

APPLICATION BEFORE THE INTER-AMERICAN
COURT OF HUMAN RIGHTS

Manuela

v.

EL SALVADOR

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Amicus Brief Submitted by

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INTERESTS OF AMICUS CURIAE

Professor Philip Alston and Leah Motzkin have the honor of submitting this Amicus Curiae brief to the Inter-American Court of Human Rights (hereinafter also referred to as “the Court” and “the Inter-American Court”) regarding the case of *Manuela v. El Salvador*. This brief examines how the harm that Manuela, a young woman living in poverty in El Salvador (hereinafter also referred to as “the State” and “the Salvadoran State”), suffered is the entirely foreseeable result of the State’s absolute ban on abortion as it affects low-income and other particularly vulnerable women. We submit that the only way to prevent many such women suffering a similar fate in the future is to make abortion legally available and accessible under appropriate circumstances.

Professor Alston was the United Nations (UN) Special Rapporteur on extreme poverty and human rights from 2014 until 2020. He also teaches international law, human rights law, economic and social rights, and strategic human rights litigation at New York University School of Law. From 2004-2010, he served as the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions. Among other roles, Professor Alston has served as the chairperson for eight years and rapporteur for four years of the UN Committee on Economic, Social, and Cultural Rights from 1987 to 1998.

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SUMMARY OF ARGUMENTS

El Salvador’s absolute abortion ban¹ has been described by experts as being among the world’s most restrictive. One of the consequences of the extreme approach adopted is to disproportionately harm poor and otherwise marginalized women.² The legal regime created by the ban and its enforcement led to the death of Manuela and puts very large numbers of similarly situated women in peril.³

El Salvador’s experience is consistent with evidence from around the world, which shows that restrictive abortion laws tend to disproportionately affect marginalized women.⁴ The factors of vulnerability that a woman faces, including living in poverty, are highly suggestive of the type of

¹ Articles 133-137 of the Salvadoran Penal Code create the absolute criminalization of abortion.

² “El Salvador has one of the world’s most restrictive abortion laws. On April 20, 1998, a new penal code took effect, eliminating situations in which, abortion previously had been permitted, such as in cases where the pregnancy posed a risk to a woman’s life, in cases of sex with a minor or rape, and cases of serious fetal deformities.⁶ Additionally, in January of 1999, article 1 of the Constitution was amended to recognize the right to life from the moment of conception.” See Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, May 30, 2014, p. 10, https://reproductiverights.org/document/report-on-the-effects-of-el-salvadors-total-criminalization-of-abortion?_ga=2.33690724.457327120.1560650670-559657739.1559788002.

³ The absolute ban on abortion in itself and as enforced violate the Article 24 of the American Convention on Human Rights (hereinafter also “the American Convention” or “the Convention”) guarantee of equal protection, as well as a variety of other protected rights. See below for further exploration of violations of Article 26 and Article 4 of the Convention.

⁴ Marge Berer, *Abortion Law and Policy Around the World: In Search of Decriminalization*, 2017 HEALTH AND HUMAN RIGHTS J. 13, 14.

consequences she will suffer, if any, as a result of such laws. The severity of El Salvador's abortion ban, however, does more than create a class of women who are unable to access safe abortion while those who are more privileged can—though that is the result of such laws globally, and El Salvador is no exception. The legal regime creates a class of women who may be subject to criminal prosecution for aggravated homicide, a criminal offense with sentences of up to 50 years in prison, as a result of suffering an obstetric emergency.

In this brief, we submit to the Court our understanding of how this law measures up against well-established principles of international human rights law. We do not go into any detail in this brief to address the fact that this is a law that prescribes extraordinarily harsh penalties that are highly disproportionate to other aspects of the legal system's approach and that by definition affect only women. This in itself amounts to deep discrimination on the grounds of sex and should be sufficient to lead the court to strike down the law. In addition, the way in which the law is applied and the incentives that are established to encourage false or speculative reporting of offences, also violates the need for laws to be fair and predictable in their application.

But because those problematic dimensions of this law are relatively straightforward and because the particular expertise of the authors of this brief relates to the intersection between poverty and the enjoyment of human rights, the focus is on the fact that this law, while neutral on its face, is in practice directed almost exclusively at women who are from low income families. It is those women who are almost uniquely vulnerable to vastly disproportionate state intervention in their lives and to extreme punishment, almost irrespective of their own actions. For many low-income women, the already traumatic experience of having a miscarriage may be just the start of a series of violations to the human rights that they are guaranteed under international human rights law.⁵

THE ABORTION BAN DISPROPORTIONATELY ENDANGERS VULNERABLE WOMEN

Studies show that laws that restrict access to abortion do not stop women from seeking and having abortions. But they do prevent certain women from having safe access to the medical care they need and are entitled to.⁶ The passage of Argentina's recent law on abortion demonstrates the extent to which there is a pressing need to balance concerns relating to the right to life with the reality that banning abortions is an ineffective and in some respects cruel way of promoting that goal.⁷

In El Salvador, the harm goes beyond the inability to access safe reproductive medical care, which in itself violates a woman's right to health and potentially her right to life. The absolute

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

⁶ SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo - Addendum - Follow-up mission to El Salvador*, PARA. 66, UN DOC. A/HRC/17/26/ADD.2 (FEB. 14, 2011); COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW), *Concluding Observations: El Salvador*, paras. 35-36, UN DOC. CEDAW/C/SLV/Co/7 (2008); COMMITTEE ON THE RIGHTS OF THE CHILD, (CRC), *Concluding Observations: El Salvador*, paras. 60, 61(d), UN Doc. CRC/C/SLV/Co/3-4 (2010); HRC, *Concluding Observations: El Salvador*, para. 14, UN Doc. CCPR/Co/78/SLV (2003); *El Salvador*, para. 10, UN Doc. ONUCCPR/C/SLV/Co/6 (2010).

⁷ Daniel Politi & Ernesto Londoño, *Argentina Legalizes Abortion, a Milestone in a Conservative Region*, N.Y. TIMES, Dec. 30, 2020.

ban is promoted and policed in a way that incentivizes medical and legal professionals to put their own interests ahead of respect for the with the rights to which all Salvadorans are entitled.⁸ Women who find themselves in a situation similar to that of Manuela are denied the care and treatment that they need and are instead turned into objects of suspicion. They do not receive the medical treatment, the due process guarantees, or the respect to their personhood and autonomy that they are owed. The result is that women who are accused of having an abortion, and who will very often not have the resources to disprove such an allegation, risk being convicted for one of the most serious crimes in the civil code, which is aggravated homicide. It is young women from a particular socio-economic class who will overwhelmingly be the targets of all such prosecutions.⁹

One way for the Court to fully evaluate the harm that Manuela suffered is to apply a “differentiated approach”.¹⁰ The Court has conducted many analyses that explore how identities can compound to make marginalized individuals vulnerable to specific harms.¹¹

By providing courts with a framework to examine how different factors of oppression can be evaluated separately and in conjunction with one another, the concept of intersectionality ensures that human rights will genuinely be interpreted as being “indivisible[,]interdependent and interrelated.”¹² It also provides the Court with the “necessary perspective for establishing reparations that include, *inter alia*, appropriate measures of non-repetition that impose on the

⁸ The absolute abortion ban established in articles 133-137 work in concert with article 312 of the Salvadoran Penal Code, which classifies the failure to report an abortion as a criminal offense, and the protection of life and recognition of the human person from conception established in Article 1 of the Constitution creates the context that leads doctors to report women in order to avoid being fined or reported themselves for complicity or for failing to alert authorities. Penal Code of El Salvador, arts. 133, 134, 135, 136, 137, 312 (1998); Political Constitution of El Salvador, art. 1 (1998).

⁹ Agrupación Ciudadana’s 2014 investigation revealed that the women most affected by El Salvador’s criminalization of abortion are young women from a lower socioeconomic class. Of the 129 cases they analyzed: 68.22% of the women were between the ages of 18 and 25; 6.98% were illiterate, 40.31% had some primary school education, 11.63% had high school degrees, and 4.65% had completed higher education (technical or university studies); 73.64% of the women were single; 57.36% of the accusations came from health professionals assisting the women and 22.48% from relatives and neighbors.; In 56.51% of the cases, the crime was identified as a homicide, which has serious repercussions vis-à-vis the principle of proportionality of punishment, because the women could have been convicted and sentenced to up to 50 years in prison. Center for Reproductive Rights, “Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador’s Total Criminalization of Abortion”, May 30, 2014, https://reproductiverights.org/document/report-on-the-effects-of-el-salvadors-total-criminalization-of-abortion?_ga=2.33690724.457327120.1560650670-559657739.1559788002.

¹⁰ Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, *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. 68. Quoting *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. 289.

¹¹ Inter-American Court. *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. Inter-American Court; *Case of Cuscul Pivarel et al. v. Guatemala. Preliminary objection, merits, reparations and costs.*, Judgment of August 23, 2018; Inter-American Court. *Case of Ramirez Escobar et al. v. Guatemala. Merits, Reparations, and Costs*. Judgment of March 9, 2018. Series C No. 351, paras. 276-277; Inter-American Court. *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.

¹² Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

States conducts aimed at overcoming discrimination and the violation of rights.”¹³ This is an essential legal analytical tool in the human rights context because it generates a fuller understanding of how various forms of discrimination interact to create increased vulnerability.

While Manuela’s discriminatory treatment was due to her status as a woman, it was also clearly a function of the fact that she was poor, young, single, and illiterate.¹⁴ An examination of available data suggests that it is precisely single, poor, young women who are by far the most likely to be affected by the criminalization of abortion, given that overall rates of obstetric emergencies and abortions are not tied to demographic factors.¹⁵ The most striking statistic in this regard is that private hospitals have never reported a suspected abortion.¹⁶

While forms of discrimination based on poverty, youth, marital status and literacy are not specifically mentioned in the statuses specified in article 1(1) of the Convention, that list is indicative, rather than exhaustive or restrictive. There are strong grounds, however, for the reference to “any other social condition” to be read so as to allow such an analysis.¹⁷ Though the Court considers “poverty” to be a state of special vulnerability rather than a condition,¹⁸ that

¹³ Concurring opinion of Judge Ricardo Pérez Manrique, *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. 24.

¹⁴ While some consider that discrimination based on multiple factors can be understood as separate from intersectionality, we consider that distinction theoretical. As the multiple factors of discrimination are also the factors that inform a person’s intersectional identity, and in practice it is impossible to separate out an individual’s lived experience of discrimination based on their identity, we advocate for the court to use an intersectional approach to any presence of multiple factors of discrimination. “Whatever the type of intersectional discrimination, the consequence is that different forms of discrimination are more often than not experienced simultaneously by marginalized women.” *General Assembly of the United Nations. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, A/CONF.189/PC.3/5, 27 July 2001, paras. 23, 32.

¹⁵ Women with financial means still can and do access abortions but do so by visiting private clinics. “It is only women who are already marginalized by the state in these other ways who must also risk their lives by going to a public hospital when they suffer complicated pregnancies or births” Jocelyn Viterna, Jose Santos Guardado Bautista, Silvia Ivette Juarez Barrios, & Alba Evelyn Cortez, *Governance and the reversal of women’s rights: The case of abortion in El Salvador* (UNU-WIDER Working Paper No. 187 Series, 2017), women with financial means can still access abortions, therapeutic or otherwise, by attending private clinics.

¹⁶ For more information on the dangerous affects this has on poor women who are thus likely to seek needed and life-saving healthcare, see *Id.*, at 14. “They were women who had, throughout their lives, been excluded from educational opportunities, access to basic health care services, and conditions that would have allowed them to change their social status. As a result, these women were extremely vulnerable and lacked the necessary tools to confront the state’s authority. Moreover, as revealed in our interviews, criminal convictions and sentences are being given to women who, facing obstetric emergencies that lead to the loss of the fetus, do not understand the legal risks of the situations they faced, lack the means to access private health care services that will not report them, and cannot afford adequate legal defense. Due to the fact that the majority of complaints come from medical personnel, women experiencing obstetric emergencies or in need of post abortion care may be afraid to seek medical help or support. This kind of social monitoring by medical personnel is problematic, because the majority of complaints are without basis. Even more seriously, such surveillance violates medical ethics and the principle of beneficence by violating professional confidentiality.” For further reading on barriers to accessing maternal health services, see also, *IACHR. Access to Maternal Health Services from a Human Rights Perspective* (June 7, 2010), paras. 29, 33.

¹⁷ *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239 para. 85; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 349, para. 122.

¹⁸ Inter-American Court. *Hacienda Brasil Verde Workers v. Brazil*, 2016, para. 26, 99; Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and*

distinction should not preclude the Court from attaching significance to the role that poverty plays in exacerbating the harms that women face in El Salvador.

The Guiding Principles on Extreme Poverty and Human Rights provide that “[n]ot only is extreme poverty characterized by multiple reinforcing violations of civil, political, economic, social and cultural rights, but persons living in poverty generally experience regular denials of their dignity and equality.”¹⁹ The Court has in the past ruled on “(a) structural discrimination; (b) intersectional discrimination; (c) discrimination based on economic status – analyzed from the perspective of the ‘poverty’ of the victims, and (d) the content of the social rights that can be derived from Article 26 of the American Convention on Human Rights.”²⁰ Adopting an intersectional analysis in the instant case will therefore appropriately require a consideration of each of these factors.

THE ABORTION BAN IS INCONSISTENT WITH THE STATE’S OBLIGATIONS TO ITS CITIZENS

It is clear from such an evaluation that certain women are more vulnerable to harm caused by the law, and that the harm they face can be severe and even deadly. The situation created by the legal system for such women in El Salvador is not compatible with the many of the guarantees provided by international human rights law.

The obligations imposed on a State through its guarantee of the right to life under Article 4 in conjunction with Article 26 include not only abstaining from implementing measures that, as was the case with *Manuela*, arbitrarily deprive citizens of their right to life, but also imposes positive obligations to ensure conditions that guarantee dignity, based on the concept of *vida digna*.²¹ These guarantees include access to healthcare,²² and humane detention conditions.²³ The legal regime that pressures doctors and nurses to be informants rather than caregivers cannot be considered to be consistent with this guarantee. Nor can a system of detention be considered humane when individuals can be imprisoned without regard to their culpability.²⁴

their families v. Brazil, Preliminary objections, merits, reparations and costs, Judgment of July 15, 2020. Series C No. 407, paras. 57.

¹⁹ UN, *Guiding Principles on Extreme Poverty and Human Rights*, adopted by the Human Rights Council, September 27, 2012, Resolution 21/11, Preface, para. 4.

²⁰ Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, *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. 68. Quoting *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, (Preliminary objections, merits, reparations and costs), para. 3.

²¹ *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para. 144; *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. 172. See for instance for an application regarding the right to life of members of an indigenous community: *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, paras. 167-168.

²² *Case of Gonzales Lluy et al. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C No. 298, para. 190.

²³ *Case of the “Juvenile Reeducation Institute” v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, paras. 152-153.

²⁴ Further, *Manuela* waited for months to receive medical treatment and then received it only sporadically. This treatment cannot be squared with the guarantee of *vida digna*.

While the treatment that Manuela received as the State investigated and later prosecuted her actions was particularly egregious, any inquiry into a personal tragedy of an obstetric emergency that is open to so much bias will be inconsistent with guarantees of equality. Only by acknowledging the role that stereotyping played in Manuela’s abhorrent treatment is it possible to understand how a young woman, seeking medical treatment at an incredibly vulnerable moment of her life—after suffering an emergency and while going in and out of consciousness²⁵—could be treated with suspicion and alarm rather than with the care and kindness owed to medical patients.²⁶ Throughout her prosecution, imprisonment, and until the day she died, Manuela never said or suggested that she had chosen to have an abortion, yet the State treated her as a criminal the entire time.²⁷

For this to occur, it is clear that the State actors were not interacting with Manuela in the objective manner required, but rather on the basis of the biases they had towards marginalized women. The abortion ban’s expansion of criminal liability to those who fail to report an abortion,²⁸ with particularly harsh penalties for medical professionals,²⁹ also must be understood as a factor that exacerbates this effect and incentivizes individuals to invoke stereotypical assumptions regardless of the complex realities that challenge the validity of such views.

As the Commission noted in its report on Manuela, “her guilt was presumed throughout the process based on a series of gender stereotypes.”³⁰ This brief does not explore every way that stereotypes³¹ and modes of manifesting intersectional discrimination affected Manuela, but focuses on one specific stereotype that exacerbated the treatment to which she was subjected.

The stereotype of the “baby-killer” mother that has been promoted by certain actors in El Salvador was an important driver of the abortion ban and is linked to a larger context of the demonization of abortion as a political tool.³² Additional pressures, such as those on medical professionals to report, and on prosecutors to bring cases, find an easy target in women who often lack social and power and are already demonized by society.³³

²⁵ IACHR, Report No. 153/18, Case 13.069. *Merits. Manuela and family. El Salvador*. December 7, 2018, para. 77.

²⁶ While this Amicus brief does not explore this violation, this treatment violates the presumption of innocence until proven guilty as defined by Article 8(2) of the Convention and Article 12 of the Political Constitution of El Salvador.

²⁷ In this way, the State arguably violated Article 5(3) of the Convention, which reads, “punishment shall not be extended to any person other than the criminal.”

²⁸ Penal Code of El Salvador, art. 312 (1998).

²⁹ Penal Code of El Salvador, art.135 (1998).

³⁰ IACHR, Report No. 153/18, Case 13.069. *Merits. Manuela and family. El Salvador*. December 7, 2018, para. 13.

³¹ “Deeply rooted patriarchal attitudes and the pervasiveness of a machista culture that reinforces stereotypes about the roles and responsibilities of women and men in the family, the workplace and society constitute serious obstacles to women’s rights, in particular their right to be free from all forms of violence.”Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo - Addendum - Follow-up mission to El Salvador, para. 11, UN Doc. A/HRC/17/26/Add.2 (2011).

³² Jocelyn Viterna, Jose Santos Guardado Bautista, Silvia Ivette Juarez Barrios, & Alba Evelyn Cortez, *Governance and the reversal of women’s rights: The case of abortion in El Salvador* (UNU-WIDER Working Paper No. 187 Series, 2017), p. 6.

³³ The structural factors that drive this behavior are explored here: “Given the institutional pressure put on these state officers to process cases and to meet monthly quotas, it is perhaps not surprising that women like those

This stereotype exacerbated Manuela’s abuse at every step in the process, as illustrated by this broader account:

[W]hen women are thought to be ‘baby-killers’, Salvadoran state officials are willing to ‘manufacture’ guilt even when no evidence of guilt exists, and to extend initial charges of abortion to the more highly penalized charge of homicide. Importantly, it is only a certain kind of woman who is targeted by the hyper-application of the abortion ban: poor, poorly educated, exposed to violence, reliant on public health care, and isolated from networks of social support.³⁴

This analysis fits the facts of this case. From the manufactured confession Manuela’s illiterate father was forced to sign with his thumb print³⁵ to the doctor’s opposing observations about the umbilical cord,³⁶ State officials, both medical and legal, acted in a way that presumed her guilt and manufactured evidence to corroborate their suspicions.

Manuela’s specific vulnerabilities clashed catastrophically with the practices outlined above, and the harms and violations that she suffered as a result were immense. Understanding how stereotyping exacerbated her treatment helps us understand the abuse not as a random occurrence but as part of a systemic pattern. All those who are similarly situated are at risk of suffering the exact same harms.

THE COURT SHOULD DECRIMINALIZE ABORTION

In light of its consideration of the confluence of vulnerabilities faced by all young women from the lower socio-economic groups in El Salvador, the Court will need to explore the remedies that will best honor Manuela and protect all similarly situated women. Applying a “differentiated approach”³⁷ to this process, and taking account of the views expressed by a wide range of human rights bodies at the international level, should lead the court to conclude that there are no piecemeal safeguards short of decriminalizing abortion that will adequately resolve the problem caused by the relevant legislation.³⁸

described below are processed much more quickly than are others awaiting trial. The women themselves are already vilified in the media as baby-killers; they have no economic or criminal power, and so cannot threaten the prosecutor, much less carry out such threats; they are obliged to use state-provided defence attorneys, who do little to prepare for their cases; and the ‘evidence’ against these women—the body of the dead infant—is typically easy to find as ‘proof’ of their guilt, in contrast to the many people who are ‘disappeared’ by gang violence. For these reasons, prosecutors likely find the cases of marginalized women highly attractive from a prosecutorial standpoint. The conditions of the country may therefore intersect powerfully with the political campaign against abortion to incentivize Salvadoran state institutions to prosecute—quickly and harshly—impoverished women.” *Id.* at 9.

³⁴ *Id.* at 14.

³⁵ IACHR, Report No. 153/18, Case 13.069. *Merits. Manuela and family. El Salvador*. December 7, 2018, Para 52.

³⁶ ACHR, Report No. 153/18, Case 13.069. *Merits. Manuela and family. El Salvador*. December 7, 2018, Para 50.

³⁷ Inter-American Court. *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. 289.

³⁸ For further legal support of the decriminalization of abortion, see U.N. Committee on Economic, Social and Cultural Rights, *General comment No. 22 on the right to sexual and reproductive health*, 2016, pars. 28, 34, 40, 57; Committee on the Rights of the Child, *General comment No. 20 (2016) on the implementation of the rights of the*

In its Report, the Commission outlined three recommendations to the Salvadoran State. The first is to provide reparations for all the violations that they found the state had violated to Manuela's detriment. The second is to conduct investigations into all administrative, disciplinary, or other responsibilities found in the report. The third is to "implement the mechanisms necessary to prevent repetition of the violations declared in this report." It proceeded to indicate how that should be done.³⁹ The recommendations include improving public defense, bolstering legal protections, and creating education campaigns aimed at removing lack of education about reproductive rights from one of the vulnerabilities an individual might face.

While some recommendations may reduce the risk of future violations, others are incompatible with the extant law governing the abortion ban and its prosecution. For example, recommendation (vii) is to "ensure the legal certainty of professional medical confidentiality through adequate regulations that are the result of properly weighing the rights and interests in question and establish a protocol for their protection governing medical personnel in cases involving obstetric emergencies or abortions that meets international standards and provides a detailed review of grounds for exception." Yet article 312 of the Salvadoran Penal Code interacts with article 133 to classify the failure to report an abortion as a criminal offense in all cases. Thus, no protocol that the State outlines will meet international standards because that would be incompatible with the law as it stands.

Other parts of the recommendation set out admirable goals, such as eliminating the use of stereotypes in the health and legal systems, but these are long-term measures and the ban itself epitomizes and entrenches precisely the stereotype of the "baby-killer" that is largely at fault. In other words, more immediate and less contingent remedies are urgently required. As noted by all of the leading international human rights authorities that have addressed this set of issues,

child during adolescence, 2016, par. 60; U.N. INTERIM REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH, 2011, pars. 21 and 65, h); JOINT STATEMENT BY CEDAW AND CRPD COMMITTEES, *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities*, (2018); U.N. SAFE ABORTIONS FOR ALL WOMEN WHO NEED THEM - NOT JUST THE RICH (2017),

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22167&LangID=E>.

³⁹ "In particular: (i) strengthen the full effectiveness of public defense, particularly in cases involving the possible imposition of severe punishments, including disciplinary measures for accountability regarding actions or omissions that constitute manifest negligence; (ii) ensure that according to regulation and in practice, individuals convicted of a crime can appeal to a higher authority that can comprehensively review the judgment to convict; (iii) ensure that the concept of *in flagrante delicto* is applied pursuant to the standards described in this report; (iv) ensure that in both law and in practice, the use of pretrial detention adheres to the standards described in this report; (v) 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 assessment of evidence, as well as on criminal responsibility in judicial decisions; (vi) review and adjust discriminatory institutional practices within criminal law and the healthcare sector, pursuant to the terms analyzed in this report; (vii) established mechanisms to inform women at the local level, specifically those in situations of poverty, on their rights regarding sexual and reproductive health; and (viii) ensure the legal certainty of professional medical confidentiality through adequate regulations that are the result of properly weighing the rights and interests in question, and establish a protocol for their protection governing medical personnel in cases involving obstetric emergencies or abortions that meets international standards and provides a detailed review of grounds for exception." IACHR, Report No. 153/18, Case 13.069. *Merits. Manuela and family. El Salvador*. December 7, 2018, recommendation 3.

nothing short of decriminalizing abortion can bring about the necessary results consistent with international guarantees.

Therefore, to effectuate the guarantee of equal protection for all in El Salvador, the Court should find the relevant law in El Salvador to be in violation of the obligations imposed on the State as a party to the Convention and other relevant treaties.⁴⁰ It should call upon the state to repeal the abortion ban.

CONCLUSION

As the Court considers the best ways to deliver justice to Manuela and her family and protect those similarly situated, we urge it to consider how the absolute abortion ban in El Salvador is incompatible with protecting the rights of its citizens, both in theory and in practice. It is to be hoped that the Court will follow the Commission in finding the State responsible for a range of human rights violations in this case. It is also important for the Court to craft a remedy that will adequately protect those who are imminently faced with violations of their right to equal protection and the deprivation of their liberty as a result of the abortion ban.

⁴⁰ An examination of the legal basis for the violation of the right to equal protection is outside the scope of the brief. Such an examination would entail an exploration of how Article 24 and 1(1) of the American Convention and Articles 2 and 25 of the ICCPR impose on States an obligation to assure material equality. Additionally, we acknowledge that there are certainly barriers that will need to be considered that may cabin the Court's ability to effectuate this ruling. El Salvador will point to Article 1 of its constitution in order to claim that there are competing human rights at stake. Yet the Court in the *Case of Artavia Murillo et al. v. Costa Rica ("In Vitro Fertilization")* concluded that an embryo cannot be considered a person in the terms of Article 4(1) of the American Convention.