nájera Ochoa on March 5, 2021 (evidence file, folio 3850).

[233] *Cf. Case of Ruano Torres et al. v. El Salvador, supra*, paras. 157, 166, 168 and 169.

[234] *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 56, and *Case of Ríos Avalos et al. v. Paraguay. Merits, reparations and costs.* Judgment of August 19, 2021. Series C No. 429, para. 118.

the parties to the case, as well as to the citizens in a democratic society. Personal or subjective impartiality is to be presumed unless there is evidence to the contrary consisting, for example, in the demonstration that a member of the court or the judge has personal prejudices or biases against the litigants. Meanwhile, the so-called objective impartiality consists in determining whether the judge in question has offered sufficient elements of conviction to exclude any legitimate misgivings or well-grounded suspicion of bias.[235]

132. Article 8(2) of the Convention establishes that "[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law." In the criminal sphere, the Inter-American Court has indicated that the principle of presumption of innocence constitutes a cornerstone of judicial guarantees.[236] The presumption of innocence means that the accused does not have to prove that he has not committed the offense of which he is accused, because the burden of proof corresponds to the accuser.[237] Moreover, the accused must have the benefit of the doubt. Thus, authoritative proof of guilt is an essential requirements for a criminal conviction, and the burden of proof falls on the accuser and not on the accused.[238] In addition, the principle of presumption of innocence means that judges do not initiate the trial with a preconceived idea that the accused has committed the offense with which he is charged.[239]

133. The Court has also indicated that gender stereotyping refers to a preconception of attributes, conducts or characteristics possessed by, or the roles that are or should be performed by, men and women, respectively. The Court has pointed out that it is possible to associate the subordination of women to practices based on socially dominant and socially persistent gender stereotypes. In this regard, their creation and use become a cause and consequences of gender violence against women, conditions that increase when they are reflected, implicitly or explicitly, in policies and practices, particularly in the reasoning and language of state authorities.[240] Indeed, even if the use of any type of stereotype is common, it becomes harmful when it limits an individual's capacity to develop their personal abilities or becomes a violation or violations of human rights.[241] The Court also underlines that the use of stereotypes by the judicial authorities in their actions may indicate a lack of impartiality.[242]

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235 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, supra*, para. 56, and *Case of Ríos Avalos et al. v. Paraguay, supra*, para. 119.

236 *Cf. Case of Suárez Rosero v. Ecuador. Merits, supra*, para. 77, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 387.

237 *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, para. 154, and *Case of Herrera Espinoza et al. v. Ecuador, supra*, para. 192.

238 *Cf. Case of Zegarra Marín v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of February 15, 2017. Series C No. 331, para. 123. The Human Rights Committee of the Covenant on Civil and Political Rights has ruled similarly. Human Rights Committee. General Comment No. 32, The right to equality before courts and tribunals and to a fair trial (HRI/GEN/1/Rev.9 (vol. I)), para. 30.

239 *Cf. Case of Cabrera García and Montiel Flores v. Mexico, supra*, para. 184, and *Case of Rodríguez Revolorio et al. v. Guatemala, supra*, para. 109.

240 *Cf. Case of González et al. ("Cotton Field")v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 401, and *Case of Guzmán Albarracín et al. v. Ecuador. Merits, reparations and costs.* Judgment of June 24, 2020. Series C No. 405, para. 188.

241 *Cf.* Office of the United Nations High Commissioner for Human Rights, Background paper on the role of the judiciary in addressing the harmful gender stereotypes related to sexual and reproductive health and rights, p. 2. Available at: https://www.ohchr.org/Documents/Issues/Women/WRGS/JudiciaryRoleCounterStereotypes_EN.pdf

242 *Cf.* CEDAW, General recommendation No. 33 on women's access to justice, CEDAW/C/GC/33, August 3, 2015, paras. 26 to 28, and Office of the United Nations High Commissioner for Human Rights, Background paper on the role of the judiciary in addressing the harmful gender stereotypes related to sexual and reproductive health and

134. The Court notes that the use of gender stereotypes in criminal proceedings may reveal a violation of the right to presumption of innocence, of the duty to provide the reasons for a decision, and of the right to be tried by an impartial court. On this basis, the Court will now examine: (a) the investigations conducted, and (b) the reasoning behind the guilty verdict.

B.2.a The investigations

135. The Court has indicated that the criminal proceedings, which represent the State's investigative and judicial response, should constitute an appropriate means to conduct a genuine search for the truth of what happened by an adequate assessment of the different hypotheses concerning the method and circumstances of the offense.[243] Consequently, owing to the principle of presumption of innocence, investigating agencies must investigate not only the perpetration of the offense, but also the possibility that no offense has occurred. This same obligations was recognized in Salvadoran legislation at the time of the facts.[244]

136. In the instant case, the principle of presumption of innocence meant that the domestic authorities should have investigated all the logical lines of inquiry, including the possibility that the newborn's death was not caused by Manuela, and this theory could have been assessed by investigating her health situation and whether this could have had an impact at the time of the birth.

137. In this regard, the Court notes that Manuela was diagnosed with severe preeclampsia, which may result in precipitate delivery and increase the risk of perinatal mortality and morbidity, placental abruption, asphyxia and intrauterine fetal death.[245] In addition, Manuela suffered from a postpartum hemorrhage, caused by the placental retention and tears to the delivery canal.[246] As a result of the postpartum hemorrhage, Manuela was possibly in a state that made it impossible for her, at the moment of the birth "to look after herself or to be able to look after someone else."[247] Furthermore, Manuela had visible lumps in her neck, which were subsequently diagnosed as Hodgkin's lymphoma; this could have contributed to the appearance of anemia, which may result in a preterm delivery.[248]

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rights, p. 5. Available at: https://www.ohchr.org/Documents/Issues/Women/WRGS/JudiciaryRoleCounterStereotypes_EN.pdf

243 *Case of Zegarra Marín v. Peru, supra*, para. 142.

244 Article 238. As soon as the Prosecutor General becomes aware of a wrongful act, either by a report or in any other reliable way, he shall endeavor to ensure that there are no further consequences and shall initiate the investigation, subject to the exceptions authorized by this Code or by law. The prosecutor shall investigate not only the circumstances that prove the charges, but also those that serve to excuse the accused, endeavoring to urgently gather evidence that could be lost. If it is deemed necessary to conduct a procedure in keeping with those established for definitive or non-reproducible evidence or if a court order is required, this shall be requested immediately from the competent magistrate; in urgent cases, the nearest one. He shall also conduct the investigations that the accused or his defense counsel request to clarify the incident and his situation *Cf.* Code of Criminal Procedure of El Salvador, Legislative Decree No. 776 of 1996, article 238. Available at: http://www.oas.org/juridico/spanish/mesicic3_slv_procesal.pdf

245 *Cf.* Expert opinion provided by affidavit by José Mario Nájera Ochoa on March 5, 2021 (evidence file, folio 3847).

246 *Cf.* Expert opinion provided by Guillermo Antonio Ortiz Avendaño during the public hearing held in this case, and Communication of the director of the San Francisco Gotera National Hospital of February 29, 2008 (evidence file, folio 59).

247 *Cf.* Expert opinion provided by Guillermo Antonio Ortiz Avendaño during the public hearing held in this case.

248 *Cf.* Expert opinion provided by affidavit by José Mario Nájera Ochoa on March 5, 2021 (evidence file, folios 3846 and 3847); Forensic analysis by Dr. José Mario Nájera Ochoa (evidence file, folio 2165), and Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital (evidence file, folio 181).

138. These characteristics of Manuela's health, and how this could have affected the birth, were not duly taken into account at any moment of the investigation. On this point, the investigators merely asked the doctor who had performed the autopsy of the newborn if it was possible that the baby could have been expelled accidentally, and he indicated that:

> Yes, this possibility does exist, but […] normally the infant remains attached to the umbilical cord and although the infant could have been extracted with the cord and the placenta detached around ten minutes after the expulsion of the infant, if the placenta had detached at once, the placenta and cord would have been found with the infant. Moreover, in this case, it was a full-term pregnancy with normal labor in which the infant does not emerge all at once; rather, first the head emerges and then the infant must be turned round so that the shoulders can emerge and then there is a pause for the hips; therefore, it would be difficult for the infant to emerge at the speed indicated by the mother. This could happen in the case of a woman who had had ten children and the infant had a low birthweight; in that situation, it is possible to speak of an accident, but in this case no.[249]

139. The Court notes that this doctor had only examined the newborn and had not examined Manuela, and did not take into account Manuela's health when responding to the question.

140. Therefore, this does invalidate the possibility that the newborn's death occurred owing to the obstetric emergency suffered by Manuela or another circumstance that could not be attributed to her. To the contrary, the autopsy's conclusion that the newborn was born alive was sufficient for the authorities to assume that a crime had occurred. Consequently, the obligation to follow up on all the logical lines of investigation was not complied with, including the possibility that the newborn's death was not caused by Manuela.

141. The Court has also recognized that personal prejudices and gender stereotypes can affect the objectivity of state officials responsible for investigating complaints, influencing their opinion of whether or not a violent act has occurred, and their assessment of the credibility of witnesses and of the victims themselves.[250]

142. In the instant case, in the record resuming the facts, the investigator in charge of the case indicated that:

> I cannot fail to mention that, as an investigator and a woman, I consider that I would not have done what [Manuela] did. If she did not want her son, she could haves given him the chance to live; there are people who are unable to have children and desperately want them. The baby found dead and full or worms was a well-formed boy, with light brown skin […] and physically very nice looking; any woman or mother would have raised him with love […].[251]

143. These considerations were transcribed in the order requiring the formal opening of the preliminary proceedings with the order for Manuela's pretrial detention.[252]

144. The Court notes, first, that these considerations are based on the assumption that Manuela was responsible for the crime she was accused of, because they reveal an evident bias concerning Manuela's guilt and this, in turn, creates doubts about the objectivity of the investigation. In addition, they represent a personal opinion of the investigator based on preconceived ideas with regard to the role of women and maternity. These are ideas based on stereotypes that condition a woman's value to being a mother and, therefore, assume that

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249 *Cf.* Statement by the doctor who performed the autopsy, transcribed in the judgment handed down by the Trial Court of San Francisco Gotera, department of Morazán, on August 11, 2008 (evidence file, folio 150).

250 *Cf. Case of López Soto et al. v. Venezuela. Merits, reparations and costs.* Judgment of September 26, 2018. Series C No. 362, para. 236, and *Case of Vicky Hernández et al. v. Honduras. Merits, reparations and costs*. Judgment of March 26, 2021. Series C No. 422, para. 114.

251 Record of interview of February 29, 2008 (evidence file, folios 52 and 53).

252 *Cf.* Request for a formal investigation with pre-trial detention of February 29, 2008 (evidence file, folio 65).

women who decide not to be mothers have less worth than the others, or are undesirable persons. In addition, this imposes on women the responsibility of prioritizing the well-being of their children, even over their own well-being, regardless of the circumstances.

145. In this regard, the Court stresses that such gender stereotyping is incompatible with international human rights law.[253] The Court also reiterates that the use of stereotyping by state authorities is particularly worrying[254] and, therefore, measures to eliminate it should be taken immediately.

146. Based on the above, the Court considers that Manuela's guilt was presumed from the very start of the investigation. Moreover, little effort was made to determine the truth of what happened and to take into account the probative elements that could have disproved the thesis of the presumed victim's guilt. This attitude was also encouraged by the investigators' prejudices against women who do not comply with the role of self-sacrificing mothers who must always seek to protect their children. The prejudices and negative gender stereotyping affected the objectivity of the agents in charge of the investigations, closing possible lines of investigation into the actual circumstances.[255] The Court also notes that, in this case, the failings in the investigation correspond to the context previously determined by the Court (*supra* para. 44), in which, frequently, no investigation is conducted into the possibility that the mother is not responsible for causing the death of which she is accused.

B.2.b The reasoning behind the guilty verdict

147. In this regard, it should be recalled that this Court does not constitute a fourth instance that can assess the evidence concerning the possible guilt or innocence of the presumed victim in this case.[256] Its purpose is not to determine Manuela's innocence or guilt, but rather to decide whether the judicial authorities violated obligations established in the Convention; particularly, the obligation to provide the reasons for a decision, the principle of presumption of innocence, and the right to be tried by an impartial court.

148. The duty to state the reasons for a decision is one of the "due guarantees" included in Article 8(1) to safeguard the right to due process.[257] The Court has established that the statement of reasons is the externalization of the reasoned justification that allows a conclusion to be reached[258] and entails a rational presentation of the reasons that led the judge to take a decision. The relevance of this guarantee relates to the correct administration of justice and the avoidance of arbitrary decisions. Furthermore, the statement of reasons

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253 *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2012. Series C No. 257, para. 302, and *Case of Velásquez Paiz et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of November 19, 2015. Series C No. 307, para. 148.

254 *Cf. Case of González et al. ("Cotton Field") v. Mexico, supra,* para. 401, and *Case of López Soto et al. v. Venezuela, supra*, para. 235.

255 *Cf. Case of Gutiérrez Hernández et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of August 24, 2017. Series C No. 339, para. 184.

256 *Mutatis mutandis, Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Moya Solís v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of June 3, 2021. Series C No. 425, para. 28.

257 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, supra* para. 78, and *Case of Martínez Esquivia v. Colombia. Preliminary objections, merits and reparations.* Judgment of October 6, 2020. Series C No. 412, para. 106.

258 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 107, and *Case of Moya Solís v. Peru, supra*, para. 83.

provides credibility to legal decisions within a democratic society and indicates to the parties that they have been heard.[259]

149. As a guarantee for the defendant in criminal proceedings, the statement of reasons is also addressed at ensuring the principle of presumption of innocence because it allows the individual subject to the punitive powers of the State to understand the reasons why a firm conviction was reached concerning the attribution of criminal responsibility, and also how the evidence was assessed in order to disprove any hypothesis of innocence, and thus confirm or refute the accusatory hypothesis.[260] This allows the presumption of innocence to be disproved and criminal responsibility determined beyond any reasonable doubt, and also makes it possible to exercise the right to defense by the ability to appeal the guilty verdict.[261]

150. In this way, the statement of reasons demonstrates to the parties that they have been heard and, in those cases in which the ruling can be appealed, enables the decision to be challenged in order to achieve a fresh examination by a higher court. On this basis, the reasoning that supports a ruling or certain administrative proceedings should allow the facts, reasons and laws on which the authority based itself to take the decision to be known so as to rule out any indication of arbitrariness.[262]

151. Additionally, the Court emphasizes that the use of gender stereotypes as grounds for a legal decision may reveal that the decision was based on preconceived beliefs rather than relevant facts. Therefore, stereotyping may reveal the absence of reasoning and a violation of the presumption of innocence, and jeopardize the impartiality of the judge.[263]

152. In this case, the reasoning of the judgment did not establish the causal nexus between Manuela's actions and the death of the newborn with factual evidence, other than mentioning the supposed complaint made by Manuela's father.[264] This absence of reasoning was substituted by stereotypes and preconceived ideas, rather than by evidence that reliably proved the presumed victim's guilt. Thus, the court indicated that:

> When reviewing the different versions that the defendant gave to the different persons who interviewed her, such as, "that she was unaware of everything and perhaps the baby had come with the pain or with the diarrhea, and that she had fainted, or in the worst case that, in this situation of unconsciousness, it was someone else who had thrown the baby into the septic tank"; these statements are unbelievable and even improbable under the rules of acceptable human understanding, because the maternal instinct is to protect the child, and, generally, any complication in the delivery results in seeking immediate medical help or, at the very least, the help of close family members, not depriving a newborn of its life. However, in this case the defendant, in her efforts to dispose of the product of her pregnancy following the birth – because it was the result of infidelity – and given the

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259 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, supra,* para. 78, and *Case of Moya Solís v. Peru*, *supra*, paras. 83 and 84.

260 *Cf. Case of Zegarra Marín v. Peru, supra*, para. 147, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 269.

261 *Case of Amrhein et al. v. Costa Rica, supra*, para. 270.

262 *Cf. Case of Claude Reyes et al. v. Chile. Merits, reparations and costs.* Judgment of September 19, 2006. Series C No. 151, para. 122, and *Case of Moya Solís v. Peru, supra*, para. 84.

263 *Cf.* CEDAW, 33 on women's access to justice, CEDAW/C/GC/33, August 3, 2015, para. 26.

264 In this regard, the Court notes that the Code of Criminal Procedure establishes the prohibition for parents to bear witness against their children. "Article 231. A child may not testify against his/her parents, or vice versa; a husband against his wife or vice versa; a sibling against another sibling; an adopter against an adoptee or vice versa, and the life partner against the partner. This prohibition shall not include the complaint filed for an offense committed against the complainant or against persons he/she legally represents or whose relationship to him/her is equal or closer that the one that connects him/her to the person accused." Code of Criminal Procedure of El Salvador, Legislative Decree No. 776 of 1996, Article 231. Available at: http://www.oas.org/juridico/spanish/mesicic3_slv_procesal.pdf

> paternal irresponsibility noted by her biological father, with full awareness, seeing the baby alive, deliberately sought the appropriate means and place to make it disappear, thus taking from her child […] the opportunity to live […] and, in this case, it is all the more reprehensible that this was an act of a mother towards her own child.[265]

153. The Court notes that, in its judgment, the Trial Court of San Francisco Gotera ruled out the possibility that the death had been accidental when assuming that the maternal instinct that Manuela should have had meant that she would have protected her child and sought help immediately. That court made this assertion without having any evidence that carefully analyzed Manuela's health (*supra* paras. 137 to 139), in order to be able to determine reliably that what happened was not, for example, the result of the obstetric emergency suffered by Manuela. In addition, on the basis of the stereotype that women must respond to the maternal instinct and sacrifice themselves for their children at all times, the court assumed that, regardless of her state of health, by failing to help to protect her child, Manuela's actions revealed that she wished to take the life of her newborn intentionally. Thus, the court alleged that Manuela should have placed the possible life of her son before her own life, even if she was unconscious, and presumed her bad faith because she did not do so.[266]

154. Additionally, the Trial Court of San Francisco Gotera assumed that Manuela should feel ashamed of her pregnancy and, therefore, supposedly hid it from her family, and presumed that this was the reason why she had decided to take the life of the newborn. This presumption was not based on evidence, but rather on the stereotype that a woman who has sexual relations outside her marriage is dishonorable and immoral.

155. Based on the foregoing considerations, this Court notes that the reasoning provided by the Trial Court demonstrates that gender stereotypes were used to supplement the court's lack of sufficient evidence. Thus, the judgment convicting Manuela suffers from all the prejudices inherent in a patriarchal system and downplays the factual circumstances and motivations. It reprimands Manuela as if she had violated duties considered inherent in her gender and indirectly criticizes her sexual conduct. It minimizes and disregards that a possible reason for the desire to conceal her supposed error was to evade the disapproval of an environment created by traditional androcentric values. Consequently, it constituted a violation of the right to presumption of innocence, the right to be tried by an impartial court, and the obligation to state the reasons for judicial decisions.

156. In addition, the Commission and the representatives have argued that this decision was also discriminatory. Article 1(1) of the Convention establishes that the States Parties "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." While Article 24 stipulates that "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." The Court has indicated that this article has a formal aspect that establishes equality before the law, and a substantive aspect that orders the adoption of positive measures in favor of groups that have historically been marginalized or discriminated against owing to the factors referred to in Article 1(1) of the American Convention.[267]

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[265] Judgment handed down by the Trial Court of San Francisco Gotera, department of Morazán, on August 11, 2008 (evidence file, folios 160, 164 and 165).

[266] 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), A/HRC/WGAD/2019/68 on March 4, 2020, para. 110.

[267] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 199*, and Case of Guachalá Chimbo et al. v. Ecuador, supra,* para. 167.

157. Regarding the first aspect, this Court has indicated that Article 24 of the American Convention prohibits discrimination *de facto* or *de jure*, not only in relation to the rights established in this instrument, but also in relation to all the laws enacted by the State and their application.[268] In other words, this article does not merely reiterate the provisions of Article 1(1) of the Convention regarding the obligation of States to respect and to ensure, without any discrimination, the rights recognized in that treaty, but also establishes a right that entails obligations for the State to respect and to ensure the principle of equality and non-discrimination to safeguard other rights and in all its domestic laws,[269] because it protects the right to "equal protection of the law";[270] therefore, it also prohibits discrimination derived from any inequality resulting from domestic laws and their application.[271]

158. The Court has determined that criminal law may be applied in a discriminatory manner if, when sentencing an individual, the judge or court bases its reasoning on negative stereotypes to determine some elements of the criminal responsibility.[272]

159. In the instant case, the Court has already determined that the criminal court convicted Manuela using gender stereotypes as grounds for its decision. The application of those stereotypes was only possible because Manuela was a woman; and the impact was exacerbated because she was poor and illiterate and lived in a rural area. Therefore, the Court considers that the distinction made in the application of the criminal law was arbitrary and, consequently, discriminatory.[273]

160. Based on the above, the Court considers that the State is internationally responsible for the violation of Article 8(1) of the Convention which establishes the duty to provide a statement of reasons for decisions and the right to be tried by an impartial court, Article 8(2) of the American Convention which recognizes the presumption of innocence, and Article 24 which establishes equality before the law, in relation to the obligation to respect rights without discrimination established in Article 1(1) of this instrument, to the detriment of Manuela.

B.3 The sentence imposed on Manuela

161. In this case, there is no doubt that Manuela suffered an obstetric emergency as a result of preeclampsia (*supra* para. **¡Error! No se encuentra el origen de la referencia.**). The Court underlines that as obstetric emergencies are medical conditions, they cannot automatically lead to a criminal conviction. However, the Court notes that Manuela was sentenced to 30 years' imprisonment for the crime of aggravated homicide. Although it has not been alleged that the sentence imposed on the presumed victim violated the Convention, the Court has competence to examine the possible violation of Article 5(2) and 5(6) of the

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268 *Cf. Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127, para. 186, and *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 289, para. 217.

269 *Cf. Case of Yatama v. Nicaragua, supra*, para. 186, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 217.

270 *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* Advisory Opinion OC-4/84, January 19, 1984. Series A No. 4, para. 54, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, para. 199.

271 *Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela, supra*, para. 209, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile, supra*, para. 199.

272 *Mutatis mutandis, Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile, supra*, para. 223.

273 *Mutatis mutandis,* 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) A/HRC/WGAD/2019/68, March 4, 2020, para. 110.

Convention based on the *iura novit curia* principle because the parties have had the opportunity to express their respective positions in relation to the facts that substantiate this.[274]

162. In previous cases, this Court has indicated that an evolutive interpretation of the prohibition of cruel, inhuman or degrading treatment or punishment established in Article 5(2) of the Convention gives rise to a requirement that the sentence by proportionate. Thus, the Court has indicated that "[t]he initial concern in this regard, focused on the prohibition of torture as a form of persecution and punishment, as well as other forms of cruel, inhuman or degrading treatment, has gradually extended to other areas including that of the punishments established by the State for the perpetration of offenses."[275] Therefore, punishments that can be considered radically disproportionate are contrary to this provision of the Convention. In addition, Article 5(6) of the American Convention establishes that "[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners." Therefore, the purpose of the measure ordered as a result of the perpetration of an offense should be the social rehabilitation of the person convicted. Consequently, the proportionality of the sentence is closely related to its purpose, and sentences that are clearly disproportionate are contrary to the social rehabilitation of prisoners and therefore violate Article 5 of the Convention.[276]

163. At the present time, there is consensus in legal doctrine and case law that the punishment should be proportionate to the level of individualized blame (or guilt) that can be determined against the offender based on the level of participation in the specific circumstances of the act. This rule is not only compatible with the Convention, but is also adapted to it, and should therefore be applied because it is based on the concept of the dignity of the human person, conceived as a being capable of self-determination and endowed with moral awareness.[277]

164. In the instant case, Manuela received a 30-year prison sentence, which was the minimum punishment established for the crime of aggravated homicide. Moreover, following the amendment of the Criminal Code in 1998, the laws of El Salvador do not expressly establish any mitigation applicable to cases of homicide committed by a mother against her baby during its birth or immediately after and, in such cases, the crime of aggravated homicide is applied for which a sentence of 30 to 50 years' imprisonment is established.

165. Although it is not for this Court to substitute for the domestic authorities in the individualization of punishments for offenses established in domestic law,[278] in exceptional cases, such as this one, the Court must rule on the proportionality of the punishment because,

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274 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 163, and *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, supra*, para. 200.

275 *Cf. Case of Mendoza et al. v. Argentina. Preliminary objections, Merits and reparations.* Judgment of May 14, 2013. Series C No. 260, para. 174.

276 *Cf. Case of Mendoza et al. v. Argentina, supra*, para. 165.

277 The proportionality of the punishment to the guilt is reflected in Salvador law, because article 63 of its Criminal Code establishes: "The punishment shall not exceed the harm resulting from the act carried out by the perpetrator and shall be proportionate to his guilt." Criminal Code of El Salvador. Legislative Decree No. 1030 of April 26, 1997, article 63. Available at: https://www.asamblea.gob.sv/sites/default/files/documents/decretos/ C0AB56F8-AF37-4F25-AD90-08AE401C0BA7.pdf

278 *Cf. Case of Vargas Areco v. Paraguay. Merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 155, para. 108, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 144.

as already indicated, a punishment that is evidently disproportionate is contrary to Article 5(2) and 5(6) of the Convention.[279]

166. In this regard, it should be pointed out, first, that the application of the punishment established for the criminal offense of aggravated homicide was clearly disproportionate in this case because it does not take into account the particular situation of women during the perinatal and postpartum stages;[280] notwithstanding the fact that, owing to a deficient investigation, it should not be ruled out that, in this case, there was an absence of any criminal responsibility.

167. To this should be added that criminological experience in relation to infanticide reveals, first, that it usually occurs in solitary, unassisted deliveries and often in toilets,[281] which means when a woman's mental fragility is most acute. In this regard, specialized legal doctrine has rightly pointed out that "the feeling of despair is accentuated in the young mother who gives birth secretly, without help."[282]

168. In addition to the abysmal disproportion in relation to the guilt resulting merely from the state that a woman finds herself in during the perinatal period, it should not be forgotten that, in most cases – and also in that of Manuela – their guilt should also be lessened because they are young women who find it difficult to communicate or who are experiencing cultural isolation (in cities, this is frequent among urban domestic employees who are originally from poor campesino families). Furthermore, many are illiterate or with little schooling. They come from family circles located in social enclaves with a backward culture that is considerably more patriarchal than the rest of society. Owing to all these negative factors, these are women who are not in a situation to join or achieve the protection of the movements that habitually struggle to achieve women's rights and equality; they are truly highly vulnerable women without a voice, driven to commit this offense due to backward enclaves with a strongly patriarchal culture.

169. Although, in Manuela's case, the criminal court took these factors into account when deciding her sentence, it is paradoxical that, after highlighting those misogynistic values, the judgment concluded that there were attenuating factors and, on that basis, decided to impose no less than thirty years' imprisonment. Moreover, it is evident that, in this case, this punishment was clearly cruel.

170. Based on the above, and pursuant to Article 5(2) and 5(6) of the American Convention, the Court considers that the sentence of 30 years' imprisonment for a homicide committed by a mother during the perinatal period was disproportionate to her level of individualized blame (or guilt). Therefore, the current punishment established for infanticide is cruel and, consequently, contrary to the Convention.

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279 See, for example, *Case of Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010. Series C No. 213, para. 150, and *Case of Mendoza et al. v. Argentina, supra*, para. 166.

280 Almost all contemporary literature on legal medicine agrees with this. *Cf.* C. Simonin, *Medicina Legal Judicial,* Barcelona, 1973, p. 273; a review of current medical bibliography in Mariano N. Castex, *Estado puerperal e infanticidio, Implicancias médico-legales y psiquiátrico-forenses,* Buenos Aires, 2008. Similarly, *Case of I.V. v. Bolivia, supra*, para. 231. Castex proposes that the period which begins for every mother at the moment the fetus become viable and concludes with the reappearance of menstruation should be referred to as the perinatal period. Mariano N. Castex, *Estado puerperal e infanticidio, Implicancias médico-legales y psiquiátrico-forenses*, Buenos Aires, 2008, p. 73.

281 This has been recorded for many years, for example: Ambrosio Tardieu, *Estudio médico-legal sobre el infanticidio*, translated by Prudencio Sereñana y Partagás, Barcelona, 1883, pp. 253 and *ff.*

282 *Cf.* C. Simonin, *Medicina Legal Judicial,* Barcelona, 1973, p. 273,

171. The Court notes that the 1973 Criminal Code of El Salvador established an attenuated scale of punishment for the offense of infanticide.[283] Under the previous Salvadoran law, the conduct was penalized with a maximum of up to four years, but now the maximum can be fifty years; previously the minimum was one year, and now this has been increased to thirty years. This new criminal dosimetry is evidently disproportionate. The Court considers that a proportionate punishment for this type of offense would have to be the same or less than the one established in the previous Salvadoran law, by the specific legal channel determined by the State.

172. Consequently, the Court finds that the State violated the rights of Manuela recognized in Article 5(2) and 5(6) of the American Convention, in relation to Articles 1(1) and 2 of this instrument.

B.4 Conclusion

173. Based on all the above considerations, the Court concludes that the investigation and trial to which the presumed victim was subjected did not comply with the right to defense, the right to be tried by an impartial court, the presumption of innocence, the duty to provide the reasons for a decision, the obligation not to apply laws in a discriminatory manner, the right not to be subjected to cruel, inhuman or degrading punishment and the obligation to ensure that the purpose of punishments consisting in deprivation of liberty is the reform and social readaptation of prisoners. Consequently, the State violated Articles 8(1), 8(2), 8(2)(d), 8(2)(e), 24, 5(2) and 5(6) of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Manuela.

VIII-3
RIGHTS TO LIFE,[284] PERSONAL INTEGRITY, HEALTH,[285] PRIVACY[286] AND EQUALITY BEFORE THE LAW[287] IN RELATION TO THE OBLIGATIONS TO RESPECT THESE RIGHTS WITHOUT DISCRIMINATION[288] AND TO ADOPT DOMESTIC LEGAL PROVISIONS[289]

A. Arguments of the parties and the Commission

174. The ***Commission*** presented arguments concerning: (i) medical professional secrecy and its implications for the right to privacy and to sexual and reproductive health, and (ii) the health care provided to Manuela and her death while in custody. Regarding the first point, the Commission alleged that "the violation of professional secrecy constituted an arbitrary restriction of Manuela's right to privacy" and "meant that Manuela did not receive treatment under equal and acceptable conditions." The Commission stressed that: (i) the doctor who treated Manuela filed a criminal complaint against her and provided details of her medical

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283 The Court notes that comparative law does not have a standardized definition of infanticide. In the 1973 Criminal Code of El Salvador, infanticide is defined as an attenuated homicide committed by the mother against her child "during its birth or within the following seventy-two hours." The Court underscores that the concept of infanticide referred to in this judgment should never be understood as including the murder of children or adolescents in circumstances other than those described in this case.

284 Article 4 of the Convention.

285 Article 26 of the Convention.

286 Article 11 of the Convention.

287 Article 24 of the Convention.

288 Article 1(1) of the Convention.

289 Article 2 of the Convention.

record when testifying before the police, and (ii) the director of the San Francisco Gotera Hospital sent a report on Manuela's medical record to the prosecutor's office, in which he included information on the presumed victim's sexual and reproductive life. In this regard, the Commission indicated that the inadequate regulation of medical secrecy in obstetric emergencies may result in doctors automatically reporting patients for fear of being sanctioned. On the second point, the Commission pointed out that "there is no record that the State made a comprehensive diagnosis of the presumed victim following her deprivation of liberty," or that it had provided regular and systematic treatment to the presumed victim before her diagnosis of Hodgkin's lymphoma in 2009. According to the Commission, these omissions gave rise to the State's responsibility for the violation of Manuela's right to life. In addition, it considered that "the State violated the right to judicial guarantees and judicial protection established in Articles 8(1) and 25(1) of the Convention, to the detriment of Manuela's family as a result of the total failure to investigate and clarify her death while in custody and the relationship of this to the omissions established in this section."

175. The ***representatives*** agreed substantially with the Commission's arguments regarding the violation of professional secrecy. In addition, they alleged that the State had not provided Manuela with accessible, acceptable and quality health care services: (i) before the obstetric emergency; (ii) when she received emergency obstetric care in the San Francisco de Gotera National Hospital, and (iii) while she was deprived of her liberty in different detention centers. They argued that, prior to the obstetric emergency, the State had failed to take the following steps: (1) identify and make an early diagnosis of the "evident symptoms of the Hodgkin's lymphoma from which the [presumed] victim suffered," and (2) provide complete and detailed information to Manuela about her health situation, which constituted a violation of Article 13 of the Convention. They indicated that when the presumed victim received emergency obstetric health care in the San Francisco Gotera National Hospital, the State failed to provide accessible, acceptable and quality emergency obstetric care to Manuela because: (i) the hospital was outside the geographical scope and financial possibilities of Manuela; (ii) the doctors gave priority to questioning her rather than to treating the serious condition she was in; (iii) the medical staff "did not have adequate training or capacity to identify the cause of the numerous complications that she had suffered and, consequently, reached the conclusion that she had committed an offense without any technical basis and without making a clinical investigation of what had happened immediately before the emergency, or of her medical history," and (iv) "when they finally began to treat her, they did so erroneously, because they endangered her health and her life." The representatives also alleged that the State had failed to provide a prompt and appropriate diagnosis and treatment while Manuela was deprived of her liberty, which constituted a violation of Manuela's right to life, "because the State, through its agents, was aware of the risk of her death and failed to take any effective measure to prevent this." They also argued that the State had not investigated Manuela's death in violation of her family's rights to judicial guarantees and judicial protection.

176. Furthermore, they indicated that Manuela had been subjected to gender-based violence and discrimination because: (i) Manuela was reported by the doctor who received her in the San Francisco Gotera National Hospital, who violated her duty to observe professional secrecy and concluded that Manuela had committed a crime "because she was pregnant as the result of an 'infidelity,' which had led her to abort because she was ashamed," and (ii) while Manuela was deprived of liberty, she was not provided with the health care she required; moreover, the "guards of the San Miguel Prison claimed that her situation was not serious and constituted a punishment for her criminal and promiscuous conduct." According to the representatives, this discrimination was intersectional. Additionally, they argued that the State had subjected Manuela to torture when she was handcuffed during her obstetric emergency in the San Francisco de Gotera Hospital and while she was in the terminal stage of her illness in the Rosales National Hospital.

177. The ***State*** argued that "women with obstetric problems are treated based, above all, on the rules prescribed by technical guidelines […] which do not establish the need for the medical staff to report women with obstetric complications because obstetric complications do not constitute an offense." It also argued that "if a woman is admitted to a hospital with signs of having given birth outside the hospital and is unable to explain the whereabouts of the baby, it is perfectly reasonable for the doctor to inquire about its whereabouts and, if he/she does not obtain a response, to inform the authorities in order to avoid any serious consequences for the child's health and life."

178. In addition, the State argued that "Manuela received various types of medical care from the public health system." On admittance to the San Francisco Gotera National Hospital "the patient was stabilized in keeping with the existing hospital protocol for the treatment of deliveries of this nature and, subsequently, she remained in the hospital for seven more days until she was discharged based on her recovery and medical evolution." It indicated that Manuela had also been treated in the Rosales National Hospital where she was diagnosed with Hodgkin's syndrome in 2009 and received nine cycles of chemotherapy between February 14, 2009, and April 29, 2010. Also, "on September 9, 2009, the Eastern Regional Criminological Council decided that it was appropriate to transfer Manuela from the San Miguel Prison to the Ilopango Women's Rehabilitation Center to facilitate the medical care that her health required." Furthermore, it argued that the circumstances of Manuela's death had been "verified by the attending physician, and Manuela's family had not filed a complaint requiring a review of the medical treatment in her case or a determination of criminal responsibility for the circumstances of her death."

179. With regard to the allegations concerning torture, the State argued that "the alleged use of handcuffs, shackles and restraints while she was in the hospital bed is derived from a single statement made before notary public by Manuela's father, who also affirmed that when he arrived to see his daughter the guards took off the handcuffs, which renders his statement contradictory; moreover, no other evidence exists to substantiate his statement incriminating the State." Regarding the use of handcuffs when Manuela received chemotherapy while she was deprived of liberty, El Salvador indicated that the representatives' arguments were speculative and based on testimony that could not be considered "reliable to determine any State responsibility."

B. Considerations of the Court

180. The Court has asserted repeatedly that the right to life is fundamental in the American Convention because the realization of all the other rights depends on its safeguard.[290] Consequently, States have the obligation to ensure the creation of the conditions required for its full exercise and enjoyment.[291]

181. In addition, the right to personal integrity is of such importance that the American Convention protects it specifically by establishing, *inter alia*, the prohibition of torture or cruel, inhuman or degrading treatment, and the impossibility of suspending this right under any circumstance.[292] Moreover, Article 5 also provides specific protection to anyone deprived of

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290 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, supra*, para. 144, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312, para. 166.

291 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, supra*, para. 144, and *Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 166.

292 Articles 5 and 27 of the American Convention. See also, *Case of the "Juvenile Re-education Institute v. Paraguay, supra*, para. 157, and *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395, para. 55.

liberty by establishing, *inter alia,* that "[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

182. In addition, the Court recalls that, taking into account that the inclusion of the right to health in the Charter of the Organization of American States (hereinafter "the OAS Charter") is derived from its Articles 34(i), 34(l)[293] and 45(h),[294] in different precedents, the Court has recognized the right to right to health as a right protected by Article 26 of the Convention.[295] Furthermore, broad regional consensus exists as regards the affirmation of this right because it is explicitly recognized in the different Constitutions and domestic laws of the States of the region.[296] Also, the Court underscores that the right to health is recognized in the Constitution of El Salvador.[297]

183. The Court has also indicated that que the rights to life and to integrity are directly and immediately linked to care for human health,[298] and that the lack of adequate medical care may result in the violation of Articles 5(1)[299] and 4 of the Convention.[300]

184. Health is a fundamental human right, essential for the satisfactory exercise of the other human rights and everyone has the right to enjoy the highest attainable standard of health that allows them to live with dignity, understanding health not only as the absence of disease or infirmity, but also as a state of complete physical, mental and social well-being derived

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293 Article 34(i) of the OAS Charter establishes: "Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: […] (i) Protection of man's potential through the extension and application of modern medical science; […] (l)) Urban conditions that offer the opportunity for a healthful, productive, and full life.

294 Article 45(h) of the OAS Charter establishes: "[t]he Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: […] (h) Development of an efficient social security policy."

295 *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, paras. 106 and 110, and *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras.* Judgment of August 31, 2021. Series C No. 432, para. 80.

296 These include: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. See the constitutional provisions of Argentina (art. 10); Barbados (art. 17(2)(A); Bolivia (art. 35); Brazil (art. 196); Chile (art. 19); Colombia (art. 49); Costa Rica (art. 46); Dominican Republic (art. 61); Ecuador (art. 32); El Salvador (art. 65); Guatemala (arts. 93 and 94); Haiti (art. 19); Mexico (art. 4); Nicaragua (art. 59); Panama (art. 109); Paraguay (art. 68); Peru (art. 70); Suriname (art. 36); Uruguay (art. 44) and Venezuela (art. 83). Cf. Constitutional Chamber Supreme Court of Justice of Costa Rica, Resolution No. 13505–2006, of September 12, 2006, considering paragraph III; Constitutional Court of Colombia, Judgment C-177 of 1998; Supreme Court of Justice of the Nation; Mexico, Judgment 8/2019 (10). Right to the protection of health. Individual and social dimensions, and Constitutional Court of Ecuador, Judgment No. 0012-09-SIS-CC, October 8, 2009.

297 Article 65 of the Constitution of El Salvador establishes that "the health of the inhabitants of the Republic constitutes a public good. The State and the individual are obliged to ensure its conservation and restoration. The State shall determine the national health policy and shall oversee and supervise its application." Available at: https://www.asamblea.gob.sv/sites/default/files/documents/decretos/EA1C26BE-E75B-4709-98AB8BC6CA287232.pdf

298 *Cf. Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs*. Judgment of November 22, 2007. Series C No. 171, para. 117*, and Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 171.

299 See, for example, *Case of Tibi v. Ecuador, supra*, and *Case of Hernández v. Argentina, supra*.

300 See, for example, Case of Gonzales Lluy et al. v. Ecuador, supra, para. 171, and Case of Chinchilla Sandoval et al. v. Guatemala, supra, paras. 170, 200 and 225.

from a lifestyle that allows the individual to achieve total balance.[301] Thus, the right to health refers to the right of everyone to enjoy the highest level of physical, mental and social well-being.[302]

185. The general obligation to protect health translates into the state obligation to ensure access to essential health services, ensuring effective and quality medical services, and to promote the improvement of the population's health.[303] This right encompasses timely and appropriate health care in keeping with the principles of availability, accessibility, acceptability and quality, the application of which will depend on the prevailing circumstances in each State. Compliance with the State obligation to respect and to ensure this right must pay special attention to vulnerable and marginalized groups, and must be realized progressively in line with available resources and the applicable domestic laws.[304]

186. As it has reiterated in its recent case law, the Court considers that the nature and scope of the obligations derived from the protection of the right to health include aspects that may be required immediately and those that are of a progressive nature.[305] In this regard, the Court recalls that, regarding the former (obligations that may be required immediately), States must adopt effective measures to ensure access without discrimination to the services recognized by the right to health, ensure equality of rights between men and women and, in general, advance towards the full effectiveness of the economic, social, cultural and environmental rights (ESCER). Regarding the latter (obligations of a progressive nature), progressive realization means that States Parties have the concrete and constant obligation to advance as expeditiously and efficiently as possible towards the full effectiveness of the said right, to the extent of their available resources, by legislation or other appropriate means. In addition, there is an obligation of non-retrogressivity in relation to the rights realized. In light of the above, the treaty-based obligations to respect and to ensure rights, as well as to adopt domestic legal provisions (Articles 1(1) and 2), are essential to achieve their effectiveness.[306]

187. In the instant case the Court must examine the State's conduct regarding compliance with its obligation to ensure respect for Manuela's rights to life, personal integrity and health. All the obligations that will be examined correspond to obligations that may be required immediately.

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301 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 118, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 100.

302 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 118, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 100. See, *inter alia,* Preamble to the Constitution of the World Health Organization (WHO), adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946, by the representatives of 61 States (Off. Rec. WHO, 2, 100), and entered into force on 7 April 1948. Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirty-ninth and Fifty-first World Health Assemblies (resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) came into force on 3 February 1977, 20 January 1984, 11 July 1994 and 15 September 2005 respectively and are incorporated into the present text. Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, August 11, 2000, UN Doc. E/C.12/2000/4, para. 12.

303 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 118, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 101.

304 *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359, para. 39, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 100.

305 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 104, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 106.

306 *Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 190, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 106.

188. The Court notes that, at the time of the facts, regulations existed with regard to the right to health that guaranteed this right to everyone without distinction.[307]

189. Based on the facts of the case and the arguments of the parties and the Commission, the Court will examine: (1) the medical attention received by Manuela before the obstetric emergency; (2) the medical attention received by Manuela during the obstetric emergency; (3) the violation of medical secrecy and the protection of personal data; (4) the medical attention received by Manuela during her detention; (5) the violation of the right to life and the alleged lack of investigation, and (6) The impact of the discrimination that occurred in this case.

B.1 The medical attention received by Manuela before the obstetric emergency

190. The ***representatives*** argued that there had been various shortcomings in the medical attention received by Manuela before the obstetric emergency, including that the State failed to make an early diagnosis of the "evident symptoms of the Hodgkin's lymphoma from which the [presumed] victim suffered."

191. In this regard, the Court recalls that the right to health requires that the services provided must be acceptable; in other words, designed to "improve the health status of those concerned," and "must also be scientifically and medically appropriate and of good quality."[308] However, this does not mean that the services must be infallible.[309] On this basis, in the instant case, the Court does not have sufficient evidence to evaluate the medical attention received by Manuela before the obstetric emergency, or to examine the alleged violation of the right of access to information.

B.2 The medical attention received by Manuela during the obstetric emergency

192. The right to sexual and reproductive health forms part of the right to health.[310] The right to sexual and reproductive health is related to reproductive freedom and autonomy with

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[307] Article 65 of the Constitution of El Salvador establishes ""the health of the inhabitants of the Republic constitutes a public good. The State and the individual are obliged to ensure is conservation and restoration. The State shall determine the national health policy and shall oversee and supervise its application." Constitution of the Republic of El Salvador, Legislative Decree No. 38 of 1983. Available at: https://www.asamblea.gob.sv/sites/default/files/documents/decretos/EA1C26BE-E75B-4709-98AB-8BC6CA287232.pdf

[308] *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 151. See also, *Committee on Economic, Social and Cultural Rights*, General Comment No. 14: The right to the highest attainable standard of health, August 11, 2000, UN Doc. E/C.12/2000/4, para. 12.

[309] Thus, for example, the European Court of Human Rights (ECHR) has indicated that where States have "made adequate provision for securing high professional standards among health personnel [… the Court] cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient in themselves" to establish the international responsibility of a State. ECHR [Fourth Section]. *Case of Byrzykowski v. Poland*, No 11562/05, of September 27, 2006, para. 104.

[310] Committee on Economic, Social and Cultural Rights, General Comment No. 22: The right to sexual and reproductive health, May 2, 2016, UN Doc. E/C.12/GC/22, para. 1. See also, *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, supra, para. 148, and *Case of I.V. v. Bolivia, supra*, para. 157. The Court has adopted the concept of reproductive health formulated by the Programme of Action of the 1994 International Conference on Population and Development held in Cairo, as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes." Consequently, [r]eproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition is the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for

regard to the right to take autonomous decisions, free of all violence, coercion and discrimination, concerning one's life project, body, and sexual and reproductive health.[311] It also refers to access to both reproductive health services, information and education, and the means to exercise the right to decide freely and responsibly on the number of children desired and the spacing between births.[312]

193. The Court has indicated that sexual and reproductive health have special implications for women owing to their biological capacity to conceive and give birth.[313] Therefore, the obligation to provide medical care without discrimination means that this must take into account that the health needs of women are different from those of men, and provide appropriate services for women.[314]

194. Additionally, the obligation to provide medical care without discrimination means that under no circumstance can the presumed perpetration of an offense by a patient condition the medical care that the said patient needs. Therefore, States must provide the necessary medical treatment, without discrimination, to women who require this.[315]

195. In the instant case, Manuela's medical record reveals various shortcomings that show that the care provided was neither acceptable nor of good quality. First, according to the hospital records, Manuela was admitted at 3:25 p.m. with placental retention, perineal tear, and signs of severe postpartum preeclampsia.[316] In this regard, expert witness Guillermo Ortiz indicated that "in the case of a postpartum woman [with severe preeclampsia], it is urgent to administer medication to avoid complications such as convulsions, […] extract the placenta immediately and suture the tears, to avoid continued loss of blood.[317] According to the file, at 5:30 p.m. on February 27, 2008, after noting down Manuela's personal information and conducting a physical examination, the treating physician informed her that she was sending

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regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant." Programme of Action of the International Conference on Population and Development, Cairo, UN Doc. A/CONF.171/13/Rev.1, 1994, para. 7(2). *Cf. Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, *supra*, para. 148. Similarly, the Court has considered, in keeping with the Pan-American Health Organization (PAHO), that sexual and reproductive health "implies that people are able to have a satisfying and safe sex life and have the capability to reproduce as well as the freedom to decide if, when, and how often to do so." Pan-American Health Organization, Health in the Americas 2007, Volume I - Regional, Washington D.C, 2007, p. 143.

311 *Cf. Case of I.V. v. Bolivia, supra*, para. 157. *See also,* UN, Committee on Economic, Social and Cultural Rights, General Comment No. 22, The right to sexual and reproductive health, May 2, 2016, para. 5.

312 *Cf. Case of I.V. v. Bolivia, supra*, para. 157. *See also,* Article 16(e) of the Convention for the Elimination of All Forms of Discrimination against Women.

313 *Case of I.V. v. Bolivia, supra*, 157.

314 UN, Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, August 11, 2000, UN Doc. E/C.12/2000/4, para. 12, and UN, Committee on Economic, Social and Cultural Rights, General Comment No. 22, The right to sexual and reproductive health, May 2, 2016, UN Doc. E/C.12/GC/22, para. 25.

315 See, similarly: UN, Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, August 11, 2000, UN Doc. E/C.12/2000/4, para. 12; United Nations Committee against Torture, Conclusions and recommendation with regard to Chile, June 14, 2004, UN Doc. CAT/C/CR/32/5*,* para. 7(m), and Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc. A/66/254, August 3, 2011, para. 30.

316 *Cf.* Emergency form, February 27, 2008 (evidence file, folio 16); Record of evolution following anesthesia of the San Francisco Gotera National Hospital (evidence file, folio 2); record of admittance and departure (evidence file, folio 17), and Communication issued by the director of the San Francisco Gotera National Hospital of February 29, 2008 (evidence file, folio 58).

317 *Cf.* Expert opinion provided by Guillermo Antonio Ortiz Avendaño during the public hearing held in this case.

a note to the prosecution service.[318] That note was received at 5:33 p.m. the same day.[319] At 7 p.m., the "complete calcified placenta" was extracted from Manuela, a curettage was performed, and her "perineal tear" was sutured.[320] The Court notes that the State has not presented arguments to justify this delay. To the contrary, the Court emphasizes that during this time, the treating physician gave priority to filing a complaint before the prosecution service concerning a presumed abortion.[321]

196. Second, the Court recalls that, since 2007, Manuela had visible lumps in her neck.[322] Nevertheless, the general examination performed on the presumed victim at 6:40 p.m. on February 27 indicates that she had a symmetrical neck.[323] In fact, during the seven days that Manuela remained hospitalized, the medical record reveals that the treating personnel never examined or recorded the lumps in Manuela's neck. On this point, expert witness Guillermo Ortiz indicated that, once the emergency had been attended to, a complete physical examination should have been performed. In this regard, he indicated that by "conducting a more thorough, more meticulous examination, the tumor in her neck would have been diagnosed," and this could have changed the course of the treatment provided to Manuela.[324]

197. Third, the Court notes that, according to Manuela's father, his daughter was handcuffed in the San Francisco Gotera Hospital.[325] This assertion concurs with the practice of handcuffing women suspected of abortion, and the Court has considered this proved by the contextual facts of the case (*supra* para. 46). In cases such as this one, where there is no direct proof of the actions of the state agents, the Court has stressed that it is legitimate to use circumstantial evidence, indications and presumptions as grounds for a judgment, provided that conclusions consistent with the facts can be inferred from them.[326] The Court considers that the statement of Manuela's father, assessed in light of the context in which the facts of the case occurred, makes it possible to presume that Manuela was handcuffed to the hospital bed, at least on February 28, 2008.

198. Handcuffs or other similar devices are frequently used as instruments of physical coercion for people who are detained and deprived of liberty. This Court has indicated that any use of force that is not strictly necessary due to the behavior of the person detained constitutes an attack on human dignity, in violation of Article 5 of the American Convention.[327] The Court recalls that numerous decisions of international bodies cite the United Nations Standard Minimum Rules for the Treatment of Prisoners (hereinafter "Rules for the Treatment

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318 *Cf.* Record of the interview of the treating physician (evidence file, folio 16).

319 Note addressed to the prosecution service dated February 27, 2008 (evidence file, folio 22).

320 Communication issued by the director of the San Francisco Gotera National Hospital of February 29, 2008 (evidence file, folio 58).

321 Note addressed to the prosecution service dated February 27, 2008 (evidence file, folio 22).

322 *Cf.* Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folios 186 and 187); Sworn statement of Manuela's mother on September 3, 2017 (evidence file, folio 2281), and Sworn statement of Manuela's father on September 3, 2017 (evidence file, folio 2288).

323 Communication issued by the director of the San Francisco Gotera National Hospital of February 29, 2008 (evidence file, folio 58).

324 *Cf.* Expert opinion provided by Guillermo Antonio Ortiz Avendaño during the public hearing held in this case.

325 Sworn statement of Manuela's father on September 3, 2017 (evidence file, folio 2288).

326 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, paras. 130 and 131, and *Case of Valenzuela Ávila v. Guatemala, supra*, para. 163.

327 *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 57, and *Case of Azul Rojas Marín et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 12, 2020. Series C No. 402, para. 158.

of Prisoners")[328] in order to interpret the content of the right of those deprived of liberty to decent and humane treatment, as basic rules for their accommodation, hygiene, medical treatment and physical exercise, among other matters.[329] These rules stipulate that "instruments of restraint shall never be applied as a punishment" and "shall not be used except in the following circumstances:

> (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority; (b) On medical grounds by direction of the medical officer; (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.[330]

199. Moreover, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) establish that "[i]nstruments of restraint shall never be used on women during labour, during birth and immediately after birth."[331] Several United Nations Special Rapporteurs have ruled similarly.[332] In addition, the European Court has indicated that the use of handcuffs on "an ill or otherwise weak person is disproportionate […] and implies an unjustifiable humiliation," and if these are used for "a woman suffering labour pains and immediately after the delivery, it amounted to inhuman and degrading treatment."[333]

200. When Manuela was detained, she had recently given birth and was being treated for severe preeclampsia. Therefore, it was unreasonable to assume that there was a real risk of

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328 United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of May 13, 1977.

329 *Cf. Case of Raxcacó Reyes v. Guatemala. Merits, reparations and costs.* Judgment of September 15, 2005. Series C No. 133, para. 99, and *Case of Hernández v. Argentina, supra*, para. 87.

330 United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of May 13, 1977, para. 33. In 2015, the United Nations General Assembly adopted the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). They also stipulate that "Other instruments of restraint shall only be used when authorized by law and in the following circumstances: (a) As a precaution against escape during a transfer, provided that they are removed when the prisoner appears before a judicial or administrative authority; (b) By order of the prison director, if other methods of control fail, in order to prevent a prisoner from injuring himself or herself or others or from damaging property; in such instances, the director shall immediately alert the physician or other qualified health-care professionals and report to the higher administrative authority." *Cf.* UN. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). General Assembly Resolution A/RES/70/175, of December 17, 2015, rule 47(2)

331 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), General Assembly Resolution A/RES/65/229 of March 16, 2011, rule 24. Similarly, see, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). General Assembly Resolution A/RES/70/175, of December 17, 2015, rule 48(2)

332 The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has indicated that "[t]he use of shackles and handcuffs on pregnant women during labour and immediately after childbirth is absolutely prohibited and representative of the failure of the prison system to adapt protocols to unique situations faced by women." In addition, in her report on a human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence, the Special Rapporteur on violence against women, it causes and consequences indicated that such measures may amount to violence against women and other human rights violations. *Cf.* Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57 of January 5, 2016, para. 21, and Report of the Special Rapporteur on violence against women, its causes and consequences on a human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence, A/74/137 of July 11, 2019, para. 22.

333 *Cf.* ECHR [Fifth section]. Case of *Korneykova and Korneykov v. Ukraine*, No. 56660/12 of March 24, 2016, paras. 111 and 115.

flight that could not have been mitigated by other less harmful means. It has not been argued before the Court that Manuela had behaved aggressively at any time with the medical staff or with the police, that she was a danger to herself, or that she had taken any measures to escape. Therefore, the Court considers that those actions amounted to a violation of the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment established in Article 5(2) of the American Convention.

201. Based on the above, the Court concludes that the State failed to comply with the obligation to provide the presumed victim with acceptable and quality medical care and, consequently, this amounted to a violation of the rights to personal integrity and to health, established in Articles 5 and 26 of the American Convention.

B.3 The violation of medical confidentiality and the protection of personal data

202. The ultimate aim of the provision of health services is to improve the mental and physical health of the patient.[334] Indeed, the Declaration of Geneva of the World Medical Association establishes that for members of the medical professions "the health and well-being of [their] patient will be [their] first consideration."[335] Similarly, the International Code of Medical Ethics of the World Medical Association indicates that "[t]he physician shall act in the patient's best interest when providing medical care" and "shall owe his/her patients complete loyalty."[336]

203. To enable medical staff to provide the appropriate medical treatment, the patient must feel able to share all necessary information with them.[337] Therefore, it is essential that the information that patients share with medical staff is not divulged illegitimately.[338] Thus, the right to health means that, for health care to be acceptable, "personal health data [must be] treated with confidentiality."[339]

204. In addition, Article 11 of the Convention prohibits any arbitrary or abusive interference in a person's private life, and spells out various areas of this, such as the privacy of his family, his home or his correspondence. Privacy includes the way in which the individual sees himself and how he decides he wishes to be seen by others,[340] and is an essential condition for the

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334 *Cf. Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, para. 139, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 151.

335 *Cf.* Declaration of Geneva, adopted by the 2nd General Assembly of the World Medical Association, September 1948 and amended by the 22nd World Medical Assembly, Sydney, Australia, August 1968, and the 35th World Medical Assembly, Venice, Italy, October 1983, and the 46th WMA General Assembly, Stockholm, Sweden, September 1994, and editorially revised by the 170th WMA Council Session, Divonne-les-Bains, France, May 2005, and the 173rd WMA Council Session, Divonne-les-Bains, France, May 2006,and amended by the 68th WMA General Assembly, Chicago, United States, October 2017.

336 *Cf.* International Code of Medical Ethics of the World Medical Association, adopted by the 3rd General Assembly of the World Medical Association, London, England, October 1949, and amended by the 22nd World Medical Assembly, Sydney, Australia, August 1968, the 35th World Medical Assembly, Venice, Italy, October 1983, and the WMA General Assembly, Pilanesberg, South Africa, October 2006.

337 *Cf.* Affidavit made by Oscar A. Cabrera on March 6, 2021 (evidence file, folio 4017).

338 ECHR, *Case of L.H. v. Latvia,* No. 52019/07. Judgment of April 29, 2017, para. 56, and Affidavit made by Oscar A. Cabrera on March 6, 2021 (evidence file, folio 4017).

339 Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, August 11, 2000, UN Doc. E/C.12/2000/4, para. 12. See also, CEDAW, General recommendation No. 24: Women and health, February 2, 1999, para. 22.

340 *Cf. Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010. Series C No. 216, para. 119, and *Case of I.V. v. Bolivia, supra*, para. 152.

free development of the persona.[341] In addition, it is related to: (i) reproductive autonomy, and (ii) access to reproductive health services.[342]

205. Even though personal health data is not explicitly established in Article 11 of the Convention, this is information that described the most sensitive or delicate aspects of an individual, so that it should be understood as protected by the right to privacy.[343] Information on an individual's sex life should also be considered as personal and highly sensitive.[344]

206. Based on the right to privacy and the right to health, everyone has the right to the confidentiality of medical attention and the protection of their health data. As a result of this protection, the information that physicians obtain in the exercise of their profession must not be disclosed and is protected by professional secrecy.[345] This includes both the information shared by the patient while being treated, and also the physical evidence that the medical staff may observe while providing this treatment. Thus, physicians have a right and a duty to ensure the confidentiality of the information to which they have access in their capacity as physicians.[346] This obligation to respect professional secrecy has been recognized in various instruments on medical ethics, including the Hippocratic oath,[347] the Universal Declaration on Bioethics and Human Rights,[348] the Declaration of Geneva adopted by the World Medical Association in 1948,[349] the International Code of Medical Ethics[350] and the Declaration of Lisbon on the Rights of the Patient.[351]

207. Nevertheless, the confidentiality of medical care and the protection of health data is not an absolute right and, therefore, may be restricted by States provided that the interference is not abusive or arbitrary; accordingly, this must be established by law, pursue a legitimate purpose and be necessary in a democratic society.[352] Similarly, there are exceptions to the obligation of physicians to respect professional secrecy.[353]

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341 *Cf., Mutatis mutandis, Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, para. 97, and *Case of I.V. v. Bolivia, supra*, para. 152.

342 *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica, supra*, para. 146.

343 ECHR, *Case of L.H. v. Latvia,* No. 52019/07. Judgment of April 29, 2017, para. 56; ECHR, *Case of Y.Y. v. Russia,* No. 40388/06. Judgment of February 23, 2016, para. 38, and ECHR, *Case of Radu v. The Republic of Moldova.* No. 50073/07. Judgment of April 15, 2014, para. 27.

344 ECHR, *Case of Mockuté v. Lithuania,* No. 66490/09. Judgment of February 27, 2018, para. 95.

345 *Case of De La Cruz Flores v. Peru. Merits, reparations and costs*. Judgment of November 18, 2004. Series C No. 115, para. 97, and *Case of Pollo Rivera et al. v. Peru. Merits, reparations and costs*. Judgment of October 21, 2016. Series C No. 319, para. 237.

346 *Case of De La Cruz Flores v. Peru, supra*, para. 101, and *Case of Pollo Rivera et al. v. Peru, supra*, para. 237.

347 *Cf.* Expert opinion provided by affidavit by Oscar A. Cabrera on March 6, 2021 (evidence file, folio 4017).

348 *Cf.* UNESCO General Conference, Universal Declaration on Bioethics and Human Rights, October 19, 2005, Article 9.

349 *Cf.* Geneva Declaration, *supra*.

350 *Cf.* International Code of Medical Ethics of the World Medical Association, *supra.*

351 Declaration of Lisbon on the Rights of the Patient of the World Medical Association, adopted by the 34th World Medical Assembly, Lisbon, Portugal, September/October 1981, and amended by the 47th WMA General Assembly, Bali, Indonesia, September 1995, and editorially revised by the 171st WMA Council Session, Santiago, Chile, October 2005, and reaffirmed by the 200th WMA Council Session, Oslo, Norway, April 2015, Principle 8.

352 *Mutatis mutandis, Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs*. Judgment of January 27, 2009. Series C No. 193, para. 56, and *Case of Escher et al. v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 6, 2009. Series C No. 200, para. 116.

353 See, for example, International Code of Medical Ethics of the World Medical Association, *supra*, and Declaration of Lisbon on the Rights of the Patient of the World Medical Association, *supra*, Principle 8.

208. In the instant case, the information that Manuela shared with the health personnel was private. Manuela did not authorize its disclosure; despite this, it was disclosed on at least three occasions: (1) when the treating physician filed the complaint against Manuela; (2) when the physician gave her statement on February 28, 2008, and (3) when the director of the San Francisco Gotera National Hospital sent a report on Manuela's medical record to the prosecution service.

209. The disclosure of this information to the judicial authorities constituted interference in her rights to privacy and to health. Therefore, the Court must examine each of these occasions to determine whether they were arbitrary or abusive or if they were compatible with the Convention.

B.3.a The complaint filed by the treating physician

210. On February 27, 2008, the physician who treated the presumed victim filed a complaint against Manuela for possible abortion. In her complaint, the physician included the following considerations:

> In order to comply with art. 312 Pn., I am hereby advising that on the 27th at 5:25 p.m. this hospital provided medical care to [Manuela], female, 25 years of age […] who revealed the following: preterm delivery, with placental retention. She does not have the newborn; apparently as a result of committing an offense. The foregoing is reported so that the pertinent legal measures may be taken.[354]

Legality of the restriction

211. In order to evaluate whether the harm to a right established in the American Convention is permitted in light of this instrument, the first step is to examine whether the measure in question complied with the requirement of legality. This means that the general conditions and circumstances under which a restriction of the exercise of a specific human right is authorized must be clearly established by law.[355] Moreover, the law establishing this restriction must be a law in both the formal and the material sense.[356]

212. In addition, the law must be precise and include clear and detailed rules in this regard.[357] The rules must be unambiguous, so that they do not raise doubt in those responsible for applying the restriction, and do not enable them to act in an arbitrary or discretionary manner, making extensive interpretations of the rules.[358] In this regard, the European Court had indicated that the "law must be adequately accessible and foreseeable, that is, formulated

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354 Note addressed to the prosecution service dated February 27, 2008 (evidence file, folio 22).

355 Article 30 of the American Convention establishes that "The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."

356 *Cf. The Word "Laws " in Article 30 of the American Convention on Human Rights,* Advisory Opinion OC-6/86, May 9, 1986. Series A No. 6, paras. 27 and 32, and *Indefinite Presidential Re-election in Presidential Systems in the context of the Inter-American System of Human Rights (Interpretation and scope of Articles 1, 23, 24 and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter). Advisory Opinion OC-28/21 of June 7, 2021. Series A No 28*, para. 115.

357 *Case of Escher et al. v. Brazil, supra*, para. 131.

358 *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 108, and *Case of Ricardo Canese v. Paraguay, supra*, para. 125.

with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct."[359]

213. The Health Code of El Salvador establishes that one of the exceptions to the inviolability of professional confidentiality is "if respecting it would violate the laws in force."[360] Also, criminal law establishes the duty of physicians to respect professional secrecy and, therefore, refrain from testifying while, on the other hand, establishing an obligation to report the occurrence of a wrongful act. And, while an article of the Code of Criminal Procedure establishes an exception to the reporting obligation when the physician has become aware of the act "under the protection of professional secrecy,"[361] article 312 of the Criminal Code defines the failure of public officials to report wrongful acts as an offense, without establishing any exception.[362] Therefore, the Court underscores that the law is not sufficiently clear about whether physicians who become aware of a possible wrongful act due to information protected by professional secrecy have an obligation to report it, and does not establish specific regulations concerning professional secrecy in relation to obstetric emergencies.

214. In this regard, expert witness Oscar A. Cabrera pointed out that "[t]he lack of regulatory frameworks that clearly establish the exceptional nature of restrictions to medical confidentiality, as well as the very limited cases in which those restrictions are acceptable, results in granting absolute discretionality to the medical staff to determine how they comply with their duties and obligations."[363] The Court recalls that, according to a study conducted in El Salvador, 80% of the obstetric gynecologists interviewed believed that it was compulsory to report all cases of obstetric emergencies (*supra* para. 45). Moreover, the possible result of this lack of clarity has been that, in El Salvador, it is frequent that the report of a suspected abortion is filed by the administrative or medical staff of the health institution where the woman was being treated (*supra* para. 45).

215. Taking the foregoing into account, the Court considers that the law did not establish clearly whether or not a reporting duty existed that would have obliged the medical staff to reveal Manuela's confidential data. The Court also notes that this lack of clarity in the law caused the medical staff to understand that they were obliged to report this type of situation because, to the contrary, they could be sanctioned. Moreover, it could also have the result, as in this case (*supra* para. 195), that the medical staff prioritize the report over the provision of emergency medical care to the woman who needs this. Thus, the Court stresses that, in the case of obstetric emergencies, the law should indicate clearly that, the duty to preserve medical professional secrecy is an exception to the general reporting obligation established in article 229 of the Code of Criminal Procedure,[364] as well as the reporting obligation imposed

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[359] ECHR, *Case of S. and Marper v. The United Kingdom* [Grand Chamber], No. 30562/04 and 30566/04. Judgment of December 4, 2008, para. 95, and *Case of Avilkina and Others v. Russia,* No. 1585/09. Judgment of June 6, 2013, para. 35.

[360] Health Code of El Salvador. Legislative Decree No. 955 of 1988, articles 37 and 38. Available at: http://asp.health.gob.sv/regulacion/pdf/ley/codigo_de_health.pdf

[361] Code of Criminal Procedure of El Salvador, Legislative Decree No. 776 of 1996, article 232.2 Available at: http://www.oas.org/juridico/spanish/mesicic3_slv_procesal.pdf

[362] Criminal Code of El Salvador, Legislative Decree No 1030 of 1997, article 312. Available at: https://www.oas.org/dil/esp/Codigo_Penal_El_Salvador.pdf

[363] Affidavit made by Oscar A. Cabrera on March 6, 2021 (evidence file, folio 4029).

[364] Article 229 of the Code of Criminal Procedure establishes that: "Anyone who witnesses the perpetration of an offense subject to public prosecution is obliged to immediately inform the Prosecutor General, the police or the nearest magistrate. If the knowledge originates from news stories or reports, the complaint is optional. If the offense depends on an individual complaint, it is not possible to proceed without this, except for acts that require urgent investigation." Code of Criminal Procedure of El Salvador, Legislative Decree No. 776 of 1996, article 229. Available at: http://www.oas.org/juridico/spanish/mesicic3_slv_procesal.pdf

on public officials and on the head or person in charge of a hospital, clinic or other similar establishment.[365]

216. Consequently, the disclosure of the information on Manuela's sexual and reproductive health based on imprecise and contradictory legislation did not comply with the requirement of legality and, therefore, constituted a violation of Article 2 of the Convention, in relation to Articles 11 and 26 of the Convention. Despite this, the Court finds it necessary in the instant case to analyze the purpose, suitability, necessity and proportionality of the restriction.

Purpose and suitability of the restriction

217. The second limitation of any restriction relates to the purpose of the restrictive measure; in other words, the reason cited to justify the restriction must be one permitted by the American Convention. According to the State, the purpose of the restriction was to avoid more serious consequences for the life and health of the infant, and to comply with the international obligation to investigate, prosecute and, as appropriate, punish offenses committed against children.

218. Regarding the first purpose indicated by the State, the Court notes that, according to the information possessed by the physician when she made her report, Manuela had indicated that the infant was dead.[366] Moreover, the actions taken by the prosecution in this case reveal that the report was treated as a report of an offense that had already taken place, and not as a situation in which the life of a newborn was in danger.[367] Therefore, the Court considers that, in the instant case, the purpose of the restriction was not to protect the life of a child, but rather to comply with the international obligation to investigate, prosecute and, as appropriate, punish offenses committed against children, which is in conformity with the Convention. Thus, the Court notes that the report made in this case was an appropriate measure to achieve that purpose.

Necessity of the restriction

219. To evaluate the necessity of the measure, the alternatives that existed to achieve the legitimate purpose sought must be examined in order to decide whether they represented greater or lesser harm.[368] In this regard, the Court notes that the report of, or information concerning, the possible perpetration of an offense by someone who has not acquired this knowledge through the medical treatment of the woman could also be appropriate. In such cases, the right to the protection of the health data of the person receiving medical care would not be violated. However, in the instant case, it is not certain that it would haves been possible

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365 Article 312 of the Criminal Code establishes that: "The public official or employee, law enforcement agent or public authority who, in the exercise of his functions or due to them, becomes aware that a punishable act has been perpetrated and fails to report this to the competent official within twenty-four hours shall be sanctioned with a penalty of fifty to one hundred days-fine [Note: a fine based on the income of the person concerned]. The same punishment shall be imposed on the head or person in charge of a hospital, clinic or other similar public or private establishment, who fails to inform the competent official within eight hours that an injured person has been admitted, in cases in which it is reasonable to consider that the injuries originated from an offense." Criminal Code of El Salvador, Legislative Decree No. 1030 of 1997, article 312. Available at: https://www.oas.org/dil/esp/Codigo_Penal_El_Salvador.pdf

366 *Cf.* Emergency record of February 27, 2008 (evidence file, folio 16).

367 In this regard, the Court underlines that, following the report, the person investigating the case wanted to go to Manuela's house; however, the police indicated that "it was very far away" and, therefore, they went next morning. *Cf.* Statement by the person investigating the case transcribed in the judgment handed down by the Trial Court of San Francisco Gotera, department of Morazán, on August 11, 2008 (evidence file, folio 158).

368 *Cf. Case of Yatama v. Nicaragua, supra*, para. 206, and Advisory Opinion OC-28/21 of June 7, 2021, *supra,* para. 121.

to investigate the presumed homicide if the medical staff had not disclosed Manuela's information, so that the measure could be a necessary measure and it is necessary to examine the proportionality of the restriction.

Proportionality of the restriction

220. On this point, it is necessary to examine whether the restriction was strictly proportionate, so that the sacrifice inherent in it was not exaggerated or disproportionate to the advantages obtained from the said limitation.[369] In this regard, the Court has indicated that the restriction must be proportionate to the interest that justifies it and be closely adapted to the achievement of that legitimate objective, interfering as little as possible in the effective exercise of the rights at stake.[370] Indeed, even if a restriction is established by law, is suitable and necessary, the Court must determine whether it is strictly proportionate.

221. Manuela went to the hospital after suffering an obstetric emergency, shared the information she considered pertinent with her physician, and allowed the physician to examine her. The information obtained by the physician while treating Manuela was subsequently used in the criminal proceedings against her. Therefore, Manuela had to decide between not receiving medical care or that this care would be used against her in the criminal proceedings.

222. The Court notes that the failure to respect medical confidentiality may prevent people from seeking medical care when they need this, endangering their health and that of the community in cases of contagious diseases.[371] Specifically, in cases in which women need medical care following a delivery or in an obstetric emergency, CEDAW has indicated that:

> "... lack of respect for the confidentiality of patients […] 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.[372]

223. Similarly, the Human Rights Committee has indicated that the "legal duty imposed upon health personnel to report on cases of women who have undergone abortions may inhibit women from seeking medical treatment, thereby endangering their lives."[373]

224. In this sense, the Court considers that, in cases related to obstetric emergencies such as this one, the disclosure of medical date may restrict the access to adequate medical attention for women who need medical care, but who avoid going to a hospital for fear of being criminalized, and this jeopardizes their right to health, personal integrity and life. Indeed, in such case, there is an apparent conflict between two rules: the duty to respect

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369 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 93, and Advisory Opinion OC-28/21 of June 7, 2021, *supra,* para. 122.

370 *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights),* Advisory Opinion OC-5/85, November 13, 1985. Series A No. 5, para. 46, and Advisory Opinion OC-28/21 of June 7, 2021, *supra,* para. 122.

371 *Cf.* ECHR, *Case of Y.Y. v. Russia,* No. 40388/06. Judgment of February 23, 2016, para. 38; *Case of Mockuté v. Lithuania,* No. 66490/09. Judgment of February 27, 2018, para. 93, and Affidavit made by Oscar A. Cabrera on March 6, 2021 (evidence file, folio 4019).

372 CEDAW, General recommendation No. 24: Women and health, February 2, 1999, para. 12(d). See also, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/22/53, February 1, 2013, para. 46.

373 *Cf.* Human Rights Committee, Concluding observations on the fourth periodic report of Chile, CCPR/C/79/Add.104, March 30, 1999, para. 15; Concluding observations on the third periodic report of Venezuela, CCPR/CO/71/VEN, August 17, 2001, para. 19, and Concluding observations on the seventh periodic report of El Salvador, CCPR/C/SLV/CO/7, May 9, 2018, para. 16.

professional secrecy and the reporting duty. In cases of obstetric emergencies in which the life of the woman is in danger, the duty to respect the professional secret should be given priority. Therefore, the harm caused by the report made by the treating physician in this case was disproportionate compared to the advantages it obtained. Consequently, the report made by the treating physician constituted a violation of Manuela's rights to privacy and health, established in Articles 11 and 26 of the American Convention.

B.3.b The physician's statement and the disclosure of the medical record

225. On February 28, 2008, the police questioned the treating physician with regard to her report. The physician revealed information about Manuela's body, which she had examined while providing medical treatment.[374] In addition, on February 29, 2008, the San Francisco Gotera Hospital shared a transcript of Manuela's medical record with the prosecution service, following a request for collaboration by that service.[375]

226. It should be pointed out that the treating physician's statement and the medical record were probative elements collected during the initial investigation conducted by the police. According to article 187 of the Code of Criminal Procedure, the physician had the obligation to refrain from making a statement concerning the information she had obtained from providing medical care to Manuela and to refrain from sharing confidential information. The Court also considers that the personal data contained in the medical record related to sensitive information that could only be disclosed with the authorization of the competent authority.[376]

227. As a general rule, medical information should be kept confidential, except when: (i) the patient gives his/her consent to its disclosure, or (ii) domestic law authorizes access by specific authorities. In addition, the law should establish the specific situations in which the medical record may be disclosed, clear safeguards for the protection of this information, and the way in which the information may be disclosed, requiring that this can only be done following a reasoned order issued by a competent authority and, only the necessary information for the particular case.

228. In the instant case, the statement made by the treating physician was contrary to domestic law which established the duty of professional secrecy. Furthermore, the laws on medical confidentially analyzed above did not establish clear criteria on the circumstances in which the medical authorities could share someone's medical record. Therefore, the Court considers that, in cases such as this one, related to obstetric emergencies, the disclosure of medical information may restrict access to adequate medical attention for women who need medical assistance, but avoid going to a hospital for fear of being criminalized, which jeopardizes their right to health, personal integrity and life. Consequently, the statement made by the physician and the disclosure of the medical record constitute a violation of Manuela's rights to privacy and to health established in Articles 11 and 26 of the American Convention.

B.3.d Conclusion

229. Based on the above, failure to comply with the obligation to respect professional secrecy and the disclosure of Manuela's medical information constituted a violation of her rights to

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374 Record of interview of the treating physician (evidence file, folios 24 and 25).

375 Request for collaboration of February 29, 2008 (evidence file, folio 55), and Communication issued by the director of the San Francisco Gotera National Hospital of February 29, 2008 (evidence file, folio 57).

376 In this regard, the Inter-American Juridical Committee has indicated that "[p]ersonal data should not be disclosed, made available to third parties, or used for purposes other than those for which it was collected except with the consent of the concerned individual or under the authority of law." Inter-American Juridical Committee. Updated Principles on Privacy and Protection of Personal Data, with annotations, adopted by Resolution CJI/RES. 266 (XCVIII/21) 98th regular session OEA/Ser. Q, of April 5 to 9, 2021, Fifth principle.

privacy and to health, in relation to the obligations to respect and to ensure these rights and the duty to adopt domestic legal provisions.

B.4 The medical attention received by Manuela during her detention

230. Pursuant to the principle of non-discrimination, the right to health of persons deprived of liberty entails the provision of a regular medical check-up[377] and, when necessary, adequate, prompt and, if appropriate, specialized medical treatment in keeping with the special care needs of those deprived of their liberty.[378]

231. In order to examine the care that Manuela received during her detention, and based on the arguments of the parties and the observations of the Commission, the Court's analysis will focus on the following: (a) whether a comprehensive medical examination was performed, and (b) the medical care that Manuela received. Regarding the alleged use of handcuffs while Manuela was detained in the Rosales National Hospital, the Court notes that it has insufficient evidence substantiating this allegation.

B.4.a A comprehensive medical examination

232. On the basis of the right to personal integrity, the Court has interpreted that States must perform a comprehensive medical examination of persons deprived of liberty as promptly as possible. The 1995 Standard Minimum Rules for the Treatment of Prisoners indicated, *inter alia*, that "[t]he medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures."[379]

233. The Court notes that Manuela was initially detained while she was hospitalized. Subsequently, on March 6, 2008, she was taken to the cells of the Morazán headquarters of the National Civil Police where she remained until her transfer to the prison in San Miguel.[380] There is no record in the case file that any medical examination was carried out when Manuela arrived at the police headquarters or at the San Miguel prison, despite the fact that she had been hospitalized for an obstetric emergency and had visible lumps in her neck that had not been examined in the establishment where she was hospitalized (*supra* para. 196).

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377 *Cf. Case of Tibi v. Ecuador, supra*, para. 156 and 157, and *Case of Rodríguez Revolorio et al. v. Guatemala, supra*, para. 90.

378 *Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 171, and *Case of Rodríguez Revolorio et al. v. Guatemala, supra*, para. 90.

379 1995 United Nations Standard Minimum Rules for the Treatment of Prisoners, *supra,* Rule 24. It is also pertinent to recall that Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted by the UN General Assembly in its resolution 43/173 of December 9, 1988) established that: "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge." The Principles and Best Practice on the Protection of Persons Deprived of Liberty in the Americas of the Inter-American Commission (Principle IX.3) indicate that: "[a]ll persons deprived of liberty shall be entitled to an impartial and confidential medical or psychological examination, carried out by idoneous medical personnel immediately following their admission to the place of imprisonment or commitment, in order to verify their state of physical or mental health and the existence of any mental or physical injury or damage; to ensure the diagnosis and treatment of any relevant health problem; or to investigate complaints of possible ill-treatment or torture."

380 *Cf.* National Civil Police, Morazán headquarters. Communication addressed to the Second Trial Judge on March 7, 2008 (evidence file, folio 1870); Communication of March 7, 2008 (evidence file, folio 1871); Communication of the director of the San Miguel Prison of September 9, 2009 (evidence file, folio 3313), and prisoner transfer authorization of September 10, 2009 (evidence file, folio 3314).

234. The Court also recalls that a medical examination of persons deprived of liberty should be carried out as often as necessary. The authorities should ensure that, when required by the nature of a medical condition, this should be subject to systematic periodical supervision in order to cure the detainee's ailments or to prevent them from deteriorating, rather than merely treating the symptoms.[381]

235. In the case of Manuela, bearing in mind the lumps in her neck and that, between November 2008 and February 2009 she lost more than 13 kilograms in weight, and suffered from a high fever and jaundice,[382] it was reasonable to consider that a medical examination was required. However, there is no record in the case file that any medical examination of Manuela was carried out between her detention in March 2008 and February 2009. The Court considers that the State was obliged to ensure that the presumed victim be examined by a physician to verify her health following the obstetric emergency, as well as the cause of the lumps in her neck, and to provide medical treatment as necessary.

B.4.b The medical treatment that Manuela received

236. The Court has indicated that prison health services should have the same level of quality as the services for people who are not deprived of liberty. Health should be understood as a fundamental and essential guarantee for the exercise of the rights to life and to personal integrity that entails the obligation for States to adopt domestic legal provisions, including adequate practices, to ensure equal access to health care for persons deprived of liberty, as well as the availability, accessibility, acceptability and quality of such services.[383] Therefore, the accessibility of the right to health for persons deprived of liberty means that, when necessary, health services must be provided in specialized health centers.

237. In the instant case, Manuela was diagnosed with nodular sclerosis Hodgkin's lymphoma on February 12, 2009.[384] The Court has indicated that persons deprived of liberty who suffer from serious chronic or terminal diseases should not remain in prisons unless States are able to ensure that they have adequate medical units to provide them with appropriate specialized care and treatment, and this includes facilities, equipment and qualified medical and nursing staff. In any case, and especially if someone is evidently ill, States have the obligation to ensure that a record or file is kept of the health and treatment of anyone who enters a detention center, either in the center itself or in the hospitals or clinics where treatment is received.[385]

238. In this case, following the diagnosis of Hodgkin's lymphoma, Manuela was prescribed chemotherapy. According to the medical record, the treatment she received was irregular. In particular, it can be seen that: (i) she was not taken to her April 2, 2009, appointment to receive chemotherapy until April 22, and during this time her tumor increased in size;[386] (ii) in January 2010, the treatment was postponed for a month,[387] and (iii) after receiving

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381 *Cf. Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 189.

382 *Cf.* Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folio 190).

383 *Cf. Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 177.

384 *Cf.* Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folio 191).

385 *Cf. Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 184.

386 *Cf.* Manuela's medical record in the Rosales National Hospital. Entry for April 22, 2009 (evidence file, folio 2640).

387 *Cf.* Manuela's medical record in the Rosales National Hospital. Entry for January 6, 2010 (evidence file, folio 2743).

chemotherapy on November 6, 2009, and on January 14, 2010, she was not taken to the subsequent follow-up appointments.[388]

239. Owing to the special position of guarantor that the State exercises over the person who is detained, and its consequent control of the evidence regarding their physical condition, detention conditions, and eventual medical care, it is the State that has the burden of proof to provide a satisfactory and convincing explanation of what happened and to disprove the arguments concerning its responsibility with valid probative elements.[389] The failure to submit evidence that clarifies the type of treatment that someone has received is particularly serious in cases that involve allegations relating to the right to health. In its position of guarantor, the State is responsible both for ensuring the rights of the individual in its custody, and for providing information and evidence on what happened to the detainee.[390] In the instant case, the State has not demonstrated that Manuela's failure to attend the hospital appointments could be attributed to the presumed victim; consequently, it must be presumed that the State was responsible for this omission.

240. The Court emphasizes that the medical services for persons deprived of liberty should be organized and coordinated with the general administration of the health care services, which means establishing expedite and adequate procedures for the diagnosis and treatment of patients, as well as for their transfer when their health situation requires special treatments in specialized prison establishments or in civil hospitals. To implement these obligations, health care protocols and agile and effective mechanisms for the transfer of prisoners are necessary, particularly in emergency situations and cases of serious illnesses.[391] In this case, Manuela was unable to attend one of her chemotherapy appointments in 2009; in 2010, the treatment was delayed by one month and, on at least two occasions, she was not taken to the hospital for follow-up medical appointments (*supra* para. 238). These deficiencies reveal that the State did not take the necessary measures to ensure that Manuela was transferred to the hospital to receive the medical treatment that she needed.

241. Additionally, the Court recalls that Article 5(2) of the Convention establishes that no one shall be subject to cruel, inhuman or degrading punishment, and that all persons deprived of their liberty must be treated with respect for the inherent dignity of the human person. In this case, Manuela's detention prevented her from receiving satisfactory medical care, so that her punishment of imprisonment also became inhuman punishment, contrary to the Convention.

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388 *Cf.* Manuela's medical record in the Rosales National Hospital. Entry for January 6, 2010 (evidence file, folio 2743), and Manuela's medical record in the Rosales National Hospital. Entry for February 18, 2010 (evidence file, folio 2735).

389 *Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 18, 2003. Series C No. 100, para. 138, *and Case of Quispialaya Vilcapoma v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2015. Series C No. 308, para. 118.

390 *Cf. Case of Bulacio v. Argentina, supra*, para. 138, *and Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 173.

391 Article 22 of the revised Standard Minimum Rules the Treatment of Prisoners. See also, Articles 25 and 26. The revised United Nations Standard Minimum Rules for the Treatment of Prisoners, also known as the "Mandela Rules," were amended to reflect the global consensus on certain minimum standards for the medical care of persons deprived of liberty, and have established that every prison shall have in place a health-care service tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs or with health issues that hamper their rehabilitation (Rule 25); and the need to maintain accurate, up-to-date and confidential individual medical files (Rule 26); that all prisons shall ensure prompt access to medical attention in urgent cases; that prisoners who require specialized treatment or surgery shall be transferred to specialized institutions or to civil hospitals; and that where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide prisoners referred to them with appropriate treatment and care (Rule 27). This amendment to the United Nations Standard Minimum Rules for the Treatment of Prisoners was adopted by the United Nations General Assembly on December 17, 2015. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

242. Therefore, the State failed to comply with the obligation to provide the presumed victim with accessible medical care, which constituted a violation of the rights to health and to personal integrity, established in Articles 26 and 5 of the American Convention.

B.5 The violation of the right to life and the alleged lack of investigation

243. The Court has indicated that, to determine the international responsibility of the State in cases of death in a medical context, the following must be proved: (a) that due to acts or omissions, a patient is denied access to health care in situations of medical emergencies or essential medical treatments, despite the foreseeable risk that this denial signifies for the patient's life, or (b) gross medical negligence,[392] and (c) the existence of a causal nexus between the action that has been proved and the harm suffered by the patient.[393] When the attribution of responsibility stems from an omission, it is necessary to verify the probability that the omitted conduct would have interrupted the causal process that brought about the harmful result. This verification must take into consideration any possible situation that indicated the special vulnerability of the person concerned,[394] such as the fact that they were in prison, and on this basis the measures adopted to protect them.[395]

244. In this case, the Court notes that Manuela died on April 30, 2010. The cause of her death was cardiorespiratory arrest and the diagnosis was Hodgkin's lymphoma.[396] According to expert witness Guillermo Ortiz:

> Hodgkin's lymphoma is one of the cancers that have the most favorable outcome when they are detected in time. That is to say, they can be 95% cured if they are detected in time. Unfortunately, in the case of [Manuela] it was detected belatedly and the treatment was too late and, therefore, it was not effective.[397]

245. The Court has verified various omissions in the medical attention provided to the presumed victim. Specifically, the State failed to comply with its obligations: (i) to perform a comprehensive examination of Manuela's health when she was hospitalized; (ii) to examine her health at the time she was detained, and (iii) to take the necessary measures to ensure that Manuela could receive medical treatment while she was deprived of liberty. If these omissions had not occurred, the probability that Manuela would die due to Hodgkin's lymphoma would have been reduced. Accordingly, the Court considers that the existence of a causal nexus in this case has been proved, and this demonstrates the failure to comply with the obligation to ensure Manuela's right to life.

246. Consequently, the State is responsible for the violation of the obligation to ensure the right to life contained in Article 4(1) of the American Convention in relation to Article 1(1) of this instrument.

247. The Court has also established that when a person dies while in the State's custody, the pertinent authorities have the duty to open, *ex officio* and immediately, a serious, impartial

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392 *Cf. Case of Ximenes Lopes v. Brazil*, *supra,* paras. 120 to 122, 146 and 150, and *Case of Cuscul Pivaral et al. v. Guatemala, supra*, para. 156.

393 *Case of Poblete Vilches et al. v. Chile, supra*, para. 148, and *Case of Cuscul Pivaral et al. v. Guatemala, supra*, para. 156.

394 *Cf. Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, para. 227, and *Case of Cuscul Pivaral et al. v. Guatemala, supra*, para. 156.

395 *Cf. Case of Ximenes Lopes v. Brazil.* Judgment of July 4, 2006. Series C No. 149, para. 125, and *Case of Cuscul Pivaral et al. v. Guatemala, supra*, para. 156.

396 *Cf.* Medical appraisal in the case of Manuela. Review of clinical and hospital treatment in the Cacaopera Health Unit and the San Francisco National Hospital" (evidence file, folio 191).

397 *Cf.* Expert opinion provided by Guillermo Antonio Ortiz Avendaño during the public hearing held in this case.

and effective investigation.[398] However, in cases such as this one, where there are no indications of violence in the death of the presumed victim (and nor was this alleged) since her death occurred in a hospital and it is reasonably probable that it was due to natural or accidental causes, a non-judicial investigation, such as the one conducted by the authorities where Manuela had been detained may be sufficient.[399] Manuela's death certificate records that the "disease or pathological condition that was the direct cause of death" was nodular sclerosis Hodgkin's lymphoma.[400] Therefore, the Court considers that it has not been proved that the State is responsible for the alleged failure to ensure access to justice, pursuant to the rights to judicial guarantees and to judicial protection recognized in Articles 8(1) and 25 of the American Convention, to the detriment of Manuela's family.

B.6 The impact of the discrimination that occurred in this case

248. The Court recalls that, as a crosscutting condition for the accessibility of health services, the State is obliged to ensure that everyone is treated equally.[401] Thus, pursuant to Article 1(1) of the American Convention, discriminatory treatment is not permitted based on a person's sex. In the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens* and permeates the whole legal system.[402]

249. The Court has also indicated that the right to equality guaranteed by Article 24 of the Convention has two dimensions (*supra* para. 156). The second dimension is material or substantive and requires the adoption of positive measures of promotion in favor of groups that have historically been marginalized or discriminated against owing to the factors mentioned in Article 1(1) of the American Convention. This means that the right to equality entails the obligation to adopt measures to ensure that the equality is real and effective; in other words, to correct existing inequalities, promote the inclusion and participation of historically marginalized groups, ensure to disadvantaged persons or groups the effective enjoyment of their rights and, in sum, provide everyone with the real possibility of enjoying the realization of material equality in their own cases. To this end, States must actively address situations of exclusion and marginalization.[403]

250. The duty to ensure material equality concurs with Articles 3 and 4 of the Convention on the Elimination of All Forms of Discrimination against Women, which establish:

> Article 3
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> States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development

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398 *Cf. Case of Vera Vera et al. v. Ecuador, supra,* para. 87, and *Case of the Landaeta Mejías Brothers et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of August 27, 2014. Series C No. 281, para. 253.

399 *Cf.* International Committee of the Red Cross, Guidelines for Investigating Deaths in Custody, October 2013, Article 1(2)(c). Available at: https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4126.pdf

400 Manuela's death certificate dated April 30, 2010 (evidence file, folios 3780 and 3783).

401 *Cf. Case of Poblete Vilches et al. v. Chile, supra*, para. 122, and *Case of Guachalá Chimbo et al. v. Ecuador, supra*, para. 166.

402 *Cf. Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 103, and *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 182.

403 *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 199*, and Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 167.

and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

251. The peremptory legal principle of the equal and effective protection of the law and non-discrimination signifies that States must refrain from creating discriminatory regulations or regulations that have discriminatory effects on different groups of the population when exercising their rights.[404] Accordingly, if a norm or practice that appears to be neutral has particularly negative repercussions on a person or group with specific characteristics, this should be considered indirect discrimination.[405]

252. The Court has recognized that the liberty and autonomy of women in the area of sexual and reproductive health has historically been limited, restricted or annulled based on negative and prejudicial gender stereotypes.[406] This was because, socially and cultural, men have been assigned a dominant role in the adoption of decisions concerning a woman's body and women are seen, quintessentially, as a reproductive being.[407] Nevertheless, women have the "right to receive dignified and respectful reproductive health care services and obstetric care, free from discrimination and any violence."[408]

253. This Court also considers that various structural disadvantages coalesced in Manuela and had an impact on her victimization. In particular, the Court underscores that Manuela was a poor illiterate woman who lived in a rural area. If the discrimination that has been alleged in this case is verified, these factors of vulnerability or sources of discrimination would have coalesced intersectionally, increasing the presumed victim's comparative disadvantages and causing a specific form of discrimination due to the confluence of all those factors.[409] Moreover, the Court stresses that those factors of discrimination coincide with the profile of most of the women who have been tried for abortion or aggravated homicide in El Salvador; they have little or no income, hardly any schooling, and reside in rural or marginal urban areas (*supra* para. 46).

254. The Court considers that the ambiguity of the laws on the medical professional secrecy and the reporting obligation that exists in El Salvador disproportionately affects women

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404 *Cf. Case of the Yean and Bosico Girls v. Dominican Republic.* Judgment of September 8, 2005. Series C No. 130, para. 141, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica, supra*, para. 286.

405 *Cf. Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica, supra*, para. 286. See also, Committee for the Elimination of Discrimination against Women, General recommendation No. 25 on temporary special measures (2004), footnote 1: "Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women.

406 *Case of I.V. v. Bolivia, supra*, para. 143.

407 *Case of I.V. v. Bolivia, supra*, para. 143.

408 Report of the Special Rapporteur on violence against women, its causes and consequences on a human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence. UN Doc. A/74/137, July 11, 2019, para. 76.

409 *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, supra*, para. 191.

because they have the biological capacity to conceive. As already mentioned, a belief exists among gynecologists that they must report cases of possible abortions, as in this case where Manuela was reported for a possible abortion. According to expert witness Guillermo Ortiz, this does not occur with other types of offense.[410] In addition, the Court notes that, according to the records, this type of report is not filed by the staff of private clinics, but only by the staff of public hospitals.[411] This reveals that the legislative ambiguity does not have an effect on women who have sufficient financial resources to be attended in a private hospital.

255. In the instant case, the medical staff gave priority to filing a report for a supposed offense over providing a medical diagnosis and treatment. In addition, this report, combined with the statement of the treating physician and the subsequent handing over of Manuela's medical record, was used in criminal proceedings against her, in violation of her rights to privacy and to health. All these actions were influenced by the perception that the prosecution of a presumed offense should prevail over a woman's rights, and this was discriminatory.

256. In sum, the Court concludes that, in this case, the State failed to ensure the right to health without discrimination, as well as the right to equality established in Articles 24 and 26, in relation to Article 1(1) of the Convention.

257. Furthermore, the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará" establishes the right of every woman to a life free from violence and that this right includes the right to be free from all forms of discrimination.[412] It also indicates that States must "refrain from engaging in any act or practice of violence against women and ensure that their authorities, officials, agents and institutions act in conformity with this obligation."[413] In this regard, the Court recalls that the protection of human rights is based on the acknowledgement of the existence of certain inviolable characteristics of the human persona that cannot legitimately be impaired by the exercise of public power. These are individual spheres that the State may not violate.[414] To ensure this protection, the Court has considered that it is not sufficient that States refrain from violating rights; rather, it is imperative that they adopt positive measures to be determined based on the particular needs for protection of the subject of law, due either to his personal situation or to the specific situation in which he finds himself.[415] The Court considers that the State obligation has special relevance when violations of the sexual and reproductive rights of woman are involved.[416]

258. The Convention of Belém do Pará has established parameters to identify when an act constitutes violence and its article 1 indicates that "violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere."[417] The Court has also indicated that gender-based violence "encompasses acts that inflict

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410 *Cf.* Expert opinion provided by Guillermo Antonio Ortiz Avendaño during the public hearing held in this case.

411 *Cf.* Expert opinion provided by David Ernesto Morales Cruz on March 4, 2021 (evidence file, folio 3944), and Human Rights Committee. Concluding observations on the seventh periodic report of El Salvador, UN Doc. CCPR/C/SLV/CO/7 of May 9, 2018, para. 15.

412 *Cf. Case of González et al. ("Cotton Field")v. Mexico, supra*, para. 394, and *Case of I.V. v. Bolivia, supra*, para. 250, both citing the Convention of Belém do Pará, Preamble and Article 6.

413 Convention of Belém do Pará, Article 7(a).

414 *Cf.* Advisory Opinion OC-6/86, *supra*, para. 21, and *Case of I.V. v. Bolivia, supra*, para. 250.

415 *Cf. Case of the Pueblo Bello Massacre v. Colombia.* Judgment of January 31, 2006. Series C No. 140, para. 111, and *Case of I.V. v. Bolivia, supra*, para. 250.

416 *Case of I.V. v. Bolivia, supra*, para. 250.

417 Convention of Belém do Pará, Article 1.

physical, mental or sexual harm or suffering, threats to commit such acts, coercion and other forms of deprivation of liberty."[418]

259. Based on the foregoing, the Court notes that, owing to the ambiguity of the laws on professional secrecy and the reporting obligation, if Manuela had recourse to the medical services to treat the obstetric emergency that jeopardized her health she could be reported, and this is what happened. Subjecting Manuela to this situation, which ended by totally ruining her life, in addition to discriminatory, constituted an act of violence against women. Consequently, the Court concludes that the State failed to comply with its obligation to refrain from any act or practice of violence against women and ensure that its authorities, officials, agents and institutions act in conformity with this obligation, contravening Article 7(a) of the Convention of Belém do Pará.

B.7 Conclusion

260. Based on the above, El Salvador is responsible for the violation of the rights recognized in Articles 4, 5, 11, 24 and 26 in relation to Articles 1(1) and 2 of the American Convention, to the detriment of Manuela. The State is also responsible for non-compliance with its obligations under Article 7(a) of the Convention of Belém do Pará.

VIII-4
RIGHT TO PERSONAL INTEGRITY OF THE FAMILY MEMBERS[419] [420] IN RELATION TO THE OBLIGATION TO RESPECT RIGHTS[421]

A. Arguments of the parties and the Commission

261. The ***representatives*** argued that "the Salvadoran State is internationally responsible for the violation of the right to personal integrity of the members of Manuela's family." They indicated that: (i) Manuela's father suffered serious mental health problems owing to the anguish of not knowing what would happen to his daughter, as well as to the treatment by the authorities, the financial difficulties to be able to visit Manuela, and realizing that he had signed a complaint against his daughter; (ii) Manuela's mother's physical and mental integrity were seriously affected as a result of the search of her home and the threats made by the authorities, the injustice that her daughter suffered, the helplessness she felt knowing that her daughter was dying without being able to see her, and the mistreatment she suffered at the hands of the prison staff when visiting her daughter in prison; (iii) Manuela's sons were significantly affected "because they lost their only parental reference," as well as due to stigmatization in their community for being the sons of someone who "killed her baby." The representatives also indicated that all this proved that the members of Manuela's family unit "suffered adverse effects and profound anguish owing to the arbitrary deprivation of Manuela's liberty." They also argued that there had been unlawful interference in Manuela's private and family life and, also, that her family did not have the financial resources to pay for travel and transportation expenses. On this basis, they also asked the Court to declare the international responsibility of the State for the violation of Articles 11(2), 17(1) and 19 of

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418 *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*. Judgment of November 25, 2006. Series C No. 160, para. 303, and *Case of I.V. v. Bolivia, supra*, para. 251**,** both citing UN, Committee for the Elimination of Discrimination against Women, General recommendation No. 19, *Violence against women.* 1992, para. 6.

419 Article 5 of the Convention.

420 Article 8(2) of the Convention.

421 Article 1(1) of the Convention.

the Convention. Neither the ***Commission*** nor the ***State*** presented arguments on the alleged violation of the right to personal integrity of the members of Manuela's family.

B. Considerations of the Court

262. The Court has repeatedly asserted that the next of kin of victims of human rights violations may, in turn, be victims.[422] The Court has considered that it is also possible to declare the violation of the right to mental and moral integrity of "direct family members" of victims and other individuals with close ties to those victims, owing to the additional suffering they have experienced as a result of the particular circumstances of the violations perpetrated against their loved ones and due to the subsequent acts or omissions of the state authorities in relation to those facts,[423] taking into account, among other matters, the steps taken to obtain justice and the existence of a close family relationship.[424]

263. Manuela's mother stated that she "still misses her daughter, and remembers her every day […]; [after what happened she fears and resents the authorities because] they went to her home to vilify her and her family […] [and] to separate her daughter from her children. This should never have happened. She suffers from nervousness and takes pills in order not to get ill."[425] Meanwhile, Manuela's father stated that he became "very anxious, felt lost, could find no peace of mind and had difficulty sleeping thinking about his daughter and feeling helpless knowing that she was ill and alone, far from her children, and in so much pain. He knew he should stay strong for his family and his grandsons, but his heart was not in it, he pretended to be well, but really he was a broken man […]."[426] He added that he "regretted that he had never learned how to read because, if he had known how to read, he would never have signed the note that the police gave him."[427]

264. Manuela's children were also affected by what happened to their mother. According to Manuela's mother, "[a]fter the death of [Manuela], the boys were sad, they grieved and they missed her a lot. They cried, they were angry and it was very difficult to console them. They waited for their mother."[428] Manuela's elder son stated that, when he went to visit his mother in the San Miguel prison, he "wanted to talk to her more, to be able to tell her more, but he could not because there was a police agent present during the visit and this frightened him. This situation did not allow him to tell his mother that he missed her, and this was very difficult for him. […] It still hurts him to relive that moment because it is the last memory he has of her."[429] He also indicated that he found it "very hard to grow up without his mother; […h]e misses her love […]. Even though he has few memories of her, he misses her and would like to have her in his life to talk to her and receive her advice."[430] Meanwhile, Manuela's younger son stated that "[i]t was painful and complicated to grow up without a mother. His life was different from that of other children owing to her absence and because he did not

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422 *Cf. Case of Castillo Páez v. Peru. Merits. Judgment of November 3, 1997.* Series C No. 34, fourth operative paragraph, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 217.

423 *Cf. Case of Blake v. Guatemala. Merits.* Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 217.

424 *Cf. Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 163, and *Case of Guachalá Chimbo et al. v. Ecuador. Merits, reparations and costs, supra*, para. 217.

425 Affidavit made by Manuela's mother on March 5, 2021 (evidence file, folio 3793).

426 Affidavit made by Manuela's father on February 26, 2021 (evidence file, folio 3799).

427 Affidavit made by Manuela's father on February 26, 2021 (evidence file, folio 3800).

428 Affidavit made by Manuela's mother on March 5, 2021 (evidence file, folio 3793).

429 Affidavit made by Manuela's elder son on February 26, 2021 (evidence file, folio 3803).

430 Affidavit made by Manuela's elder son on February 26, 2021 (evidence file, folio 3803).

have her guidance. […] He feels anger and frustration when thinking of the humiliations that his mother endured."[431]

265. Additionally, the Court notes that an expert opinion on the psychological impact, which the representatives presented to the Commission, concluded that Manuela's family suffered from "psychological effects that affect their daily life with symptoms and characteristics corresponding to post-traumatic stress as a result of the deprivation of liberty and the stigma that has remained even after the death of their daughter."[432]

266. The evidence in the case file allows the Court to confirm that Manuela's direct family experienced profound suffering and anguish that affected their mental and moral integrity owing to Manuela's detention, prosecution, imprisonment and death, which persist until today. Consequently, the Court concludes that the State violated the right to personal integrity recognized in Article 5(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Manuela's mother, father, and elder and younger son.

267. Regarding the alleged violations of Articles 11(2), 17(1) and 19 of the Convention, the Court notes that the facts related to those allegations are essentially the same as those that it has already examined in this chapter. Therefore, the Court finds that it is not necessary to rule on the alleged violations of the rights to private and family life, and to protection of the family, and the rights of the child.[433]

IX
REPARATIONS

268. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to make adequate reparation, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[434] The Court has also established that the reparations must have a causal nexus to the facts of the case, the violations declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must analyze the concurrence of these factors to rule appropriately and pursuant to law.[435] In addition, the Court finds that, in this case, the reparations should include an analysis that not only establishes the right of the victims to obtain reparation, but also incorporates a gender perspective in both their formulation and their implementation.[436]

269. Consequently, and based on the considerations set forth on the merits and on the violations of the Convention declared in this judgment, the Court will proceed to examine the claims presented by the Commission and the victims' representatives, as well as the observations made on these by the State, in light of the criteria established in its case law

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[431] Affidavit made by Manuela's younger son on February 26, 2021 (evidence file, folio 3807).

[432] Expert opinion on the psychological impact on the members of Manuela's family provided by Rosa Margarita O'Farrill Dominguez, Clinical psychologist and consultant on human rights on July 17, 2012 (evidence file, folios 1558 to 1560, 1562, and 1564).

[433] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 138, and *Case of Colindres Schonenberg v. El Salvador. Merits, reparations and costs.* Judgment of February 4, 2019. Series C No. 373, para. 92.

[434] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, paras. 24 and 25, and *Case of Garzón Guzmán et al. v. Ecuador. Merits, reparations and costs*. Judgment of September 1, 2021. Series C No. 434, para. 95.

[435] *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Grijalva Bueno v. Ecuador, supra*, para. 163.

[436] *Mutatis mutandis, Case of Guzmán Albarracín et al. v. Ecuador, supra,* para. 215.

concerning the nature and scope of the obligation to make reparation, in order to establish measures to redress the harm caused.[437]

A. Injured party

270. This Court considers that, pursuant to Article 63(1) of the Convention, anyone who has been declared a victim of the violation of any right recognized therein is the injured party. Therefore, the Court considers that Manuela, her mother, her father and her two sons are the "injured party" and, as victims of the violations declared in Chapter VIII, they will be considered beneficiaries of the reparations ordered by the Court.

B. Measures of satisfaction

B.1 Publication of the judgment

271. The ***representatives*** asked the Court to order the State to publish the official summary of the judgment "in the Official Gazette, and a national newspaper with widespread circulation, and on the websites of the Attorney General's Office, the Public Defenders' Unit of the Attorney General's Office, the Ministry of Education, the Human Rights Council of the Presidency, the Ministry of Justice and Public Security, the General Directorate of Prisons, and the Ministry of Public Health." They also asked that the State translate the content of the judgment "into an easy-to-read format to allow it to be understood by Manuela's family and others who do not have access to formal education.

272. The ***State*** indicated its willingness to publish the official summary of the judgment "in the Official Gazette and in a national newspaper, as well as on the institutional websites of the domestic institutions directly linked to the facts of the case within the framework of internal competences."

273. The Court establishes, as it has in other cases,[438] that the State must publish, within six months of notification of the judgment: (a) the official summary of the judgment prepared by the Court, once, in the Official Gazette and in a national newspaper with widespread circulation, in an adequate and legible font, and (b) this judgment in its entirety, available for at least one year, on the official websites of the Attorney General's Office, the Public Defenders' Unit of the Attorney General's Office, the Ministry of Education, the Human Rights Council of the Presidency, the Ministry of Justice and Public Security, the General Directorate of Prisons, and the Ministry of Public Health, in a manner that is accessible to the public from the initial page of the websites.

274. The State must advise the Court immediately it has made each of the publications ordered, regardless of the one-year time frame for presenting its first report established in the operative paragraphs of this judgment.

B.2 Public act to acknowledge international responsibility

275. The ***representatives*** asked that the State "organize a public act to acknowledge international responsibility and make a public apology in relation to the facts of this case." The ***State*** did not comment on this request.

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[437] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, *supra*, paras. 25 and 26, and *Case of Almeida v. Argentina. Merits, reparations and costs.* Judgment of November 17, 2020. Series C No. 416, para. 57.

[438] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 117.

276. The Court finds it necessary to establish, in order to repair the harm caused to the victims and to avoid a repetition of facts such as those of this case, that the State organize a public act to acknowledge international responsibility in relation to the facts of this case. During this act, reference must be made to the human rights violations declared in this judgment. Also, it should take place in a public ceremony in the presence of senior State officials and the members of Manuela's family or their representatives.[439] Furthermore, as it has in other cases,[440] the Court orders the State to disseminate this act as widely as possible through the media, including by radio, television and the social networks, in particular those belonging to the Ministry of Health and the Ministry of Justice and Public Security.

277. The State and the victims and/or their representatives, must reach agreement on the method of complying with the public act, as well as on the necessary details such as the date and place.[441]

B.3 Scholarships for Manuela's sons

278. The ***representatives*** asked the Court to order scholarships for Manuela's two sons. For Manuela's elder son, they requested a "full financial and educational scholarship so that he may complete his primary and secondary education and that he be provided with and ensured a tutor to support his studies" as well as a "full financial and educational scholarship so that he is able to study mechanics in the establishment of his choice, including transportation from his home to that establishment." For Manuela's younger son, the representatives requested a "full financial and educational scholarship so that he can undertake a university career, including post graduate studies in the area of systems engineering and computer science, to cover enrolment and tuition fees, academic supplies, transportation to visit his family in Cacaopera, attendance at congresses, additional courses if available, in the university of his choice, based on his personal interests, and for as long as his studies require." The ***State*** did not comment on this request.

279. The Court notes that what happened to Manuela caused significant changes for the life project of her sons and had an impact on their personal and professional development. Consequently, the Court considers that it is appropriate to order the State to grant a scholarship in public or private primary, secondary, technical and higher education establishments in El Salvador for both Manuela's sons, in agreement with them, so that they may complete primary and secondary education and undertake technical or university studies, at the graduate and/or postgraduate level, or vocational training.[442] Moreover, the scholarship may not be conditional on their obtaining notes that allow them to obtain a merit scholarship or depend on their academic performance and, rather, must be granted based on the fact that they are victims of the violations declared in this judgment. The scholarship must be granted from the time that the beneficiaries ask the State to provide it and until the conclusion of their higher technical or university studies and must cover all the expenses required for them to conclude such studies, including academic or educational supplies, and maintenance expenses. The victims or their legal representatives have six months from notification of this judgment to advise the State of their intention to receive these scholarships. In addition, they have 24 months from the completion of their secondary studies to inform the State of their

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439 *Cf. Case of Cantoral Benavides v. Peru, supra,* para. 81, and *Case of Guzmán Albarracín et al. v. Ecuador, supra*, para. 232.

440 *Cf.,* for example, Case of the Miguel Castro Castro Prison v. Peru, *supra,* para. 445, and *Case of Guzmán Albarracín et al. v. Ecuador, supra*, para. 233

441 *Cf. Case of Radilla Pacheco v. Mexico, supra,* para. 353, and *Case of Guzmán Albarracín et al. v. Ecuador, supra*, para. 233.

442 *Cf. Case of the Gómez Paquiyauri Brothers v. Peru. Merits, reparations and costs*. Judgment of July 8, 2004. Series C No. 110. para. 237, and *Case of López Soto et al. v. Venezuela, supra,* para. 311.

intention of receiving the scholarship for their technical or university studies, as well as with regard to the career that they decide to follow at that level.

C. Measure of rehabilitation

280. The ***representatives*** asked the Court to order the State to provide the highest quality medical and psychological treatment, completely free of charge and lifelong, to Manuela's mother and father, in the medical center of their choice.

281. The ***State*** indicated its willingness to "provide health care and psychological treatment to the victims determined by the Court, based on an initial comprehensive evaluation to determine their individual needs, and to be provided through the public health system, with primary care in the health centers nearest to their place of residence."

282. The Court has verified the serious impact that the facts of this case had on the physical integrity of Manuela's parents (*supra* para. 263). Consequently, it considers it appropriate that the State provide, free of charge and immediately, through specialized health institutions, the adequate and effective medical, psychological and/or psychiatric treatment required by Manuela's parents, including the free provision of medicines, following their informed consent and for as long as necessary. In addition, the treatments should be provided, insofar as possible, in the centers chosen by the beneficiaries. If there are no health centers nearby, the State must cover the costs of transportation and meals. The victims have 18 months from notification of this judgment to require the State to provide this treatment.[443]

D. Guarantees of non-repetition

283. Among the measures of non-repetition, the Court will order the State to amend the law. Compliance with the measures ordered herein cannot be obstructed by use of the principle of legal reservation that undermines women's rights. Therefore, the obligation to amend the law may be executed directly by the State's Executive Branch.[444]

D.1 Regulation of medical professional secrecy and its exceptions, and adaptation of the medical protocols and guidelines for attending to obstetric emergencies

284. The ***Commission*** asked the Court to order the State "to ensure the legal certainty of professional medical secrecy by adequate regulation resulting from the due weighting of the rights and interests concerned, and to establish a protocol to ensure protection of those rights and interests by medical staff in cases involving obstetric emergencies or abortion, that meets international standards and that establishes the grounds for exceptions in detail."

285. The ***representatives*** repeated the Commission's request, adding that the protocol should provide details of "the procedure for [revealing the medical secret] and a detailed list of the authorities with competence to request and to authorize this."

286. The ***State*** did not comment on these requests but, together with its final written arguments, presented several clinical guidelines and also the guidelines of the Ministry of Health relating to obstetric care.[445]

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443 *Cf. Case of Rosendo Cantú et al. v. Mexico, supra,* para. 253, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 114.

444 *Mutatis mutandis, Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, para. 135.

445 *Cf.* Ministry of Health of El Salvador. Clinical guidelines Gynecology and Obstetrics, February 2012 (evidence file, folios 5561 to 5812); Ministry of Health of El Salvador. Technical guidelines for obstetric procedures and surgery,

287. The Court recalls that, in the instant case, after suffering an obstetric emergency, Manuela was reported by her physician for the possible "perpetration of a crime."[446] Based on this report, Manuela was investigated for "the unlawful act of abortion."[447] The laws of El Salvador regulate medical professional secrecy ambiguously and, in practice, this has meant that, to avoid being sanctioned, medical personnel report women suspected of having committed the offense of abortion (*supra* paras. 213 to 216). Moreover, the confidentiality of medical records and the exceptional nature of their disclosure is not regulated sufficiently (*supra* para. 228). Consequently, the Court deems it pertinent that the State adopt, within two years of notification of this judgment, clear regulations on the scope of medical professional secrecy, the protection of medical records, and the exceptions, pursuant to the standards described in this judgment (*supra* paras. 211 to 228). These regulations should explicitly establish: (i) that medical and nursing staff do not have an obligation to report women who have received medical attention for possible abortions; (ii) that, in such cases, health personnel must observe medical professional secrecy when questioned by the authorities; (iii) that the failure of health personnel to report such cases does not entail administrative, criminal or any other type of reprisal, and (iv) the situations in which medical records can be disclosed, and clear safeguards for the protection of this information and the way in which it may be disclosed, requiring that this only occurs as the result of a reasoned order from a competent authority, following which, only the part required in the specific case may be disclosed. Until such regulations come into force, the Court finds it appropriate to order the State, as it has in other cases,[448] to refrain from applying the current laws concerning the obligation of health personnel to report possible cases of abortion.

288. In addition, the Court notes that the clinical and technical guidelines provided by the State lack clear directives on medical professional secrecy. Consequently, and in light of the context in which the facts occurred, the Court finds it necessary that the State adopt, within one year of notification of this judgment, a protocol on attention for women who require urgent medical care for obstetric emergencies. The protocol must be addressed to all public and private health care personnel in El Salvador, establishing clear criteria to ensure that, when attending to these women: (i) the confidentiality is ensured of the information to which the medical staff have access owing to their profession; (ii) the access to health services is not conditioned by their presumed perpetration of an offense or by the patients' cooperation in criminal proceedings, and (iii) the health personnel refrain from questioning the patients in order to obtain confessions or to report them. When elaborating this protocol, the State must take into account the criteria developed in this judgment and in the Court's case law, and it should conform to the standards described in paragraphs 211 to 228 of this judgment.

D.2 Adaptation of the regulation of the imposition of pretrial detention

289. The ***Commission*** asked the Court to order El Salvador to "ensure that, in both law and practice, the use of pretrial detention adheres to the standards described in [the Merits Report]." The ***representatives*** replicated the Commission's request. The ***State*** referred to

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2020 (evidence file, folios 5813 to 5914); Ministry of Health of El Salvador. Technical guidelines for the application of code orange in the health service network (RIIS), December 2017 (evidence file, folios 5915 to 5943); Ministry of Health of El Salvador. Technical guidelines for the application of code yellow in the health service network (RIIS), June 2016 (evidence file, folios 5949 to 5972), and Ministry of Health of El Salvador. Technical guidelines for the application of code red in the health service network (RIIS), July 2015 (evidence file, folios 5973 to 6006).

446 Report of the treating physician of February 27, 2008 (evidence file, folio 22).

447 Request for a search warrant of February 28, 2008 (evidence file, folio 27).

448 *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, supra, para. 212, and *Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs*. Judgment of June 20, 2005. Series C No. 126, para. 130(c).

its internal regulations, indicating the situations in which the imposition of pretrial detention is appropriate, and provided information on the progress achieved regarding other precautionary measures that did not require deprivation of liberty, such as electronic monitoring.

290. In this case, the Court has verified that the imposition of pretrial detention in the criminal proceedings against Manuela was based on a regulation that contravened the American Convention (*supra* paras. 103 to 112). The Court notes that the current Salvadoran Code of Criminal Procedure regulates the use of pretrial detention in the same way.[449] Therefore, the Court considers that the State, within two years, should amend its procedural legislation in order to make it compatible with the standards for pretrial detention developed in the Court's case law, as established in paragraphs 99 to 112 of this judgment.

D.3 Awareness-raising and training for public officials

291. The ***Commission*** asked the Court to order the State to "conduct proper training of public defenders, prosecutors, judges, and other judicial officials aimed at eliminating the use of discriminatory stereotypes on the role of women, taking into account their negative impact on criminal investigations and the assessment of evidence, as well as on criminal responsibility in judicial decisions" and to "review and adjust discriminatory institutional practices in criminal investigations and within the healthcare sector." It also asked that the State reinforce "the full effectiveness of public defense, particularly in cases involving the possible imposition of severe punishments, including disciplinary measures ensuring accountability for acts or omissions that constitute manifest negligence."

292. The ***representatives*** asked that the State "provide training to eliminate the use of discriminatory stereotypes concerning the role of women taking into account their negative impact in criminal investigations and in the assessment of evidence and criminal responsibility in judicial decisions," and also "permanent education and training programs for all professionals who work in health institutions, the police and the judiciary, on the appropriate treatment of obstetric emergencies, professional secrecy, pregnancy, gender, human rights, and the prevention of torture." They asked that this training be provided: "(i) in the university careers of medicine, nursing, law, psychology and social work; (ii) to the health personnel throughout the country; (iii) to forensic physicians, and (iv) to agents of justice, including public defenders, through the corresponding judicial academy." Similarly, they asked the Court to order the State "to reinforce the full effectiveness of public defenders, particularly in cases that involve the possible imposition of severe punishments, including disciplinary measures ensuring accountability for acts or omissions that constitute manifest negligence."

293. The ***State*** indicated its intention of advancing towards "measures relating to the permanent education and training of public officials and employees." It also advised that it had "developed a permanent training program to eliminate discriminatory stereotypes concerning the role of women addressed, in particular, at enhancing the knowledge, capabilities and competences of public servants, including public defenders, prosecutors, judges and other judicial officials, as well as of auxiliary organs of the administration of justice." Thus, for example, the State was working "on the implementation of specialized technical training for the exercise of a professional defense in cases of the interruption of the gestation of the fetus"; it was developing "a specialized training program on human rights, addressed, above all, at judges and judicial agents," and the Prosecutor General had ordered the inclusion or strengthening of components in the training program for auxiliary prosecutors on "the elimination of discriminatory stereotypes concerning the role of women and their

[449] *Cf.* Legislative Assembly of the Republic of El Salvador. Code of Criminal Procedure, Decree Law No. 733, articles 329 and 331.

negative impact on criminal investigations and the assessment of the evidence." In the area of health care, "women facing obstetric problems are attended based, above all, on the procedures established in the [health] manuals and guidelines." It also indicated that, in order to reinforce the professional capacity of public defenders, the Attorney General "had imparted training sessions that contribute to improving the role of the defense in complex cases and to compliance with the mandate of filing pertinent remedies at each procedural stage."

294. The Court recognizes the important progress that the State has made in training its public officials in the area of human rights, the use of stereotypes against women subject to criminal prosecution, and medical attention for obstetric emergencies. Nevertheless, in this case, the Court considers it necessary for the State to adopt, within one year, an awareness-raising and training program for both judicial officials and also the health personnel of the Rosales National Hospital. In the case of the former, the State must adopt permanent education and training programs for judicial officials who intervene in criminal proceedings against women accused of abortion or infanticide, including public defenders, on the standards developed by the Court in this case in relation to the discriminatory nature of the use of presumptions and gender stereotypes in the investigation and criminal prosecution of women accused of such offenses; the credibility and weight given to women's voices, arguments and testimony, as parties and witnesses, and the effect of the inflexible standards (stereotypes) often developed by judges and prosecutors for what they consider to be appropriate behavior for women.[450] In addition, it must explain the restrictions to the use of handcuffs or other similar devices on women who are about to give birth, during the delivery, or in the period immediately after this, or who have suffered obstetric emergencies, pursuant to the standards developed in paragraphs 198 to 200 of this judgment.

295. In the case of health personnel, the Court deems it pertinent to order the State to design and implement, within the same time frame, a training course on medical professional secrecy for the nursing and medical staff of the Rosales National Hospital, based on the standards developed in this judgment concerning the scope of medical professional secrecy and its exceptions, and on gender stereotypes, as well as on the protocol ordered by this Court for the attention of women who require urgent medical care for obstetric emergencies (*supra* para. 288).

D.4 Adaptation of the criminal dosimetry for infanticide

296. In the instant case, the Court has verified that the imposition on Manuela of a sentence of 30 years' imprisonment was based on a regulation that failed to take into account the particular situation of women during the perinatal period, and this is contrary to the American Convention. Therefore, the Court considers that the State must, within two years, amend its criminal laws in order to make them compatible with the standards concerning the proportionality of the punishment in this type of case, as established in paragraphs 161 to 172 of this judgment. While this amendment is being made, the Court recalls that state authorities and, in particular, judges have the obligation to apply a control of conventionality in their decisions.

D.5 Sexual and reproductive education program

297. The ***Commission*** asked that the Court order the State to "establish effective mechanisms to inform women at the local level, particularly poor women living in rural areas, of their rights with regard to sexual and reproductive health." In addition, the ***representatives*** requested that the State organize information campaigns on sexual and

[450] *Cf.* CEDAW, General recommendation No. 33 on women's access to justice, CEDAW/C/GC/33, August 3, 2015, para. 29.c.

reproductive health. The ***State*** indicated that the Salvador Institute for the Advancement of Women had undertaken actions "to increase the information on their rights available to women at the local level through the Municipal Committees for the Prevention Of Violence, mobile information units, awareness-raising campaigns, advisory committees, and the Social Comptroller's Office. Also, by the elaboration of municipal plans for equality and prevention of violence against women, and the National Intersectoral Strategy to Prevent Child and Adolescent Pregnancies."

298. The Court appreciates the efforts made by the State to provide training in this regard. However, it finds it pertinent to order that, within two years, the State design and implement, within the school curriculum, special content "on sexuality and reproduction that is comprehensive, non-discriminatory, evidence-based, scientifically accurate and age-appropriate, [... and] that take[s] into account the evolving capacities of children and adolescents."[451] During the first year after notification of this judgment, the State must report on the progress made in the design and implementation of this measure.

D.6 Attention in cases of obstetric emergencies

299. The ***Commission*** recommended "review and adapt discriminatory institutional practices within the […] health sector." The ***representative***s asked that the State "adopt health protocols that ensure comprehensive health care (including for sexual and reproductive health) for girls and women in El Salvador, in keeping with the highest international human rights standards."

300. The Court notes that the State possesses various Ministry of Health manuals and guidelines concerning obstetric care.[452] However, it finds it necessary to order the State to take forthwith the measures required to ensure comprehensive medical attention for women who suffer obstetric emergencies. The Court will monitor compliance with this measure for three years.

E. Compensation

301. The ***Commission*** indicated that the State should "adopt measures to provide financial compensation and satisfaction for the non-pecuniary damage. Taking Manuela's death into account, these measures should be implemented in favor of her family unit."

E.1 Pecuniary damage

302. The ***representatives*** asked the Court to establish the sum of US$200,000.00 as consequential damage, to be distributed among the members of Manuela's family, arguing that the Court should take into account: (i) the elevated cost of the transportation, board and lodging for the family members to visit her in the hospital and, subsequently, in prison; (ii) the expenses relating to Manuela's burial; (iii) the fact that the family members had actively sought to obtain justice and to establish the truth of what happened, which meant that they had to abandon their daily occupations. The representatives indicated that, given that nine

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[451] The CESCR has ruled similarly in General Comment No 22 on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), paras. 9 and 49.

[452] *Cf.* Ministry of Health of El Salvador. Clinical guidelines Gynecology and Obstetrics, February 2012 (evidence file, folios 5561 to 5812); Ministry of Health of El Salvador. Technical guidelines for obstetric procedures and surgery, 2020 (evidence file, folios 5813 to 5914); Ministry of Health of El Salvador. Technical guidelines for the application of code orange in the health service network (RIIS), December 2017 (evidence file, folios 5915 to 5943); Ministry of Health of El Salvador. Technical guidelines for the application of code yellow in the health service network (RIIS), June 2016 (evidence file, folios 5949 to 5972), and Ministry of Health of El Salvador. Technical guidelines for the application of code red in the health service network (RIIS), July 2015 (evidence file, folios 5973 to 6006).

years had passed since the events occurred, the family did not have the vouchers for such expenses; therefore, they asked the Court to establish an amount, based on equity. In the case of loss of earnings, they asked for "the payment of US$92,060.00 in favor of the members of Manuela's family as a result of the loss of earnings corresponding to the life that Manuela would have had if she had not died for causes attributable to the State." To calculate this amount, they indicated that "life expectancy was 71 years to 2010" and the minimum wage was "US$224.81."

303. The ***State*** requested, with regard to the consequential damage: (1) "verification of the costs that may already be reflected for this concept in the items corresponding to costs and expenses," and (2) that "a reasonable amount should be assessed for compensation," because "there was no relationship between the possible financial capacity of Manuela's family and the costs incurred." Regarding loss of earnings, the State indicated that "Manuela worked in subsistence agricultural production and also in the informal sector and this did not guarantee a permanent income." Therefore, the State argued that the measures of reparation should not be "appreciably disproportionate to the extent of the damage, or the nature of the act or omission that was attributed to it"; consequently, "when the measures requested are disproportionate, the result can only be that they are determined to be inadmissible, without this in any way affecting the duty to redress the harm caused."

304. In its case law, this Court has developed the concept that pecuniary damage supposes the loss of, or detriment to, the income of the victims, the expenses incurred owing to the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case.[453]

305. The Court notes that, even though no expense vouchers were provided, it can be presumed that Manuela's family incurred different expenses owing to the her detention and hospitalization, and the actions taken in the search for justice. Therefore, the Court finds it reasonable to establish the sum of US$20,000.00 (twenty thousand United States dollars), as compensation for consequential damage, and this must be delivered in equal parts to Manuela's parents, with each one receiving US$10,000.00 (ten thousand United States dollars).

306. In addition, since it has been determined that the sentence and subsequent death of Manuela constituted violations of the American Convention, it is possible to apply the criteria concerning compensation for Manuela's loss of earnings, which covers the earnings that she would have received during her probable life time. Consequently, the Court finds it reasonable to establish the sum of US$60,000.00 (sixty thousand United States dollars), as compensation for pecuniary damage, which must be delivered to Manuela's sons, with her elder son receiving US$30,000.00 (thirty thousand United States dollars) and her younger son US$30,000.00 (thirty thousand United States dollars).

E.2 Non-pecuniary damage

307. The ***representatives*** requested payment of "US$100,000.00 for the concept of non-pecuniary damage, to be distributed in equal parts" between Manuela's mother, father and two sons. In addition, they requested payment of US$30,000.00 for each of the victims. The ***State*** did not comment on this request.

308. In its case law, this Court has developed the concept of non-pecuniary damage, and has established that this may include both the suffering and affliction caused to the direct victim and his close family, and also the impairment of values of great significance to the individual,

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[453] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 130.

and also the alterations of a non-pecuniary nature in the living conditions of the victims or their families.[454]

309. Considering the circumstances of this case, the violations committed, the different levels of suffering caused and experienced, the time that has passed, the denial of justice, the change in the living conditions of some family members, the proven violations of the personal integrity of the victim's family members and the other consequences of a non-pecuniary nature that they have experienced, the Court will now establish compensation for non-pecuniary damage in favor of the victims.

310. First, the Court considers that it is evident that the circumstances surrounding Manuela's incarceration, criminal prosecution and lack of medical treatment that led to her death, caused fear and profound suffering. On this basis, the Court considers that Manuela should be compensated for non-pecuniary damage and finds that a payment of US$100,000.00 (one hundred thousand United States dollars) is reasonable. Taking into account the effects that those facts have had on the life of Manuela's family members and, especially, her sons, this sum must be divided as follows: US$30,000.00 (thirty thousand United States dollars) to Manuela's elder son; US$30,000.00 (thirty thousand United States dollars) to Manuela's younger son; US$20,000.00 (twenty thousand United States dollars) to Manuela's mother, and US$20,000.00 (twenty thousand United States dollars) to Manuela's father.

311. Second, the Court considers that the lives of the members of Manuela's family were affected as a result of what happened to the victim and they have experienced great suffering which has had repercussions on their life projects. Consequently, the Court finds it reasonable to establish the sum of US$40,000.00 (forty thousand United States dollars) in favor of the members of Manuela's family for non-pecuniary damage. This compensation must be delivered as follows: (i) US$10,000.00 (ten thousand United States dollars) in favor of Manuela's mother; (ii) US$10,000.00 (ten thousand United States dollars) in favor of Manuela's father, and (iii) US$10,000.00 (ten thousand United States dollars) in favor of each of Manuela's sons.

F. Other measures requested

312. The ***Commission*** asked the Court to order El Salvador to: (i) investigate the administrative, disciplinary or other responsibilities derived from the human rights violations declared in the Merits Report; (ii) ensure that the concept of *in flagrante delicto* is applied pursuant to the standards described in the Merits Report, and (iii) "ensure that under the regulations and in practice, individuals convicted of a crime can appeal to a higher authority for a comprehensively review of the guilty verdict."

313. The ***representatives*** asked: (i) that Manuela's elder son be provided with "specialized attention and therapy to help him overcome the consequences of the meningitis he suffered, during which he did not receive medical treatment owing to a lack of resources," and given "access to an entrepreneurship program or granted a specific sum of money to establish a business or seed capital to develop a productive project"; (ii) that Manuela's younger son be provided with a laptop computer to be able to apply the knowledge acquired in the technical field in which he is interested," "a guaranteed position in one of the Government's institutions in accordance with his professional profile of systems engineer and computer technician" or else "access to an entrepreneurship program or granted a specific sum of money to establish a business or seed capital to develop a productive project"; and that the State (iii) ensure Manuela's parents access to social security, retroactive to 2008, and particularly, that their retirement pensions and funeral expenses are covered; (iv) ensure the victims have decent

[454] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, supra*, para. 84, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 132.

housing; (v) grant Manuela's parents a plot of land apt for agriculture near their current dwelling; (vi) designate a ward in the maternity or oncology unit of the Rosales National Hospital, with the name "Manuela"; (vii) erect "a monument as a permanent public tribute in memory of the victims of criminalization due to obstetric emergencies"; (viii) regulate *in flagrante delicto* in keeping with the standards of the inter-American system; (ix) adopt the necessary measures to generate a quantitative and qualitative report on the magnitude of the criminalization of obstetric emergencies in El Salvador, as well as to identify short-, medium- and long-term measures to eliminate the existence of such cases, make adequate reparation to the victims, and ensure that there will be no new prosecutions; (x) review the sentences of women criminally punished for obstetric emergencies, and (xi) regulate "the remedy of appeal appropriately so that it abides by inter-American standards and guarantees that those sentenced in second instance have access to a comprehensive review of the guilty verdict by a judgment ordering a new trial or an acquittal."

314. The ***State*** advised that it was investigating, "through the prosecution service, the actions of the public defender in order to determine the administrative, disciplinary or other responsibilities, and the appropriate measures to take." El Salvador did not refer to the other requests made by the Commission and the representatives.

315. The Court finds that the delivery of this judgment and the reparations ordered in this chapter are sufficient and adequate to redress the violations suffered by the victims; therefore, it does not find it necessary to order the preceding measures.

G. Costs and expenses

316. The ***representatives*** requested the reimbursement of costs and expenses corresponding to disbursements for several days of board and lodging and transportation to assist the presumed victims and to develop arguments prior to the presentation of the pleadings and motions brief, amounting to US$11,087.01 for the *Colectiva Feminista para el Desarrollo Local* of El Salvador, and US$54,638.67 for the Center for Reproductive Rights. Regarding the sum requested for the Center for Reproductive Rights, the representatives indicated that "[o]ther undocumented expenses exist and it is requested that they are calculated, in equity," at US$29,241.24. In their final written arguments, they requested the additional payment of US$4,180.71 in favor of the *Colectiva Feminista para el Desarrollo Local* of El Salvador and US$6,182.07 in favor of the Center for Reproductive Rights. In total, they asked for the payment of US$15,267.72 for the *Colectiva Feminista para el Desarrollo Local* of El Salvador and US$60,820.74 for the Center for Reproductive Rights.

317. The ***State*** underscored that the expense vouchers provided by the *Colectiva Feminista para el Desarrollo Local* of El Salvador corresponded to "expenses that have been charged to cooperation projects, whose funds are non-reimbursable." Regarding the Center for Reproductive Rights, the State indicated that "the expenses reported correspond only to the item of air fares and travel without proving that this was specifically related to the case." Therefore, it asked the Court to determine the expenses that were clearly related to and "incurred exclusively for the purpose of this case and that are sufficiently authenticated."

318. The Court reiterates that, according to its case law,[455] costs and expenses form part of the concept of reparation, because the actions taken by the victims in order to obtain justice, at both the internal and the international level, entail disbursements that should be compensated when the international responsibility of the State has been declared in a judgment. Regarding reimbursement of costs and expenses, the Court must prudently assess their scope, which includes the expenses incurred before the authorities of the domesticl

[455] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 138.

jurisdiction, and also those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties provided that the *quantum* is reasonable.[456]

319. This Court has indicated that "the claims of the victims or their representatives for costs and expenses, and the evidence supporting them, must be presented to the Court at the first procedural moment granted to them, that is, in the pleadings and motions brief, without prejudice to those claims being updated subsequently, in keeping with the new costs and expenses incurred due to the proceedings before this Court."[457] In addition, the Court reiterates that it is not sufficient merely to forward probative documents; rather, the parties are required to include arguments that relates the evidence to the fact that it is considered to represent and that, in the case of alleged financial disbursements, the items and their justification are clearly established.[458]

320. Taking into account the sum requested by the representatives and the expense vouchers presented, the Court decides to establish, in equity, the payment of: a total of US$14,500.00 (fourteen thousand five hundred United States dollars) for costs and expenses in favor of the *Colectiva Feminista por el Desarrollo Local* of El Salvador and a total of US$33,000.00 (thirty three thousand United States dollars) for costs and expenses in favor of the Center for Reproductive Rights. These sums must be delivered directly to the said organisations. During the stage of monitoring compliance with this judgment, the Court may establish that the State reimburse the victims or their representatives any reasonable expenses incurred at that procedural stage.[459]

H. Method of compliance with the payments ordered

321. The State shall make the payments of the compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses established in this judgment directly to the persons and organizations indicated herein, within one year of notification of this judgment, without prejudice to making the complete payment earlier, and in keeping with the following paragraphs.

322. If any of the beneficiaries is deceased or dies before they receive the respective sum, this shall be delivered directly to their heirs, pursuant to the applicable domestic law.

323. The State shall comply with its pecuniary obligations by payment in United States dollars.

324. If, for causes that can be attributed to the beneficiaries, it is not possible to pay the amounts established within the indicated time frame, the State shall deposit such amounts in their favor in a deposit account or certificate in a solvent Salvadoran financial institution, in United States dollars, and in the most favorable financial conditions permitted by banking law

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456 *Cf. Case of Garrido and Baigorria v. Argentina, supra,* para. 82, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 138.

457 *Cf. Case of Garrido and Baigorria v. Argentina, supra,* para. 79, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 139.

458 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra,* para. 277, and *Case of Garzón Guzmán et al. v. Ecuador, supra*, para. 139.

459 *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs.* Judgment of September 1, 2010. Series C No. 217, para. 29, and *Case of Bedoya Lima et al. v. Colombia. Merits, reparations and costs.* Judgment of August 26, 2021. Series C No. 431, para. 214.

and practice. If the corresponding amount is not claimed, when ten years have passed, the sum shall be returned to the State with the interest accrued.

325. The amounts allocated in this judgment as measures of reparation for damage and to reimburse costs and expenses shall be delivered in full, without any deductions derived from possible taxes or charges.

326. If the State should incur in arrears, it shall pay interest on the amount owed corresponding to banking interest on arrears in El Salvador.

X
OPERATIVE PARAGRAPHS

327. Therefore,

THE COURT

DECIDES,

Unanimously:

1. To reject the preliminary objection concerning the alleged time-barred presentation of the petition, pursuant to paragraphs 20 and 21 of this judgment.

2. To reject the preliminary objection concerning the Commission's alleged failure to assess the progress made in complying with the Merits Report, pursuant to paragraph 23 of this judgment.

DECLARES,

Unanimously, that:

3. The State is responsible for the violation of the rights to personal liberty and the presumption of innocence, pursuant to Articles 7(1), 7(3) and 8(2) of the American Convention on Human Rights, in relation to the obligations to respect and to ensure the rights and the duty to adopt domestic legal provisions established in Articles 1(1) and 2 of this instrument, to the detriment of Manuela, pursuant to paragraphs 97 to 112 of this judgment

Unanimously, that:

4. The State is responsible for the violation of the right to defense, the right to be tried by an impartial court, the presumption of innocence, the duty to provide a statement of reasons, the obligation not to apply laws in a discriminatory manner, the right not to be subjected to cruel, inhuman or degrading punishment and the obligation to ensure that the purpose of a prison sentence is the social rehabilitation and reform of those convicted, pursuant to Articles 8(1), 8(2), 8(2)(d), 8(2)(e), 24, 5(2) and 5(6) of the American Convention on Human Rights, in relation to the obligations to respect and to ensure the rights without discrimination and the duty to adopt domestic legal provisions established in Articles 1(1) and 2 of this instrument, to the detriment of Manuela, pursuant to paragraphs 118 to 173 of this judgment.

By six votes to one that:

5. The State is responsible for the violation of the rights to life, personal integrity, privacy, equality before the law and health, pursuant to Articles 4, 5, 11, 24 and 26 of the American Convention on Human Rights, in relation to the obligations to respect and to ensure the rights without discrimination and the duty to adopt domestic legal provisions established in Articles 1(1) and 2 of this instrument, and also for failing to comply with the obligations of Article 7(a) of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará," to the detriment of Manuela, pursuant to paragraphs 180 to 260 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

Unanimously, that:

6. The State is responsible for the violation of the right to personal integrity, recognized in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Manuela's mother, father, elder and younger son, pursuant to paragraphs 262 to 266 of this judgment.

AND ESTABLISHES:

Unanimously, that:

7. This judgment constitutes, *per se*, a form of reparation.

Unanimously, that:

8. The State shall make the publications indicated in paragraph 273 of this judgment.

Unanimously, that:

9. The State shall hold a public act to acknowledge international responsibility, pursuant to paragraphs 276 and 277 of this judgment.

Unanimously, that:

10. The State shall grant scholarships to the Manuela's elder and younger son, pursuant to paragraph 279 of this judgment.

Unanimously, that:

11. The State shall provide, free of charge and immediately, in a prompt, adequate and effective manner, medical, psychological and/or psychiatric treatment to Manuela's parents, pursuant to paragraph 282 of this judgment.

By six votes to one that:

12. The State shall regulate the obligation of medical professional secrecy and the confidentiality of medical records, pursuant to paragraph 287 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

Unanimously, that:

13. The State shall elaborate an action protocol for the treatment of women who require emergency medical attention for obstetric emergencies, pursuant to paragraph 288 of this judgment.

Unanimously, that:

14. The State shall adapt its regulations on pretrial detention, pursuant to paragraph 290 of this judgment.

By six votes to one that:

15. The State shall design and implement an awareness-raising and training course for judicial officials, as well as the health personnel of the Rosales National Hospital, as established in paragraphs 294 and 295 of this judgment.

Dissenting Judge Eduardo Vio Grossi.

Unanimously, that:

16. The State shall adapt its regulation concerning the dosimetry of the sentence for infanticide, pursuant to paragraph 296 of this judgment.

Unanimously, that:

17. The State shall design and implement an education program on sexuality and reproduction, pursuant to paragraph 298 of this judgment.

Unanimously, that:

18. The State shall take the necessary measures to ensure comprehensive care in cases of obstetric emergencies, pursuant to paragraph 300 of this judgment.

Unanimously, that:

19. The State shall pay the amounts established in paragraphs 305, 306, 310, 311 and 320 of this judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, pursuant to paragraphs 321 to 326 of this judgment.

Unanimously, that:

20. The State, within one year of notification of this judgment, shall provide the Court with a report on the measures taken to comply with it, without prejudice to the provisions of paragraph 274 of this judgment.

Unanimously, that:

21. The Court will monitor full compliance with this judgment, in exercise of its authority and in fulfillment of its duties under the American Convention on Human Rights, and will consider this case closed when the State has complied fully with its provisions.

DONE, at San José, Costa Rica, on November 2, 2021, in the Spanish language, by means of a virtual session.

Judges Humberto Sierra Porto, Eugenio Raúl Zaffaroni, and Ricardo Pérez Manrique informed the Court of their concurring opinions. Judge Eduardo Vio Grossi informed the Court of his partially dissenting opinion.

I/A Court HR. *Case of Manuela et al. v. El Salvador. Preliminary objections,* merits, reparations and costs. Judgment of November 2, 2021. Judgment adopted in a virtual session, in San José, Costa Rica.

Elizabeth Odio Benito
President

L. Patricio Pazmiño Freire

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Eduardo Ferrer Mac-Gregor Poisot

Eugenio Raúl Zaffaroni

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Secretary

So ordered

Elizabeth Odio Benito
President

Pablo Saavedra Alessandri
Secretary

PARTIALLY DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF MANUELA *ET AL. V.* EL SALVADOR

JUDGMENT OF NOVEMBER 2, 2021,
(Preliminary objections, merits, reparations and costs)

1. This partially dissenting opinion with regard to the judgment in reference,[1] is issued to explain why I have dissented from three of its operative paragraphs, as indicated below.

2. Evidently, and as in the case of the other separate opinions issued by the undersigned, this opinion is issued, on the one hand, with full respect for the Inter-American Court of Human Rights[2] and all its members and, on the other hand, in accordance with both the provisions that regulate the Court's decisions,[3] and also those relating to individual opinions,[4] all of this in order to collaborate towards the fullest understanding of the decisions taken.

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[1] Hereinafter, the judgment.

[2] Hereinafter, the Court.

[3] Article 16 of the Court's Rules of Procedure*:* "1. The President shall present, point by point, the matters to be voted upon. Each Judge shall vote either in the affirmative or the negative; there shall be no abstentions.
2. The votes shall be cast in reverse order of precedence as established in Article 13 of the Statute.
3. The decisions of the Court shall be adopted by a majority of the Judges present at the time of the voting.
4. In the event of a tie, the President shall have a casting vote."

Art. 32(1)(a) of the Court's Rules of Procedure: "The Court shall make public: its judgments, orders, opinions, and other decisions, including separate opinions, dissenting or concurring, whenever they fulfill the requirements set forth in Article 65(2) of these Rules."

[4] Art. of the Convention: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment."

Art. 24(3) of the Court's Statute: "The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate."

Art. 65(2) of the Court's Rules of Procedure: "Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the President so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."

I. RIGHT TO HEALTH

3. This separate opinion on the judgment is submitted because I do not share the reference made in its fifth operative paragraph[5] to Article 26[6] of the American Convention on Human Rights[7] in order, consequently, to make the violation of rights to which this article alludes justiciable before the Court.

4. In keeping with the reasons given in the other separate opinions that the undersigned has issued in this regard,[8] which are hereby ratified, and in accordance with the considerations in a preceding separate opinions regarding Article 26,[9] I do not agree with the provisions of the said fifth operative paragraph because, among other reasons and in sum, the Convention only regulates the rights that in it are "recognized"[10] "*set*

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[5] "The State is responsible for the violation of the rights to life, personal integrity, privacy, equality before the law and health, pursuant to Articles 4, 5, 11, 24 and 26 of the American Convention on Human Rights, in relation to the obligations to respect and to ensure the rights without discrimination and the duty to adopt domestic legal provisions established in Articles 1(1) and 2 of this instrument, and also for failing to comply with the obligations of Article 7(a) of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará," to the detriment of Manuela, pursuant to paragraphs 180 to 260 of this judgment."

[6] "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means and subject to available resources, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."
Hereinafter, Article 26.

[7] Hereinafter, the Convention.

[8] Partially dissenting, *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala, of October 6, 2021;* Concurring, *Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras,* of August 31, 2021; Partially dissenting, *Case of Guachalá Chimbo et al. v. Ecuador*, of March 26, 2021; Dissenting*, Case of Casa Nina v. Peru,* of November 24, 2020*;* Partially dissenting, *Case of the Workers of the Fireworks Factory in Santo Antonio de Jesús and their families v. Brazil,* of July 15, 2020; Dissenting*, Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, of February 6, 2020;* Partially dissenting, *Case of Hernández v. Argentina,* of November 22, 2019; Partially dissenting*, Case of Muelle Flores v. Peru, of March 6, 2019;* Partially dissenting, *Case of San Miguel Sosa et al. v. Venezuela,* of February 8, 2018; Partially dissenting*, Case of Lagos del Campo v. Peru,* of August 31, 2017, and Separate, *Case of the Dismissed Employees of PetroPeru et al. v. Peru,* of November 23, 2017.

[9] *Case of the Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala,* of October 6, 2021.

[10] Art. 1(1): "Obligation to Respect Rights. The 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."

Art. 22(4): "Freedom of Movement and Residence. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest."

Art. 25(1): "Right to Judicial Protection. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

Art. 29(a*)*""Restrictions regarding Interpretation. No provision of this Convention shall be interpreted as*:* permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.*"*

Art. 30: "Scope of Restrictions. The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."

Art.31: "Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention."

forth"[11], "guaranteed,"[12] "protected" *(consagrado)*[13] or "protected" (*protegido),*[14] which is not the case of the rights referred to in Article 26 as "*derived*" from the Charter of the Organization of American States;[15] because, the Convention itself refers to such rights separately from the civil and political rights, according them a different treatment to that given to the latter; because Article 26 is entitled "Progressive Development" so that the obligation that it consequently established is to adopt measures to realize those rights and not that they are already justiciable before the Court; because those rights are referred to by the OAS Charter as "basic objectives"[16] and "principles and mechanisms";[17] that is, as components of public policies that should be adopted to realize the said rights; because even the authoritative history of Article 26 supports the preceding interpretation, and finally, because this is in keeping with the "reinforcing or complementing" nature of the protection of the Inter-American Convention.[18] In other words, the interpretation of this article provided in the judgment does not correspond to the provisions of Article 31(1) of the Vienna Convention on the Law of Treaties.[19]

5. Lastly, it should be added that the undersigned truly regrets that, by voting against the said fifth operative paragraph for the reason indicated above, he has had to do so also with regard to the other provisions of the Convention included in this paragraph. This is so because the Court has not proceeded in the same way as in another case,[20] in which the reference to Article 26 was made in a different operative paragraph to the one citing the other applicable articles of the Convention, thus making it possible to dissent from the former and agree with the latter.

Art.48(1)(f): "When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: … (f) The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention."

11 Art. 45(1): "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

12 Art. 47(b) "The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: … the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention."

13 *Supra* footnote 10, art.48(1)(f).

14 Art.4(1): "Right to Life. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

Art. 63(1): "Art. 63(1): "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

15 Hereinafter, the OAS.

16 Art. 34.

17 Art. 45(f).

18 Para. 3 of the Preamble of the Convention.

19 Art. 31(1). A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

20 *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, *supra,* footnote 8.

II. ABORTION

6. This separate opinion is issued because I dissent from the fifth operative paragraph of the judgment[21] because, in addition to my previous considerations,[22] when sentencing the State, it also does so in relation to abortion by referring to the practice of handcuffing women, to the rules adopted by the United Nations in this regard, and to the reporting of possible offenses.[23]

7. This partially dissenting opinion is also issued in relation to the twelfth operative paragraph of the judgment,[24] because, on the one hand, it is based on the fact that, in practice, as a result of the ambiguity of the laws on professional secrecy, "to avoid being sanctioned, medical personnel report women suspected of having committed the offense of abortion"[25] and, on the other, that the regulation that it orders the State to adopt, should establish that there is no obligation to report women who have received medical attention due to an abortion and, lastly, that the State should refrain "from applying the current laws concerning the obligation of health personnel to report possible cases of abortion."[26]

8. Lastly, this opinion also records my discrepancy with the provisions of the fifteenth operative paragraph of the judgment,[27] because the paragraph to which it refers back establishes that the training courses should be for judicial officials who intervene in judicial proceedings concerning abortion.[28]

9. To the foregoing, it should be added that the judgment contains an unresolvable contradiction when it declares, on the one hand, that, in this case, "[w]hat is in dispute is the State's alleged responsibility for the detention, prosecution and conviction of the presumed victim for aggravated homicide following the obstetric emergency that she suffered"[29] and, on the other, "that the Commission's Merits Report includes the criminalization of abortion in El Salvador and the alleged effect of this in cases of obstetric emergencies and infanticide as part of the context of this case. To the extent that the facts included by the representatives are pertinent to explain and clarify the said context and its relationship to this case, the Court will take them into account."[30]

10. The latter viewpoint is reiterated in the judgment, when indicating that "the Commission's Merits Report includes the criminalization of abortion in El Salvador and the

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21 *Supra*, footnote 5.

22 *Supra,* Part I.

23 Paras. 202, 219, 259. 260. Hereinafter, it will be understood that "paras." refers to paragraphs of the judgment.

24 "The State shall regulate the obligation of medical professional secrecy and the confidentiality of medical records, pursuant to paragraph 287 of this judgment."

25 Para. 286.

26 Para. 286.

27 "The State shall design and implement an awareness-raising and training course for judicial officials, as well as the health personnel of the Rosales National Hospital, as established in paragraphs 294 and 295 of this judgment."

28 Para. 293.

29 Para. 92.

30 Para. 30 of the judgment.

alleged effect of this in cases of obstetric emergencies and infanticide"[31] and that "[e]ven though the criminal laws on abortion were not applied in this case, … this information relates to the alleged criminalization of women who have suffered obstetric emergencies," so that "the Court will examine that relationship … and take it into account when analyzing this specific case."[32]

11. In this way, the judgment introduces the issue of abortion repeatedly and without any need in this case which relates to aggravated homicide. This is why I dissent.

12. It should also be added that the judgment failed to take into account the "pivotal" principle of international human rights law concerning the collaborative or complementary nature of the inter-American protection in relation to the protection provided by the domestic law of the States of the region.[33] This means that the corresponding State incurs international responsibility if the most recent act undertaken in relation to the respective case violates a valid international obligation, unless it involves a continuing act[34] or a composite act[35] or an omission.[36] To the contrary, acts prior to the instantaneous act[37] are indeed different, and should not be considered because, to the contrary, the State would have been unable to amend its actions and, in this eventuality, the international protection would be substituting the domestic protection, and even transforming it into a fourth instance. This is precisely what has happened in the judgment, by ruling on the initial actions of the investigation conducted that were based on investigating a possible abortion.[38] To the contrary, in the instant case, the issue was to determine the possible illegality of the aggravated homicide in question and never that of an abortion.

13. It is also necessary to indicate that the Court's jurisdiction is exercised within the framework of international law,[39] based on the objective nature of the State's international responsibility for an internationally wrongful act; that is, the State incurs in this if an action is attributable to it under international law, and if this constitutes a breach

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31 The Inter-American Commission on Human Rights refers to this fact as "the criminalization of abortion" (para. 1 of the judgment). The judgment reiterates this expression in para. 41.

32 Para. 41.

33 Para. 3 of the Preamble to the Convention: "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States."

34 Art. 14(2), Responsibility of States for Internationally Wrongful Acts (AG/56/83): "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."

35 Art. 15(1), *Idem*: "The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."

36 Art.14(3), *Idem*: The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

37 Art.14(1), *Idem:* "The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."

38 *Supra*, footnote 32.

39 Art. 62(3): "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

of one of its international obligations.[40] In this regard, it is undeniable that, as indicated in one of my separate opinions,[41] there is no inter-American or international legal provision, either in a convention or by international custom or general principle of law, that recognizes abortion as a right. There are only resolutions of international bodies – most of them composed of international officials and not of representatives of States – resolutions that, moreover, are not binding and do not interpret valid international law, but rather reflect aspirations that the latter be amended in the sense they suggest.

14. To the foregoing, it should be added that although it is true that the Commission indicates that the provisions on abortion form part of the facts of the case,[42] it is not true that they form part of the context of the case. This consists of the Commission's considerations but not that these are applicable, especially when such provisions are cited in relation to a context that falls outside the purpose of the case, which relates to aggravated homicide and the punishment for this that was applied to the victim, and not to abortion. This same commentary is also valid with regard to the mentions made in the judgment to resolutions of international bodies with regard to abortion.[43]

15. It should also be recalled that the Court has not directly stated that abortion would be a right. It has only indicated that "the embryo cannot be understood to be a person," that "conception […] occurs at the moment when the embryo becomes implanted in the uterus" and that "the protection of the right to life [… is] gradual and incremental according to its development."[44] All of which could evidently be used as an argument to promote recognition of abortion as a right. On this basis, the undersigned expressed his discrepancy in his corresponding dissenting opinion.[45]

16. Lastly, it is necessary to stress the circumstance that none of those who intervened in this case – that is, victims, State and Commission – included an opinion on abortion in their respective briefs submitted to the Court. In this regard, it could be said that the judgment incurred in *ultra petita.*

17. Based on the above, it may be concluded that the allusions to abortion in the judgment are inappropriate and unnecessary, and even weaken the arguments that it includes on the unlawful nature of the State's conduct with regard to the victim in this case.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

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[40] Art. 2 of the draft Articles on the Responsibility of States for Internationally Wrongful Acts, annex to (AG/56/83).

[41] Dissenting opinion of Judge Eduardo Vio Grossi, *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2012.

[42] *Supra,* footnote 32.

[43] Paras. 42 and 43.

[44] *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica.* Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012, para. 264

[45] *Supra*, footnote 41.

CONCURRING OPINION OF JUDGE HUMBERTO ANTONIO SIERRA PORTO

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF MANUELA *ET AL. V.* EL SALVADOR

JUDGMENT OF NOVEMBER 2, 2021
(Preliminary objections, merits, reparations and costs)

1. With my usual respect for the majority decisions of the Inter-American Court of Human Rights (hereinafter "the Court"), the purpose of this opinion is to explain my partial discrepancy with the fifth operative paragraph in which the international responsibility of the State of El Salvador (hereinafter "the State" or "El Salvador") is declared for the joint violation of the rights to life, personal integrity, privacy, equality before the law and health in relation to the obligations to respect and to ensure these rights without discrimination and the duty to adopt domestic legal provisions, to the detriment of Manuela. This opinion supplements the position I have already expressed in my partially dissenting opinions in the cases of *Lagos del Campo v. Peru,*[1] the *Dismissed Employees of PetroPeru et al. v. Peru,*[2] *San Miguel Sosa et al. v. Venezuela,*[3] *Cuscul Pivaral et al. v. Guatemala,*[4] *Muelle Flores v. Peru,*[5] *the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru,*[6] *Hernández v. Argentina,*[7] the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina,*[8] *Guachalá Chimbo et al. v. Ecuador*[9]; as well an in my concurring opinions in the cases of *Gonzales Lluy et al. v.*

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[1] *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[2] *Cf. Case of the Dismissed Employees of PetroPeru et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[3] *Cf. Case of San Miguel Sosa et al. v. Venezuela. Merits, reparations and costs.* Judgment of February 8, 2018. Series C No. 348. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[4] *Cf. Case of Cuscul Pivaral et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[5] *Cf. Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[6] *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[7] *Cf. Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[8] *Cf. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs.* Judgment of February 6, 2020. Series C No. 400. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[9] *Cf. Case of Guachalá Chimbo et al. v. Ecuador.* Merits, reparations and costs. Judgment of March 26, 2021. Series C No. 423. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

Ecuador,[10] *Poblete Vilches et al. v. Chile,*[11] *Casa Nina v. Peru*[12] and *Vera Rojas et al. v. Chile*[13] in relation to justiciability of Article 26 of the American Convention on Human Rights (hereinafter "the Convention" or "the ACHR)".

2. I have been consistent in maintaining that the direct justiciability of the economic, social, cultural and environmental rights (hereinafter "the ESCER") through Article 26 of the American Convention suffers from numerous logical and legal inconsistencies. Among others, this position taken in the Court's case law disregards the literal meaning of the American Convention;[14] ignores the rules of interpretation of the Vienna Convention on the Law of Treaties;[15] changes the nature of the obligation of progressivity;[16] ignores the intention of the States contained in Article 19 of the Protocol of San Salvador[17] and undermines the Court's legitimacy in the regional sphere.[18] All the foregoing prevents me from voting in favor of the declaration of the responsibility of a State founded on the direct and autonomous violation of the ESCER through Article 26 of the Convention.

3. In this regard, I have indicated[19] the difficulties that result from the practice adopted by the Court to assemble in a single operative paragraph all, or an important group, of the violation of the Convention-based obligations, reducing the ability of the judges to express their discrepancy in relation to the justiciability of the ESCER. It is this reasoning that underlines my separate opinion because, although I am in agreement with the fact that the Court has declared the violation of Articles 4, 5, 11 and 24 in relation to Articles 1(1) and 2 of the American Convention, as well as the obligations under Article 7(a) of the Convention of Belém do Pará, because it is evident that the

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[10] *Cf. Case of Gonzales Lluy et al. v. Ecuador*. *Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[11] *Cf. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[12] *Cf. Case of Casa Nina v. Peru.* Preliminary objections, merits, reparations and costs. Judgment of November 24, 2020. Series C No. 419. Concurring and partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[1313] *Cf. Case of Vera Rojas et al. v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2021. Series C No. Concurring opinion of Judge Humberto Antonio Sierra Porto**.**

[14] *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[15] *Cf. Case of Muelle Flores v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of March 6, 2019. Series C No. 375. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[16] *Cf. Case of Cuscul Pivaral et al. v. Guatemala.* Preliminary objection, merits, reparations and costs. Judgment of August 23, 2018. Series C No. 359. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[17] *Cf. Case of Poblete Vilches et al. v. Chile*. Merits, reparations and costs. Judgment of March 8, 2018. Series C No. 349. Concurring opinion of Judge Humberto Antonio Sierra Porto.

[18] *Cf. Case of the Dismissed Employees of PetroPeru et al. v. Peru.* Preliminary objections, merits, reparations and costs. Judgment of November 23, 2017. Series C No. 344. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto.

[19] *Cf. Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2019. Series C No. 394. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto**,** para. 6; *Case of Hernández v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 22, 2019. Series C No. 395. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto**,** para. 17**;** *Case of Casa Nina v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2020. Series C No. 419. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto**,** para. 7, and *Case of Guachalá Chimbo et al. v. Ecuador*. Merits, reparations and costs. Judgment of March 26, 2021. Series C No. 423. Partially dissenting opinion of Judge Humberto Antonio Sierra Porto para. 6.

State disregarded its obligations to respect and to ensure Manuela's rights – and I therefore voted in favor of the fifth operative paragraph, I must express my position which is contrary to the justiciability of the right to health through Article 26 of the American Convention.

4. I am repeating the foregoing because I consider it essential to state that, even though this position is being reiterated constantly in inter-American case law and, thus, has acquired a sort of legal effect, the reasons on which it is grounded still suffer from the contradictions that I have expressed since the case of *Lagos del Campo v. Peru*.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE EUGENIO RAÚL ZAFFARONI

INTER-AMERICAN COURT OF HUMAN RIGHTS,

CASE OF MANUELA *ET AL. V.* EL SALVADOR

JUDGMENT OF NOVEMBER 2, 2021
(*Preliminary objections, merits, reparations and costs*)

1. I consider it appropriate to indicate – as *obiter dicta* – two aspects relating to this judgment.

2. Above all, I note that the arguments that resulted in the operative paragraphs find and relate to an evident contradiction in the laws of El Salvador with regard to the general obligation to report offenses subject to public prosecution.

3. Although, ultimately, this incoherence has no practical effects – or at least they are not revealed – it is useful to point this out for a better understanding of that legislation in light of international law, in case at another time and in other circumstances it is sought to derive any punitive effects from it.

4. Article 241 of the Constitution of the Republic of El Salvador establishes that: "Public, civil and military officials who become aware of official offenses committed by officials or employees who are their subordinates shall communicate this to the competent authorities as soon as possible for their prosecution, and if they do not do so promptly, they shall be considered accessories and shall incur the corresponding criminal responsibilities."

5. Coherently with this, article 312 of the Criminal Code establishes penalties for the violation of this provisions: "The public official or employee, law enforcement agent or public authority who, in the exercise of his functions or due to them, becomes aware that a punishable act has been perpetrated and fails to report this to the competent official within twenty-four hours shall be sanctioned with a penalty of fifty to one hundred days-fine [Note: a fine based on the income of the person concerned]. The same punishment shall be imposed on the head or person in charge of a hospital, clinic or other similar public or private establishment, who fails to inform the competent official within eight hours that an injured person has been admitted, in cases in which it is reasonable to consider that the injuries originated from an offense."

6. In accordance with the foregoing, article 232 of the Code of Criminal Procedure in force at the time of the facts established that: "The following are obliged to report offenses subject to public prosecution: (i) Officials who become aware of such offenses in the exercise of their functions. They shall also report official offenses committed by officials or employees who are their subordinates and if they do not do so promptly, they shall incur criminal responsibility; (2) "physicians, pharmacists, nurses and other persons who exercise health-related professions and who learn […] [of actionable offenses] when providing the assistance required of their profession, unless the knowledge they acquire is protected by professional secrecy, and (3) Persons who, by an order of the law, of the authority, or by a legal measure, are responsible for the management, administration, care or control of the goods or interests of an institution, entity or person, in relation to an offense committed to its detriment, or to that of the assets or patrimony under their responsibility or control provided that they learns of the fact due to the exercise of their functions, unless offenses that do not have a serious impact on those assets are involved. In all the foregoing cases, the report is not compulsory if there is a reasonable risk of

criminal prosecution of the person making the report, or their spouse or ascendants, descendants, siblings or life companion or partner."

7. All the foregoing provisions, although not totally in conformity with each other, may be harmonized perfectly pursuant to the sound rules of interpretation.

8. Nevertheless, the Code of Criminal Procedure in force at the time of the facts is surprising by including an article that disrupts this harmony – article 229: "Anyone who witnesses the perpetration of an offense subject to public prosecution is obliged to immediately inform the Prosecutor General, the police or the nearest magistrate. If the knowledge originates from news stories or reports, the complaint is optional. If the offense depends on an individual complaint, it is not possible to proceed without this, except for acts that require urgent investigation." This provision has been retained in article 216 of the procedural code currently in force.

9. This article seeks to impose a reporting obligation on any individual, above and beyond the provisions of the State's Constitution. The said provision is incompatible with the model of a republican and democratic State at the service of the citizen; rather it reflects the contrary. The State and the law are at the service of the individual it is not the individual who is at the service of the State or the law.

10. The citizen or inhabitant has a duty to respect the law, but he is not a police officer or an agent of justice of the State. Evidently, the case of the official who assumes a particular responsibility by engaging in the exercise of the power or the administration of the State is different, because he occupies a particular position of guarantor.

11. The attempt to impose the duties inherent to agents of its criminal justice system or to the State's officials on every inhabitant signifies considering that the latter have an obligation of *total loyalty* to the State, and this is not in the nature of an inconsequential concept of law; rather it belongs to an anthropomorphic or organization-oriented conception of the State in which the citizens are reduced to the condition of cells, entities or subsystems at its service.

12. This requirement of *total loyalty* was the famous *Treue* of Nazi law, the violation of which – disloyalty or *Untreue* – was considered the ultimate essence of any offense, because it involved the violation, by omission, of the supposed ethical mandates that emanated from the *people's community* (*Volksgemeinschaft*), into which the individuality of every human being of the same *race* melted.

13. We could continue to examine totalitarianisms and find similar requirements of extreme *total loyalty* to the State by the Stalinist *dictatorship of the proletariat* or to the Fascist enterprise as a synthesis of past, present and future generations. But this requirement of *total loyalty* has no place within the framework of the democratic and republic rule of law, where its inhabitants are *individuals* to whom the State must ensure *the means for self-realization* (so that everyone may become what they wish based on their existential choice) and they may never be used as a medium for the supposed realization of any transcendent or *supra-personal* entity such as *Volksgemeinschaft*, the dictatorship of the proletariat, the corporate State, national security or any similar ideological construct.

14. Be that as it may, it should be emphasized that, even though the provisions of article 229 of the Code of Criminal Procedure of El Salvador are contrary to the dignity of the person established in the American Convention, it is not necessary to censure it as such, because it has the very curious particularity of not being a real legal norm, because it lacks a sanction since this is not contemplated in article 312 of the Criminal Code, which falls within the framework indicated by the Constitution.

15. That article appears to be merely an expression of aspirations, because any precept without a sanction is a sort of bell without a clapper or a guitar without strings, but in any case it is out of place in a democratic and republican legal system, and it is necessary to highlight this in order to avoid any practical consequences of its undesirable presence in the law.

16. On a separate issue – and also *obiter dictum* – I consider it necessary to state that, as a general principle limiting any obligation to report an offense, the basic rule that must be followed is that this obligation must never be taken to the extreme of placing a person in the dilemma of being punished or letting themselves die.

17. The human rights hierarchy necessarily places life above the requirements for efficiency of any administration of justice and, if there is a conflict, the right to life must evidently have priority over the interests of the State in punishing those who break its laws.

18. It can be seen that article 312 of the Criminal Code did not violate this rule because it establishes the reporting obligation of the physician when the injuries *should reasonably be considered to result from an* offense - the injuries suffered *result from an offense*; in other words, injuries that someone has inflicted on the patient. Thus, in principle, this only refers to the injuries of a victim, a provision that is especially relevant in cases of domestic violence or of incapacitated victims. For example, the injuries that someone suffers as a result of a defensive action by the police *do not result from an offense*, because the action of the police in legitimate defense is not a crime.

19. Article 232 of the Procedural Code does not violate the aforementioned basic rule because it exempts from the reporting obligation cases in which it is precluded by professional secrecy, and this includes the situation in which reporting confronts someone with that dilemma.

20. Any *notitia criminis* that resulted in a trial based on a complaint filed in violation of the obligation of professional secrecy would constitute a reason for its nullity pursuant to the principle that a criminal action can never be undertaken – or a sentence executed – based on an unlawful act.

21. The latter principle, according to which the effectiveness of the law cannot be sought by means of its violation, encompasses all criminal procedural law, because many other consequences that lead to nullities arise from this, such as the consequences emanating from the *fruit of the poisonous tree* doctrine of the United States Supreme Court and the rejection of the strange doctrine of *male captus bene detentus* or, a little more remotely, in the case of the *agent provocateur* and the more problematic undercover agent.

22. I consider that these reflections *obiter dicta* define the scope of the findings made in this judgment, and this is why I have made them.

This is how I have voted.

Eugenio Raúl Zaffaroni
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE RICARDO C. PÉREZ MANRIQUE

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF MANUELA ET AL. V. EL SALVADOR

JUDGMENT OF NOVEMBER 2, 2021
(*Preliminary objections, merits, reparations and costs*)

I. INTRODUCTION

1. The judgment considers that the State of El Salvador is responsible for the violation of the rights to personal liberty and the presumption of innocence pursuant to Articles 7(1), 7(3) and 8(2) of the American Convention on Human Rights (the Convention) in relation to the obligations to respect and to ensure these rights and the duty to adopt domestic legal provisions established in Articles 1(1) and 2 of this instrument, to the detriment of Manuela. It also considers that the State is responsible for the violation of the right to defense, the right to be tried by an impartial court, the presumption of innocence, the duty to provide the reasons for a decision, the obligation not to apply the law in a discriminatory manner, the right not to be subjected to cruel, inhuman or degrading punishment and the obligation to ensure that the purpose of a prison sentence is the reform and social rehabilitation of the person convicted pursuant to Articles 8(1), 8(2), 8(2)(d), 8(2)(e), 24, 5(2) and 5(6) of the Convention, in relation to the obligations to respect and to ensure these rights without discrimination, and the duty to adopt domestic legal provisions established in Articles 1(1) and 2 of this instrument. Furthermore, it considers the State responsible for violating the rights to life, personal integrity, privacy, equality before the law and health, pursuant to Articles 4, 5, 11, 24 and 26 of the Convention in relation to the obligations to respect and to ensure these rights without discrimination, and the duty to adopt domestic legal provisions established in Articles 1(1) and 2 of this instrument, and also for failing to comply with its obligations under Article 7(a) of the Convention of Belém do Pará, to the detriment of Manuela. Lastly, it considers the State responsible for violating the right to personal integrity, recognized in Article 5(1) of the Convention in relation to Article 1(1) of this instrument, to the detriment of Manuela's mother, father, and older and younger sons.

2. In this opinion, I concur with the judgment and examine the way in which I consider that the IACtHR should address cases involving violations of the economic, social, cultural and environmental rights, based on the universality, indivisibility, interdependence and interrelation of all human rights as grounds for their justiciability. Then, I will examine the intersectionality of vulnerabilities and the structural discrimination of which Manuela was a victim. Lastly, I will analyze the importance of including a gender perspective when adjudicating a case such as that of Manuela.

II. THE ISSUE OF THE RIGHT TO HEALTH OF MANUELA AS AN ECONOMIC, SOCIAL AND CULTURAL RIGHT JUSTICIABLE *PER SE*

3. As I have argued in previous opinions, and reiterating the rationale proposed in them,[1] based on the universality, indivisibility, interdependence and interrelation of human rights, I maintain the Court's competence to examine individual violations of the economic, social, cultural and environmental rights. I do so in the belief that human rights are interdependent

[1] *Cf.* Among others, concurring opinion to the judgment of November 21, 2019, in the *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence* (Ancejub-Sunat) v. Peru; to the judgment of November 22, 2019, in the *Case of Hernández v. Argentina;* to the judgment of February 6, 2020, in the *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, and to the judgment of July 15, 2020, in the *Case the Workers of the Fireworks Factory in Santo Antonio de Jesús and their families v. Brazil.*

and indivisible and, therefore, as in this case, civil and political rights are interwoven with economic, social, cultural and environmental rights, and cannot be separated.

4. Consequently, I have asserted that this interdependence and indivisibility allows the human being to be seen integrally, as fully entitled to all rights, and this has an impact on the justiciability of his rights. A similar vision is set forth in the Preamble to the Protocol of San Salvador: "Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified."

5. From this perspective, Article 26 of the Convention acts as a framework article, in the understanding that it makes a general allusion to the economic, social, cultural and environmental rights, for the description and determination of which, it refers us to the OAS Charter. The Protocol of San Salvador individualizes and provides content to the economic, social, cultural and environmental rights. This Protocol underlines the importance that these (rights) be reaffirmed, developed, perfected and protected (see Preamble). Lastly, a series of instruments exist in the inter-American *corpus juris* that also refer to the ESCER.

6. Thus, I consider that this judgment reveals the coexistence of several rights of the victims that are indivisible and justiciable before the Court *per se* as explained in paragraphs 180 and *ff.* of the judgment. Consequently, Article 19(6) of the Protocol of San Salvador does not constitute an impediment of any kind for the Court to consider their joint violation in this case.

7. As indicated in the third, fourth and fifth operative paragraphs, it is declared that the rights to life, personal integrity, privacy, equality before the law, and health were violated in this case pursuant to Articles 4, 5, 7(1), 7(3), 8(2), 8(1), 8(2), 8(2)(d), 8(2)(e), 11 and 24 of the Convention, in relation to the obligations to respect and ensure rights, and the duty to adopt domestic legal provisions contained in Articles 1(1) and 2 of this instrument. Therefore, I understand that based on the concept that I have maintained regarding the interpretation and application of the American Convention, the right to health is justiciable owing to the coexistence of the violation of several Convention-based rights, without any need to resort to justifications based on the autonomous citing of Article 26 of the Convention.

III. THE INTERSECTIONALITY AND STRUCTURAL DISCRIMINATION THAT MANUELA WAS A VICTIM OF PLACED HER IN A SITUATION OF SPECIAL VULNERABILITY

8. Paragraph 253 of the judgment indicates that "various structural disadvantages coalesced in Manuela and had an impact on her victimization. In particular, the Court underscores that Manuela was a poor illiterate woman who lived in a rural area. If the discrimination that has been alleged in this case is verified, these factors of vulnerability or sources of discrimination would have coalesced intersectionally, increasing the presumed victim's comparative disadvantages and causing a specific form of discrimination due to the confluence of all those factors." Added to this, in the same paragraph, the Court considers that "those factors of discrimination coincide with the profile of most of the women who have been tried for abortion or aggravated homicide in El Salvador; they have little or no income, hardly any schooling, and reside in rural or marginal urban areas." Consequently, in this section, I will analyze the importance of taking into account the intersectionality of vulnerabilities and structural discrimination that prejudiced Manuela.

9. As I mentioned previously, in my concurring opinion in the judgment in the *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil,*[2] I understand intersectionality as the confluence in a single person or group of persons, of the violation of different rights, which makes them victims of enhanced discrimination. The confluence of numerous discriminations increases the devastating effects on the human dignity of the persons who suffer from them and results in a greater and more diverse violation of rights than when these discriminations are constituted in relation to a single right.

10. The first person to address the concept of intersectionality was Kimberle Crenshaw when indicating that black women encounter combined race and sex discrimination. Thus, compared to a white woman or an Afro-descendant man, their situation may be similar or different, but involves greater vulnerability.[3] She also developed the importance of its significance when designing and evaluating policies in order to avoid remedies focused on the acceptance of the predominant factor of discrimination that make the intersection of other factors of discrimination invisible.[4]

11. The concept of intersectionality, as a hermeneutic element, allows the Court to determine persons or groups who suffer discrimination and analyze the causes of this situation. As it has in this judgment, the assessment of this phenomenon, the adequate understanding of its severity and the analysis of its causes and effects for the individual, helps the Court decide the merits of the cases submitted to its consideration and, also, provides the necessary perspective for establishing reparations that include, *inter alia*, appropriate measures of non-repetition that impose on the States lines of action aimed at overcoming discrimination and the violation of rights.

12. The IACtHR used the concept of "intersectionality" for the first time in the analysis of the discrimination suffered by a child in access to education in the case of *Gonzales Lluy et al. v. Ecuador.*[5] In that case, it asserted that: "numerous factors of vulnerability and risk of discrimination intersected that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced by Talía was caused not only by numerous factors, but also arose from a specific form of discrimination that resulted from the intersection of those factors; in other words, if one of those factors had not existed, the discrimination would have been different. Indeed, the poverty had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV. The situation of poverty also had an impact on the difficulties to gain access to the education system and to lead a decent life."[6]

13. In addition, the Commission, in an analysis of poverty,[7] has referred to the differentiated impact of poverty as a factor of vulnerability that is increased and exacerbated when it is added to the vulnerability of certain groups of the population such as women.

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[2] *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020. Series C No. 407, Concurring opinion of Judge Ricardo C. Pérez Manrique

[3] *Cf.* Kimberle Crenshaw, «Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics», University of Chicago Legal Forum 1, No. 8, 1989, p. 149. Available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf.

[4] *Cf.* Kimberle Crenshaw, *supra*, p. 152.

[5] *Cf. Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298.

[6] *Cf. Case of Gonzales Lluy et al. v. Ecuador, supra,* para. 290.

[7] *Cf.* IACHR. *Report on poverty and human rights in the Americas.* OEA/Ser.L/V/II.164, September 7, 2017.

14. Within the universal system for the protection of human rights, added to what has been mentioned in the judgment, the United Nations High Commissioner for Human Rights, in his 2017 report to the Human Rights Council, referred to the effects of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls.[8] He also indicated the need to offer special protection, adapted to the needs of women and girls, emphasizing the violation of rights owing to socio-economic exclusion and poverty.

15. The Committee for the Elimination of Discrimination against Women (hereinafter "CEDAW") has indicated that "discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women."[9] Thus, "intersecting factors make it more difficult for women from those groups to gain access to justice."[10]

16. Meanwhile, the European Court of Human Rights related characteristics that are assumed to define a vulnerable group to the violation of rights they have suffered; for example, determination of the essential content of a right differs in the case of gypsies,[11] prisoners,[12] or unaccompanied minors.[13] In this regard, the European Court has use the concept of "particular vulnerability" considering that "the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute."[14] Based on the concept of the "particular vulnerability" of the applicant, an African woman offering sexual services on the street, it is possible to appreciate the intersection of factors such as her race, sex, and social and work situation.

17. Intersectionality has been considered a useful tool for interpreting human rights as interdependent, interrelated and indivisible, because they allow the different factors of oppression and violation to be examined.[15] In the instant case, it is possible to analyze the different factors of vulnerability that have their own profile, but at the same time interact in an intersectional manner with the others. Similarly, this Court has recognized that "certain groups of women suffer discrimination throughout their life based on more than one factor combined with their sex, which increases their risk of suffering acts of violence and other human rights violations."[16]

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[8] *Cf.* Human Rights Council, *Impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls*, Report of the United Nations High Commissioner for Human Rights, April 21, 2017, UN Doc. A/HRC/35/10.

[9] CEDAW. General recommendation No. 33 on women's access to justice, CEDAW/C/GC/33, August 3, 2015, para. 8.

[10] CEDAW. General recommendation No. 33 on women's access to justice, CEDAW/C/GC/33, August 3, 2015, para. 8.

[11] *Cf.* ECHR, *Case of Buckley v. The United Kingdom*, No. 20348/92, Judgment of September 29, 1996.

[12] *Cf.* ECHR, *Case of Salman v. Turkey, No. 21986/93,* Judgment of June 27, 2000, and *Case of Algür v. Turkey,* No. 32574/96, Judgment of October 22, 2002.

[13] *Cf.* ECHR, *Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, Judgment of October 12, 2006.

[14] ECHR, *Case of B.S. v. Spain,* No. 47159/08, Judgment of July 24, 2012, para. 71.

[15] *Cf.* Andrea Catalina Zota-Bernal, «Incorporación del análisis interseccional en las sentencias de la Corte IDH sobre grupos vulnerables, su articulación con la interdependencia e indivisibilidad de los derechos humanos», *Eunomía. Revista en Cultura de la Legalidad*, 2015. Available at: https://e-revistas.uc3m.es/index.php/EUNOM/article/view/2803/1534.

[16] *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 30, 2016. Series C No. 329, para. 247, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Serie C No. 298, para. 288.

18. On various occasions, the Commission has indicated that intersectionality specifically affects the women of this region in relation to their economic, social and cultural rights.[17] In this regard, the "Report on poverty and human rights in the Americas," indicated that "Women are affected by poverty to a greater extent and are at a particular disadvantage in exercising their civil, political, economic, social, and cultural rights."[18] In its thematic report on "Guidelines for preparation of progress indicators in the area of economic, social and cultural rights," the Commission recognized the immediate nature of the obligation not to discriminate and to guarantee equality in the exercise of the economic, social and cultural rights, and identified women as a population that had historically been discriminated against and excluded from the exercise of those rights. "In mid-2014, there were 612 million people living in Latin America, more than half of whom were women (310 million women and 302 million men). For that year it was estimated that '28.0% of the region's population lived in poverty and 12% in indigence."[19]

19. In this regard, in this case, consideration of the context of the absolute prohibition of abortion in El Salvador is also key for its analysis, particularly in situations in which there is a context of discrimination and violence against women,[20] because the intersectional discrimination that Manuela suffered due to poverty and gender constituted a cascading violation of rights. This pattern of intersectional and structural discrimination calls for special attention to prevent, and to avoid in future, the lack of protection and the violation of the rights of women who are already victims owing to the disproportionate impact caused by their biological capacity to conceive (paragraph 254 of the judgment).

20. All these vulnerabilities acted together and, owing to their intersectionality, they increased the special situation of helplessness in view of the State's failure to comply with its obligation to respect and, above all, to ensure the human rights of such individuals. In this regard, paragraph 253 of the judgment describes the patterns of structural and intersectional discrimination.

21. The Court has already referred to the existence of patterns of conduct in relation to certain situations of vulnerability in the case of *González et al. ("Cotton Field") v. Mexico,*[21] in which it verified the existence of a systematic pattern of violence and discrimination against women in Ciudad Juárez. The Inter-American Commission indicated the same in its report on the case of María Da Penha.[22]

22. In general, the experience of women is not based on a single type of subordination; rather, there is an interaction of various factors and systems of subordination as a result of which this particular type of experience is not the same as that suffered based on just one of the factors.

23. The existence of patterns of intersectional discrimination against poor women in different parts of the region[23] is a problem that requires special protection by the State. In this case, Manuela was a member of a group in a special situation of vulnerability; the

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[17] *Cf.* IACHR, *Guidelines for preparation of progress indicators in the area of economic, social and cultural rights*, OEA/Ser.L/V/II.132, July 19, 2008, para. 56 and *ff.*

[18] *Cf.* IACHR, *Report on poverty and human rights in the Americas, supra*, para. 304.

[19] *Cf.* IACHR, *Report on poverty and human rights in the Americas, supra*, para. 103.

[20] Amicus Curiae submitted by Amnesty International and Juan E. Méndez in the case of Manuela and family v. El Salvador.

[21] *Cf. Case of Gonzales et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 132.

[22] *Cf.* IACHR, Report No. 54/01. Case 12,051. Maria Da Penha Maia Fernandes. Brazil. April 16, 2001.

[23] *Cf.* Committee for Latin America and the Caribbean for the Defense of Women's Rights (CLADEM), *Patterns of violence against women in Latin America and the Caribbean.* Report presented by the UN Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 2014.

deprivation of rights and the intersectionality increased the State's obligations to respect and to ensure her rights (Art.1(1) of the Convention) and determined that, pursuant to Article 2, the State must adopt " the legislative or other measures" required to overcome the numerous rights' violations.

III. Importance of the gender perspective in relation to access to justice in cases such as that of Manuela

24. The positive obligation of the State, on verifying a pattern of intersectional and structural discrimination such as that described, consists in the development of lines of action by implementing systematic policies that act on the origins and causes of its existence. Therefore, it is necessary to mention that the State is especially obliged to ensure the right to the presumption of innocence and the right to defense in cases such as this one in which, in a context of structural discrimination against women, several factors of discrimination coalesce intersectionally.[24]

25. In this regard, the Committee for the Elimination of Discrimination against Women has indicated that "discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women"[25] Thus, "these intersecting factors make it more difficult for women from those groups to gain access to justice."[26]

26. In this context, the guarantee of the right to a professional defense with a gender perspective and awareness of gender issues, competent, efficient and provided from the first interrogation and during the subsequent procedures was essential. This was a specific duty of the State in this case, in which a special situation of vulnerability existed caused by the intersectionality of various factors of discrimination, such as Manuela's condition of being a poor illiterate rural women, which exacerbated the structural discrimination against women in general, and severely limited her access to justice.[27]

27. The convergence of all these elements constitutes a specific form of discrimination,[28] in which the different factors are interrelated and mutually reinforcing,[29] and this exacerbates the structural discrimination against women and creates a special situation of vulnerability, such as that of Manuela. The Court has considered, in this regard, that when victims belong to a group in a special situation of vulnerability, the State's obligations to respect and ensure rights are increased.[30]

28. Accordingly, I consider it essential to elaborate on the measure of non-repetition linked to the verified intersectionality of violations in order to address the structural pattern of discrimination against women. This State obligation signifies that the authorities in charge of the investigation, such as the police and the prosecutors must act with enhanced

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[24] Amicus Curiae, Fundación para el Debido Proceso, p. 3.

[25] CEDAW. General recommendation No. 33 on women's access to justice, CEDAW/C/GC/33, August 3, 2015, para. 8.

[26] CEDAW. General recommendation No. 33 on women's access to justice, CEDAW/C/GC/33, August 3, 2015, para. 8.

[27] Amicus Curiae Fundación para el Debido Proceso, p. 15

[28] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020. Series C No. 407, para. 191, and *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 290.

[29] *Cf.* Human Rights Council. Report of the Working Group on the issue of discrimination against women in law and in practice. Women deprived of liberty. A/HRC/41/33, May 15, 2019, para. 15.

[30] *Cf. Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020. Series C No. 407, para. 198.

due diligence that incorporates the gender perspective starting with the initial procedures and must eliminate any gender stereotyping or bias in order to truly guarantee the presumption of innocence of the woman who is being investigated. In such cases, the professional defense to which the Court has referred extensively in its case law is a right that the State must ensure from the very outset, ensuring that this defense incorporates a gender perspective and is provided with enhanced due diligence.[31]

29. I also take advantage of this opinion to make a brief mention of the importance of the 2030 Agenda and its Sustainable Development Goals, the main purpose of which is to "leave no one behind." The 2030 Agenda responds to a rights approach in development policies and strategies, and its content recognizes that development is a human right that can be demanded of governments and that development policies must be based on human rights. Human rights are an essential element in the design of development policies and strategies.

30. Point 35 of the Declaration that precedes the goals affirms that: "Sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development. The new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that **are based on respect for human rights (including the right to development), on effective rule of law** and good governance at all levels and on transparent, effective and accountable institutions […]" (bold added).

31. This relationship between human rights and sustainable development is established in the 2030 SDGs as the road map resulting from international consensus to enable people to overcome situations in which their rights are violated, such as those proved in this judgment. It is Goal 16 that reflects this relationship, promoting the rule of law at the national and international levels (16.3); the development of effective, accountable and transparent institutions (16.6); public access to information and protection of fundamental freedoms (16.10), and the promotion and enforcement of non-discriminatory law and policies for sustainable development (16.b).

32. The situation in the instant case is related, in particular, to Goals: 1. "End poverty in all its forms everywhere"; 5. Achieve gender equality and empower all women and girls"; 8. "... sustainable economic growth ... and decent work for all"; 10. "Reduce inequality," and 16. Promote peace, justice and inclusive institutions.

33. The violations of the rights proved in this case require the State to act with the utmost diligence in the execution of its obligations to ensure and to respect the human rights that were violated (Art. 1(1) of the Convention) and to adopt the measures established in this judgment, requesting the appropriate international cooperation in order to comply with them (Art. 2 of the Convention).

III. CONCLUSION

34. Manuela, a poor young woman who lived with her parents and two sons, became pregnant and suffered preeclampsia, the condition in which her delivery took place. Owing to her health situation, her father took her to a hospital in which priority was given to reporting an offense, rather than the immediate need of treating her health situation. To the extent that the disease that finally resulted in her death was not detected.

35. She was handcuffed to a bed, and subjected to a criminal trial that culminated in a sentence of 30 years' imprisonment, without observing the guarantee of the presumption of her innocence and without respecting her right to a proper defense and an impartial judge, because the judgment convicting her is full of detrimental gender stereotypes that

[31] Amicus Curiae, Fundación para el Debido Proceso, p. 15.

increased her numerous vulnerabilities. Manuela was discriminated against from the moment that she required medical attention and she obtained neither health nor justice from the State.

36. The request for medical attention resulted in the immediate activation of the criminal system, an absolutely disproportionate response by the State that violated Article 5(2) of the American Convention: she was given the minimum legal sentence established in the laws of El Salvador: 30 years' imprisonment.

37. As most of the victims, Manuela was rendered invisible: first, during the criminal trial during which she was not heard and those who had the duty to exercise her defense adopted an irresponsible attitude of passivity; second, by judges who based themselves on detrimental gender stereotypes without addressing her particular circumstances, and third by a prison system that did not provide attention for a disease that finally led to her death.

38. I would like to emphasize, in particular, the situation of Manuela's two sons, today adults, who were victims of the loss of their mother, and whose rights were also violated in this case, especially the right to live with their mother and the special protection that their status as children required under Articles 17 and 19 of the American Convention. They were also victims who were made invisible in this case:

> "Manuela's elder son stated that, when he went to visit his mother in the San Miguel prison, he "wanted to talk to her more, to be able to tell her more, but he could not because there was a police agent present during the visit and this frightened him. This situation did not allow him to tell his mother that he missed her, and this was very difficult for him. […] It still hurts him to relive that moment because it is the last memory he has of her." He also indicated that he found it "very hard to grow up without his mother; […h]e misses her love […]. Even though he has few memories of her, he misses her and would like to have her in his life to talk to her and receive her advice." Meanwhile, Manuela's younger son stated that "[i]t was painful and complicated to grow up without a mother. His life was different from that of other children owing to her absence and because he did not have her guidance. […] He feels anger and frustration when thinking of the humiliations that his mother endured" (paragraph 264).

39. In summary, in this case, the victims, Manuela and her sons above all, suffered the consequences of the State's actions which condemned them based on structural discrimination against Manuela, who paid with her life for the numerous violations of her rights and, until the end of her life, suffered discrimination and the consequent violation of her rights.

Ricardo C. Pérez Manrique
Judge

Pablo Saavedra Alessandri
Secretary