

THE SLIPPERY SLOPE OF ABORTION RIGHTS:
THE *MANUELA V. EL SALVADOR* INFANTICIDE
DECISION BY THE INTER-AMERICAN COURT
OF HUMAN RIGHTS

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ABSTRACT

In an unprecedented holding for any international human rights court, the Inter-American Court of Human Rights ordered El Salvador to create impunity for infanticide, to carry out criminal procedure law reform to inhibit its prosecution, and to inhibit enforcement of El Salvador’s ban on abortion in *Manuela v. El Salvador*, decided in November 2021.

This paper analyzes the case’s factual, legal and political context, and challenges the validity of the judgment’s holdings under the American Convention on Human Rights.

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I. INTRODUCTION

There are many horrifying ways to kill a person known to human imagination. Drowning someone in a septic tank, in a pool of human waste, while bleeding from a severe wound in the stomach, however, is not often heard of. Yet that is exactly how Dolores Gabriel Hernandez died in the village of Cacaopera in El Salvador.

Dolores Gabriel was a healthy newborn baby boy whose life was ended by his mother and probably his grandmother, only minutes to a couple of hours after birth. Dolores Gabriel's umbilical cord was violently torn off his abdomen and he was thrown into a latrine where he drowned in a septic tank, in a pool of human feces, urine and other waste.¹ The cause of his death was

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determined to be “mechanical asphyxiation due to obstruction of the upper [respiratory tract] with feces and severe bleeding from the navel”² The trial court judgment indicates that human feces were extracted from his nose and mouth.³

Law enforcement officers who rescued his body were unable to save his life but made sure that he got proper burial. As indicated in the court record, they got him birth and death certificates giving him the evocative name of Dolores Gabriel;⁴ Dolores meaning pains or sufferings in Spanish, and Gabriel, the archangel’s name.

A member of the team that rescued his remains from the septic tank testified that the child was lovely (*bonito* in Spanish), with brown skin and well-formed “with no apparent genetic defect,”⁵ and that he had maggots on his body.⁶ His death was estimated to have taken about 10 to 15 minutes after being thrown into the septic tank; his autopsy revealed brain injury caused by asphyxia, “[a] cerebral edema for lack of oxygen.”⁷

Dolores Gabriel’s mother, María Edis Hernández Méndez de Castro, later given the pseudonym “Manuela” by organizations that purported to represent her, was tried by a Salvadorian court for aggravated homicide, El Salvador’s statutory equivalent of infanticide, i.e. the killing of an infant

1. *Manuela and Family v. El Salvador*, Petition 424-12, Inter-Am. Comm’n H.R., Report No. 29/17, OEA/Ser.L./V/II.161, doc. 36 rev. sec. V, paras. 2-3, 5 (2017); *see also* Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.).

2. Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.); *see also* *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm’n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. paras. 8, 51 (2018).

3. *See* Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.).

4. *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm’n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. paras. 66, 107 (2018); *see also* Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.).

5. *See* *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm’n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. paras. 48, 155 (2018); *see* Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.).

6. *See* Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.).

7. *Id.*

immediately following birth.⁸ His grandmother was a suspect in the crime but was never formally charged, at María Edis's request.⁹ His grandfather reported the crime and apparently provided crucial evidence regarding the circumstances of the child's death.¹⁰

The court examined medical and forensic evidence relating to María Edis and her newborn son's bodies, DNA test results proving maternity, the baby's autopsy, reports from law enforcement officers who inspected the crime scene, and relevant photographs.¹¹ Two forensic tests (called optical and hydrostatic docimasia) were performed on Dolores Gabriel's lungs to determine whether he had taken a breath outside the womb, the requirement for a live birth under Salvadorian law; both tests gave a positive result, proving that the child was "born alive" and had "independent life and legal existence", under the domestic civil code.¹² The autopsy revealed that the baby was born full-term at 40 weeks gestation.¹³

The trial court also heard two expert witnesses, a psychiatrist and a psychologist, who evaluated Manuela's mental capacity and found that she met the required statutory standard in El Salvador, i.e. that she was mentally capacitated to distinguish between right and wrong at the time that she committed the crime, having no history of mental illness, suffering "no mental alienation, grave disturbance of her consciousness, incomplete or retarded mental development" that would prevent her from understanding "the illicit nature of her actions."¹⁴ The medical doctor who examined

8. *Manuela and Family v. El Salvador*, Petition 424-12, Inter-Am. Comm'n H.R., Report No. 29/17, OEA/Ser.L./V/II.161, doc. 36 rev. sec. V, para. 5 (2017).

9. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 82 (Nov. 2, 2021).

10. *Id.* at paras. 51, 62; Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, V (El Sal.).

11. *See* Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.).

12. *Id.*

13. *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. para. 73 (2018).

14. *See* CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 27, sec. 4(a-c) (El Sal.); *see also* Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, V (El Sal.).

Manuela in the hours following the birth also noted that, at the time of the examination, she seemed “conscious and oriented.”¹⁵

The trial court, a three-judge panel, unanimously found Manuela guilty of aggravated homicide against her newborn son.¹⁶ The judges, however, gave her the lowest possible penalty for aggravated homicide in El Salvador, a 30-year prison sentence (versus a fifty year maximum sentence), due to her low socio-economic and educational background.¹⁷ Manuela eventually served less than two years of her 2008 prison sentence given that, in 2010, she died of metastatic lymphatic cancer, a disease that she was diagnosed with since 2006.¹⁸

The above facts are undisputed before any and all national and international courts that heard the case, from the town of Cacaopera’s trial court to the Inter-American Court of Human Rights, an international court that oversees application of the American Convention on Human Rights. The American Convention is an international human rights treaty to which El Salvador is a party and the United States a signatory. Official, original trial court records are public and available online for the world to see.¹⁹

The story that pro-abortion organizations told the public and the Inter-American Court, however, had nothing to do with the actual facts of the case or the applicable law:²⁰ the crime committed against Dolores Gabriel was misrepresented as a miscarriage, where a poor young mother had suffered an “obstetric emergency,” had accidentally miscarried a fetus, was unlawfully investigated and wrongfully convicted for the “abortion” of an unborn child

15. See Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco de Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.) (words used by the medical doctor were “consciente y orientada,” which literally translates to “conscious and oriented,” but alert and clear-headed seem to be more in line with the meaning normally attributed to these terms in Spanish).

16. *Id.* at V.

17. *Manuela and Family v. El Salvador*, Petition 424-12, Inter-Am. Comm’n H.R., Report No. 29/17, OEA/Ser.L./V/II.161, doc. 36 rev. sec. V, para. 5 (2017).

18. *Id.* at sec. V, para. 6.

19. See Ligia Castaldi, *Infanticidio por aborto: El caso Manuela, El Salvador ante la CIDH* [*Infanticide for abortion: the Manuela case, El Salvador before the IA Court*], FUNDACIÓN VIDA SV (Oct. 23, 2019), <https://vidasv.org/2019/10/23/infanticidio-por-aborto-el-caso-manuela-el-salvador-ante-la-cidh/> (VIDA SV, a pro-life organization from El Salvador, has published trial court documents containing greater detail about the case’s facts, Dolores Gabriel’s autopsy, photographic evidence, trial, conviction and appeals in Salvadorian courts).

20. See Corte Interamericana de Derechos Humanos, *Audiencia Pública. Caso Manuela y otros Vs. El Salvador. Parte 2* [*Public hearing. Manuela case v. EL Salvador. Part 2*], YOUTUBE (Mar. 11, 2021), <https://www.youtube.com/watch?v=4LRz5JSz-6Y> (State’s representative denouncing “manipulation” in the characterization of the facts).

by overzealous law enforcement agents hunting for women who had abortions in El Salvador.²¹

Dolores Gabriel's existence, information about his live birth, and gruesome death were deliberately concealed for the sake of promoting decriminalization of abortion in El Salvador. Readers may have been exposed to scandalous media coverage where El Salvador was condemned by many—including Hollywood actresses and Democratic congresswomen—as a primitive, fundamentalist country that criminalized women who had miscarriages, due to its overzealous prosecution of induced abortions,²² all on the basis of fabricated stories about Manuela and other infanticide convicts.

In November 2021, El Salvador was held internationally liable by the Inter-American Court of Human Rights for alleged human rights violations against Manuela and her surviving family members, including Dolores Gabriel's grandmother, to whom it was ordered to pay compensation. The judgment held that El Salvador's enforcement of criminal penalties against Manuela for the aggravated homicide of her newborn son, Dolores Gabriel, violated the American Convention on Human Rights.²³

In a novel spin for international abortion rights advocacy, the Inter-American Court also ordered El Salvador to create impunity for infanticide and to officially discourage its reporting to law enforcement, along with reporting of abortion.²⁴ As of 2022, this is an unprecedented holding for any international human rights court and, in the view of many, a disturbing precedent for children's rights, in particular their right to life, which the American Convention explicitly protects from the moment of conception in article 4(1): "Every person has the right to have his life respected. This right

21. *Manuela v. El Salvador: The Impact of Blanket Abortion Bans on Women Experiencing Obstetric Emergencies*, CTR. FOR REPROD. RTS. (Mar. 4, 2021), <https://reproductiverights.org/manuela-v-el-salvador-impact-blanket-abortion-bans-women-experiencing-obstetric/>.

22. See, e.g., Anna-Catherine Brigida, *Women serving decades-long prison terms for abortion in El Salvador hope change is coming*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/world/the-americas/women-serving-decades-long-prison-terms-for-abortion-in-el-salvador-hope-change-is-coming/2018/09/26/0048119e-a62c-11e8-ad6f-080770dcddc2_story.html; Alyssa Milano, (@Alyssa_Milano), #EyesOnElSalvador, TWITTER (Apr. 24, 2018, 2:18 PM), https://twitter.com/hashtag/EyesOnElSalvador?src=hashtag_click; Kelly Baden, *State Lawmakers Visited El Salvador for a Fact-Finding Mission on Abortion Bans*, MS. MAG., Nov. 21, 2019, at 2, 4.

23. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 4-6 (Nov. 2, 2021).

24. *Id.* at paras. 87-88.

shall be protected by law and, in general, *from the moment of conception*. No one shall be arbitrarily deprived of his life.”²⁵

II. STRATEGIC ABORTION LITIGATION AND THE LAWSUIT’S POLITICAL CONTEXT

The case was first filed before the Inter-American Commission on Human Rights (hereinafter the Commission) by a pro-abortion organization based in the United States, the Center for Reproductive Rights, and its main affiliates in El Salvador, the *Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico* [Citizen’s group for decriminalization of therapeutic, ethical and eugenic abortion], and the *Colectivo Feminista para el Desarrollo Local de El Salvador* [Feminist collective for local development of El Salvador].²⁶ Both local organizations also receive funding from the United Kingdom-based International Planned Parenthood Federation (IPPF), the international arm of the U.S.-based Planned Parenthood Federation of America.²⁷

For several years prior to filing the *Manuela* complaint, these organizations, which have received U.S. federal funds through International Planned Parenthood Federation (IPPF) and Center for Reproductive Rights,²⁸ have unethically litigated for impunity of infanticide in the name of creating abortion rights in El Salvador, a country that legally protects prenatal life from the moment of conception as required by the American Convention. At the national level, they litigated to free at least twenty-three female convicts (called “las 17+” [the 17+] in the media) who have been criminally tried and convicted in El Salvador’s courts for aggravated homicide of their own

25. See Organization of American States, American Convention on Human Rights, pt. I, ch. II, art. 4, sec. 1, Nov. 22, 1969, O.A.S.T.S. 36, U.N.T.S. 17955 (emphasis added).

26. *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm’n H.R., Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175 rev. para. 1 (2018).

27. Nancy Flanders, *Planned Parenthood is helping to free El Salvador women who stabbed and strangled newborns*, LIVE ACTION (Aug. 5, 2020, 10:51 AM), <https://www.liveaction.org/news/planned-parenthood-el-salvador-stabbed-newborns/>.

28. *Id.*

newborn children.²⁹ Most of their appeals and requests for amnesty were denied by the national supreme court for lack of merit, but at least fourteen inmates have been freed via parole procedures or executive discretionary action.

According to campaigns by these organizations, female perpetrators of infanticide, not their children, are victims of human rights violations. Newborn babies who could have been safely delivered and placed with adoptive families are called “fetuses” and their deaths presented as “spontaneous abortions” or “obstetric emergencies,” despite overwhelming forensic and medical evidence of infanticide in every instance.³⁰ Media campaigns by these and other pro-abortion organizations have celebrated the release of female perpetrators of infanticide as heroes who have unfairly suffered the consequences of El Salvador’s abortion ban; the Inter-American Commission has supported those efforts and has repeatedly demanded that El Salvador set the 17+ inmates free.³¹

29. See U.S. Dep’t of State, *El Salvador Human Rights Report 23 (2017)* (describing complaint by human rights organizations that 17 women had been convicted for abortion in El Salvador and indicating that the Legal Medicine Institute responded that the women had committed infanticide instead). See also Edward Schumacher-Matos, *Abortion Or Infanticide In El Salvador?*, NPR (Nov. 10, 2014, 9:53 AM), <https://www.npr.org/sections/publiceditor/2014/11/10/361207588/abortion-or-infanticide-in-el-salvador> (pointing out inaccuracy in NPR reporting about El Salvador’s prosecution of Cristina Quintanilla for abortion, where her case actually involved infanticide and mercy killing, not abortion). See also Pete Baklinski, *NPR says El Salvador mom was charged for “having an abortion” - but evidence shows she murdered her newborn*, LIFE SITE (Oct. 3, 2014, 2:40 PM), <https://www.lifesitenews.com/news/npr-says-el-salvador-mom-was-charged-for-having-an-abortion-but-evidence-sh> (indicating that abortion complaint against El Salvador actually involved infanticide not abortion).

30. Ligia De Jesus Castaldi, *The 17+ Women in El Salvador: A Case of Infanticide Impunity in the Name of Abortion Rights*, PUB. DISCOURSE (Feb. 9, 2020), <https://www.thepublicdiscourse.com/2020/02/59850/>.

31. See Press Release, IACHR Urges El Salvador to End the Total Criminalization of Abortion, O.A.S. (Mar. 7, 2018), http://www.oas.org/en/iachr/media_center/PReleases/2018/042.asp (indicating that IACHR calls on El Salvador to launch a moratorium on enforcement of Criminal Code Article 133 and to review convictions of 27 women allegedly convicted for abortion, citing Commissioner Macaulay’s statements to that effect). E.g., Comisión Interamericana de Derechos Humanos, *El Salvador: Mujeres privadas de libertad por emergencias obstétricas [El Salvador: Women deprived of liberty due to obstetric emergencies]*, YOUTUBE (Oct. 19, 2015), <https://www.youtube.com/watch?v=h9Op-28nM2U> (showing where several NGOS including Center for Reproductive Rights and Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico de El Salvador [Citizens group for the decriminalization of therapeutic, ethical and eugenic abortion] state that women have been imprisoned for obstetric emergencies in the country, while El Salvador State representatives categorically reject such allegations). See also Agrupación Ciudadana, *Audiencia CIDH El Salvador [IACHR Hearing El Salvador]*, YOUTUBE (Mar. 16, 2013), <https://www.youtube.com/watch?v=XRSAA7UWsko> (showing where Commissioners Tracy Robinson, Rose Marie Antoine and Rosa Maria Ortiz express their concern

Manuela is the oldest case in this litigation and the only one where the mother convicted for aggravated homicide against her child has been deceased for over ten years. No evidence was apparently submitted that Manuela ever expressed a desire to be represented by the pro-abortion non-governmental organizations (NGOs) that spoke for her in the Inter-American human rights system.³² Petitioning NGOs did not defend her case or intervene throughout domestic proceedings, but nevertheless assumed representation and took a complaint on her behalf before the Commission posthumously, two years after her death, and four years after the last judgment against her, without any evidence that Manuela would have so wanted.³³

A lawsuit against El Salvador was filed by the Commission and the pro-abortion organizations as plaintiffs in the lawsuit before the Inter-American Court of Human Rights, an international court located in San José, Costa Rica, first directly, then indirectly seeking impunity for infanticide as a step towards legalization of abortion in El Salvador.³⁴ The Commission and the pro-abortion NGOs both requested the Court to order El Salvador to carry out procedural and substantive criminal law reforms that would inhibit the investigation and prosecution of crimes against the life of newborn children when committed by their own mothers in El Salvador.³⁵ The request for reforms also included the imposition of sanctions on physicians and health care personnel who report the suspected homicide of a newborn child in El Salvador.³⁶

The Inter-American Court issued the *Manuela v. El Salvador* judgment, largely indulging these requests while disregarding virtually all substantive

over El Salvador's full ban on abortion and alleged wrongful prosecution of women who miscarry, argued by IPAS, CEJIL and other non-governmental organizations).

32. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 89 (Nov. 2, 2021) (indicating that the pro-abortion NGOs in question only became involved with her case in 2011, about a year after her death) (no power of attorney signed by Manuela is cited in the judgment).

33. *Id.* at paras. 17-18.

34. *See Manuela and Family v. El Salvador*, Petition 424-12, Inter-Am. Comm'n H.R., Report No. 29/17, OEA/Ser.L./V/II.161, doc. 36 rev. sec. V, para. 1 (2017); *see also* Corte Interamericana de Derechos Humanos, *supra* note 20.

35. *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. para. 160 (2018).

36. *Id.*

arguments by the State,³⁷ and refusing to hear the only witness who would have testified about the child's autopsy: Dr. Alfredo Romero Díaz, a chief forensic medical doctor who would have spoken about the child's live birth and death, a fundamental issue in this case.³⁸ The Court denied the State's request to allow Dr. Romero to appear at the case's public hearing in March 2021 for procedural reasons, leaving El Salvador in a state of defenselessness, with no expert witnesses on the panel, while admitting all of the plaintiff's and Commission's witnesses regardless of procedural objections.³⁹ El Salvador was ultimately held internationally responsible for human rights violations against Manuela, the deceased alleged victim in the case, and her family members, also alleged victims.⁴⁰

Aside from typical reparations, such as officially issuing a public apology acknowledging human rights violations, El Salvador was ordered to pay the amount of USD \$47,500 to pro-abortion NGOs that brought the lawsuit for reimbursement of legal fees and expenses, even though they had already charged that amount and more to foreign assistance projects, as the State of El Salvador pointed out.⁴¹

El Salvador ratified the American Convention in 1978 and accepted the Court's permanent jurisdiction in 1995,⁴² and is therefore bound to comply with the judgment, but only the decision's section on compensatory reparations is self-executing in a domestic jurisdiction, meaning directly enforceable in domestic courts as per article 68 of the American Convention on Human Rights.⁴³

37. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 17-18 (Nov. 2, 2021) (dismissing State's procedural objections).

38. *Manuela v. El Salvador*, Provisional Measures, Order of the President of the Court, "Having Seen," sec. D, para. 18 (Inter-Am Ct. H.R. Dec. 2, 2020), https://www.corteidh.or.cr/docs/asuntos/manuela_y_otros_02_12_2020.pdf.

39. *CTR. FOR REPROD. RTS.*, *supra* note 21.

40. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 174 (Nov. 2, 2021).

41. *Id.* at paras. 316, 319.

42. *Id.* at para. 15.

43. *See American Convention on Human Rights*, *supra* note 25, at pt. II, ch. VIII, sec. 3, art. 68.

III. THE ORDER TO CREATE IMPUNITY FOR INFANTICIDE: A REGRESSION OF CHILDREN'S RIGHTS

The homicide of one's own child is punishable under Salvadorian criminal law, as it is in virtually every other nation in the world.⁴⁴ El Salvador's criminal law treats the homicide of one's own child, which includes but is not limited to infanticide, as *aggravated homicide*, i.e. a homicide involving malice or cruelty, which Salvadorian legislators have deemed to be aggravating factors; other forms of aggravated homicide include the killing of a human person during acts of terrorism, rape, kidnapping, and drug trafficking.⁴⁵ El Salvador's criminal law treats both the killing of one's own child, the killing of one's own spouse or domestic companion, and the killing of one's own parent (parricide) equally as aggravated homicide and imposes an identical penalty of thirty to fifty years imprisonment for either offense.⁴⁶

The Inter-American Court has emphasized that "the State has the obligation to *fight impunity* by all available legal means," and that the "obligation to fight impunity is emphasized when dealing with violations whose victims are *children*."⁴⁷ Yet in the *Manuela* judgment, the Court orders El Salvador to lower its infanticide penalty to a specific sentencing range of "one to four years' imprisonment," "*or less*."⁴⁸ This order trivializes the crime of infanticide when committed by the mother *only*; it does not apply to other comparable forms of aggravated homicide, such as

44. See *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 164 n.11 (Nov. 2, 2021) (citing Brief of amici curiae human rights organizations: Abogados por la Vida, American College of Pediatricians, Americans United for Life, AFI, Asociacion Chilena de Juristas Catolicos, C-Fam, Charlotte Lozier Institute, Comité Provida, Family Watch International, FAFCE, Fundación Si a la Vida, Global Life Campaign, Instituto Conservador-Liberal, International Human Rights Group, International Organization for the Family, ISHRI, Jerome LeJeune Foundation, Juristes pour l'Enfance, Movimiento Restaurador Viva Mexico, Ordo Iuris International Law Center, Priests for Life, Project for Human Development, Red Familia, Susan B. Anthony List, United Families International, University of St. Thomas ProLife Center, Vida SV, and World Youth Alliance, in support of El Salvador, addressing international consensus over the legality of infanticide prosecution under international human rights law. Brief of Amici Curiae Human Rights Organizations, *Manuela v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 (2018)).

45. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 129, sec. 2 (El Sal.).

46. *Id.*

47. *Servellón García et al. v. Honduras*, Merits, Reparations and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 152, para. 154 (Sept. 21, 2006) (emphasis added).

48. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 35 n.85, para. 171 (Nov. 2, 2021) (emphasis added).

infanticide committed by the father, the killing of an older child by the mother, or the killing of one's own parent, which would all remain subject to penalties of thirty to fifty years' imprisonment.⁴⁹

Neither pro-abortion organizations speaking for Manuela nor the Commission had argued that penalties for infanticide in El Salvador were excessive, nor requested that they be lowered,⁵⁰ but the Court decided to make the argument anyway on its own initiative, invoking the principle of *iura novit curia*.⁵¹ It also dictated the terms for its order to diminish penalties for infanticide in the dispositive and reparations sections, incorporating large non-resolatory sections of the judgment by reference,⁵² a strategy that seems designed to make a judgment's *dicta* more authoritative than it actually is.

The judgment explicitly orders El Salvador to reverse its criminal law reform of 1998 in which legislators categorized infanticide as aggravated homicide and established penalties of thirty to fifty years' imprisonment, in consistence with the seriousness of the crime.⁵³ It orders the country to, at a minimum, revert back to its 1973 criminal law standards that used to categorize infanticide as "attenuated" homicide and applied penalties of one to four years' incarceration.⁵⁴ The Court also urged El Salvador to consider even lower penalties for infanticide: "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 [sic] . . ."⁵⁵

If implemented, the Inter-American Court's order would lead to one of two situations: (a) at a minimum, it would recategorize infanticide, by the mother during the perinatal period, as *attenuated homicide* (such as "mercy killing" or involuntary manslaughter, punished with similar penalties of up to five years imprisonment in El Salvador);⁵⁶ or (b) it would go even further by

49. See *id.* at para. 166; Corte Interamericana de Derechos Humanos, *supra* note 20 (where Judge Eugenio Raúl Zaffaroni suggests that a comparison must be made between the penalties for infanticide and parricide, which are identical under El Salvador's criminal code).

50. See Corte Interamericana de Derechos Humanos, *supra* note 20 (Judge Humberto Sierra Porto asks Commission and pro-abortion NGOs if they are seeking an attenuated penalty for infanticide, to which they respond no).

51. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 161 (Nov. 2, 2021).

52. *Id.* at para. 295, (operative para. 16, p. 88).

53. *Id.* at para. 295.

54. *Id.* at paras. 35, 171.

55. *Id.* at para. 171.

56. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 130-31 (El Sal.).

imposing even lower penalties that would no longer treat it as a homicide at all, since current penalties for homicide are not punished with anything less than two to four years in El Salvador.⁵⁷ In any case, the lower penalties ordered by the Court could effectively decriminalize infanticide by turning the crime into a commutable offense that may be subject to non-incarceration penalties (*medidas sustitutivas*), such as weekend detention and community service.⁵⁸

The judgment gave no definition of the “perinatal” period during which a woman would be exempt from criminal penalties for infanticide but expressed approval of an individual author’s very broad definition of “perinatal” as the period starting at fetal viability until the woman’s first menstruation after birth,⁵⁹ which could mean a month or more after childbirth. The World Health Organization, which the Court often cites, however, gives a narrower definition of perinatal period as beginning at 22 completed weeks of gestation and ending seven completed days after birth;⁶⁰ therefore, the preference for a much broader definition seems designed to promote impunity for infanticide within a longer period of time after the child’s birth. The viability criterion suggested by the Court, seems reminiscent of abortion and could, if this definition was implemented, extend infanticide exemptions to late-term abortions of viable children.

The erratic holding is unprecedented because no other international court has ever ordered impunity for infanticide as required by international human rights law. For years, United Nations human rights committees had been ordering El Salvador to stop enforcing its ban on abortion and infanticide but always indirectly, invoking abortion rights. The Human Rights Committee, the U.N. Committee for Social, Economic and Cultural Rights, and the CEDAW Committee all condemned El Salvador’s enforcement of its infanticide prohibition, arguing that the cases in question, including Manuela’s, were not homicides but spontaneous abortions, incomplete

57. *Id.* at art. 132.

58. *Id.* at art. 74 (establishing mandatory commutation of jail sentences of six months to one year imprisonment for weekend detention, community service, or fines; and discretionary commutation for jail sentences of one to three years imprisonment for weekend detention and community service only, for an equivalent time period).

59. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 166 n.280 (Nov. 2, 2021).

60. *International Statistical Classification of Diseases and Related Health Problems*, 2 WHO 89, 95 (2d ed. 2004).

abortions or miscarriages, as pointed out by Judge Vio Grossi.⁶¹ None of them, however, ordered impunity for infanticide as directly or specifically as the Inter-American Court.

The Court gave El Salvador a deadline of two years to “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 . . . this judgment.”⁶² Plaintiff pro-abortion organizations demanded that criminal reform be done through the executive, without the usual legislative checks that the lawmaking process normally requires.⁶³ But the Inter-American Court recommended that it be done by whatever “specific legal channel determined by the State.”⁶⁴ Under El Salvador’s constitutional law, as in that of most Latin American countries, only the legislative branch would, of course, have the power to amend a national criminal code.

A. *Dolores Gabriel and the Infant’s Right to Life*

Dolores Gabriel Hernandez, the victim of aggravated homicide in the case, goes unnamed and ignored in the *Manuela* judgment. The Court did not deny Dolores Gabriel’s horrific death, yet entirely ignored the grotesque facts proven at trial, with no single section of the verdict addressing Dolores Gabriel’s right to life. No sensitivity was shown to the sufferings of Dolores Gabriel, even though the evidence weighed by the trial court showed that he suffered unspeakable violence and died in a degrading and inhumane manner by bleeding to death and drowning in human waste in a rural septic tank. The need to bring the perpetrators of the crime against him to justice was not given any weight or consideration by the Inter-American Court.⁶⁵

Instead, the Court found a violation of *Manuela’s right to life* and right to health,⁶⁶ attributing her death from metastatic cancer in 2010 to the Salvadorian government.⁶⁷ During her incarceration, the State did provide

61. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 29, 42-44, 222-23 (Nov. 2, 2021); *id.* at para. 14 (Vio Grossi, J., dissenting in part).

62. *Id.* at para. 295 (majority opinion).

63. *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm’n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. para. 160 (2018).

64. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 171 (Nov. 2, 2021).

65. *Id.*

66. *Id.* at paras. 5, 241-47, (operative para. 5, p. 87).

67. *Id.* at para. 244, (operative para. 5, p. 87) (citing a violation of article 26).

Manuela with cancer treatment, but the plaintiffs and the Court called missing her last two appointments for chemotherapy an “inhuman punishment,”⁶⁸ even though the treatment had very little chance of prolonging her life at her terminal stage and could have caused greater discomfort than medical benefits. Despite the lack of evidence that Manuela was actually handcuffed to her bed while detained in the hospital other than her father’s statement nine years after the crime,⁶⁹ the Court held that the alleged use of handcuffs on Manuela was “torture” and violated the torture prohibition in article 5 of the Convention.⁷⁰

Testimony and forensic evidence of Dolores Gabriel’s horrific death and sufferings received little attention and credibility from the Inter-American Court. Ignoring overwhelming evidence that the child had been born alive and was proven to breathe outside the womb for a period of 10 minutes to 2 hours, the Court unreasonably suggested that Dolores Gabriel’s demise could have been a “intrauterine fetal death” caused by preeclampsia.⁷¹

Expert witness testimony and forensic evidence, including two docimasia standard tests used around the world to determine a baby’s live birth, were discredited by the Court⁷² for no reason other than its choice to believe the expert testimony of a pro-abortion medical doctor tainted by conflict of interest. Doctor Guillermo Ortiz, a medical doctor who had no actual involvement with the case, no contact with Manuela or even familiarity with her judicial file, as pointed out by the State,⁷³ questioned the reliability of standard docimasia testing. The Court accepted his opinions as evidence and ignored his clear conflict of interest as a full-time medical advisor for Ipas, an international abortion provider that not only advocates for, but performs abortions in countries that legally prohibit it.⁷⁴

Great sensitivity was shown by the Court to Manuela’s mother, a suspect in the crime, for the loss of her daughter, her fears, and resentment towards

68. *Id.* at para. 241.

69. *Id.* at para. 64 n.133.

70. *Id.* at paras. 200, 260.

71. Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco de Gotera], Case No. TS066/2008, Aug. 11, 2008, V(f) (El Sal.).

72. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 127 (Nov. 2, 2021) (operative para. 5, p. 87).

73. Corte Interamericana de Derechos Humanos, *supra* note 20 (State’s representative points out that expert witness had not studied Manuela’s judicial files).

74. *Doctors as champions for abortion rights: Ipsas’s Dr. Guillermo Ortiz says the health needs of women should come first*, IPAS (Sept. 22, 2017), <https://www.ipas.org/news/doctors-as-champions-for-abortion-rights/>.

law enforcement authorities.⁷⁵ Unlike testimony on Dolores Gabriel's horrific death, expert witness testimony on his grandmother's psychological ailments was given due weight and deference, and the State was held responsible for a violation of her right to personal integrity.⁷⁶

Manuela's mother was suspected by Salvadorian authorities of having cooperated with the crime by severing and then cutting the child's umbilical cord, throwing the baby in the septic tank, and then burying what she believed to be the placenta, thus destroying evidence.⁷⁷ Manuela had stated that "in her home, her whole family knew that she was pregnant . . ."⁷⁸ Her mother then gave a statement to law enforcement where she said that her daughter had suffered a miscarriage and that she had "helped" her by burying a "blob of blood" in the municipal cemetery.⁷⁹ Plaintiff pro-abortion organizations later admitted that the mother "buried" the "fetus" in the latrine, which suggests that they knew of her complicity with the crime by throwing the child into the septic tank.⁸⁰

Manuela's mother and father received compensation in the amount of USD \$20,000 for material and emotional damages, and an additional USD \$10,000 for immaterial damages, even though Manuela was not a minor and Judge Perez Manrique suggested that the parents were not central victims in the case.⁸¹ El Salvador was ordered to pay for the education of Manuela's two living sons and to pay them financial compensation.⁸² None of her

75. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 263 (Nov. 2, 2021).

76. *Id.* at paras. 6, 265-66, (operative para. 6, p. 88).

77. *See* Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.); *see also* *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 53, 82, 127 (Nov. 2, 2021) (indicating that Manuela's mother's testimony was initially proposed by her defense attorney but then withdrawn upon Manuela's request and that the defense attorney requested her acquittal); *id.* at para. 83 (quoting the trial court's suggestion that "someone else" could have thrown the child in the septic tank).

78. *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. para. 75 (2018).

79. Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.).

80. *Id.*; *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. para. 8 (2018).

81. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 304, 309-10, (operative paras. 10, 19, pp. 88, 89) (Nov. 2, 2021); *see also id.* at para. 38 (Perez, J., concurring).

82. *Id.* at paras. 278-79, 304, 309-10, (operative paras. 10, 19, pp. 88, 89) (majority opinion).

family members received compensation for the loss of Dolores Gabriel, their brother and grandchild.

B. *Proportionality of Infanticide Penalties in El Salvador*

The *Manuela* judgment concluded that the aggravated homicide penalty for infanticide was disproportionate to the Court's perceived general lack of criminal culpability of women during the perinatal period; the infant child's right to life was omitted from the Court's proportionality calculus.⁸³ Starting with Judge Eugenio Raúl Zaffaroni during the Inter-American trial's public hearing, the Court invoked a set of patronizing stereotypes about poor, uneducated women living in rural areas where "misogynistic values" abound, to suggest that a poor woman who kills her newborn child should *always* be exempt from criminal responsibility.⁸⁴ In support of that assertion, it cited two academic articles by authors who promoted decriminalization of infanticide according to whom "a woman's mental fragility" when committing infanticide would *always* excuse the crime.⁸⁵

The superficial, capricious proportionality finding can be challenged from multiple angles, starting with the judgment's blanket assumption that *all* poor, uneducated women suffer from some sort of mental incapacity or emotional disturbance in the perinatal stage that would promote an absurd uniform rule of non-culpability that would give any poor woman who kills her newborn infant a free pass from criminal prosecution, whether mentally competent or not. Such a rule would also prevent a case-by-case consideration of individualized circumstances and criminal responsibility of the perpetrator, as well as any consideration of the circumstances of the child's death and the human rights violations committed against her.

In addition, domestic law was grossly misrepresented despite the Court's better knowledge: Salvadorian criminal law *does* establish defense grounds on the basis of insanity and diminished mental capacity for any crime, including infanticide.⁸⁶ The Salvadorian criminal statute stipulates mitigating and attenuating factors for any homicide, such as extreme

83. Corte Interamericana de Derechos Humanos, *supra* note 20.

84. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 169 (Nov. 2, 2021).

85. *Id.* at para. 167 n.280 (citing Mariano N. Castex and C. Simonin).

86. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 27 (El Sal.).

emotional disturbance, intoxication, and mitigating acts to reduce harm to the victim,⁸⁷ that could apply to infanticide perpetrators.

The national criminal procedure statute also allows state attorneys discretionary prosecution to waive criminal prosecution (called *criterio de oportunidad*) where an accused person has suffered grave, irreparable, or disabling physical or mental harm from the commission of the crime,⁸⁸ which could certainly apply to some mothers who commit infanticide. It also allows for discretionary prosecution of accused persons who suffer terminal illness,⁸⁹ as Manuela did at the time she committed the crime. Prosecution waivers eliminate the possibility of criminal sanctions too,⁹⁰ which can result in exceptions to the criminal ban on infanticide on a case-by-case basis.

The criminal code gives judges wide discretion to weigh attenuating factors, including non-enumerated factors that may arise in individual situations,⁹¹ which allows for individualized consideration of an infanticide perpetrator's mental state at the time of the crime and allows for proportional sentencing on a case-by-case basis. Female victims of domestic violence, for instance, can also obtain reduced sentencing under the "National Criminal Prosecution Policy in Matters Relating to Violence Against Women" (*Política de Persecución Penal en materia de Violencia contra Las Mujeres*),⁹² which would have been inapplicable here, since Manuela was not a domestic violence victim.

The existence of criminal defenses and attenuating, mitigating factors in current Salvadorian criminal statutes, applicable to all homicidal crimes, reveals that the Inter-American Court's criminal reform is entirely frivolous and unnecessary. It also shows that the *Manuela* judgment was simply wrong when it stated that "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"⁹³

87. *Id.* at art. 29, secs. 1, 3, 4.

88. CÓDIGO PROCESAL PENAL DE LA NACIÓN [CÓD. PRO. PEN.] [CRIMINAL PROCEDURE CODE] art. 20 (El Sal.).

89. *Id.* at art. 20, sec. 4.

90. *Id.* at art. 31, sec. 6.

91. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 64 (El Sal.).

92. Press release, Douglas Arquímedes Meléndez Ruíz, Attorney General, Arquímedes Meléndez Ruíz Statement on Política de Persecución Penal (May 30, 2017), <https://www.fiscalia.gob.sv/medios/portal-transparencia/normativas/Politica-de-Persecucion-Penal%202017.pdf>.

93. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 164 (Nov. 2, 2021).

The Inter-American Court ironically acknowledged that these factors were *actually* weighed in Manuela's conviction itself and led to the imposition of the lowest possible penalty for infanticide: the trial court explicitly gave Manuela the minimum sentence of 30 instead of 50 years imprisonment because of her "very low [educational] level."⁹⁴ The Inter-American Court judgment acknowledged this fact but emphasized that it simply did not like the penalty she received: "in Manuela's case, *the criminal court took these factors into account* when deciding her sentence [but] . . . decided to impose no less than thirty years' imprisonment. . . . [I]t is evident that, in this case, this punishment was clearly *cruel*."⁹⁵ No reasoning was given as to why a thirty year sentence for the killing of one's own newborn child is "cruel." The Court merely stated its preference for the 1973 statutory provision that treated infanticide as "attenuated" homicide, noting that the increase in penalties from 1973 to 1998 was "evidently disproportionate."⁹⁶

Remarkably, the judgment's proportionality analysis failed to look at the proportionality of its own proposed sanctions in the context of El Salvador's criminal statute. The judgment's proposed penalties of "one to four years' imprisonment" "or less" would punish infanticide similarly to lesser offenses such as using a fake identity (six months to a year imprisonment), welfare fraud by simulation of pregnancy (six months to two years), vehicular theft (six months to a year imprisonment), destruction of environmentally protected areas (one to three years imprisonment), and physical child abuse (one to three years imprisonment), none of which involves homicidal crimes against a human person's right to life.⁹⁷ It would disproportionately punish infanticide more lightly than illegal hunting or fishing of protected species, unlawful gun possession, or sexual harassment (three to five years imprisonment).⁹⁸

Ironically, if El Salvador complied with the Court's order, penalties for infanticide would be lower than those for abortion, which are stipulated at a range of two to eight years incarceration,⁹⁹ while criminal statutes explicitly

94. See Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, VI(4) (El Sal.) (author translation).

95. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 169 (Nov. 2, 2021) (emphasis added).

96. *Id.* at para. 165.

97. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 197, 204, 259, 288 (El Sal.).

98. *Id.* at arts. 165, 261, 346(B)(a).

99. *Id.* at art. 133.

state that miscarriage or involuntary abortion is not punishable by law, even where the mother's behavior has contributed to it.¹⁰⁰ To punish infanticide as a lesser crime than abortion would be absurd, since both the unborn child and the newly born child are equal persons under El Salvador's Constitution and have an equal right to life,¹⁰¹ and even other jurisdictions that have legalized abortion universally continue to punish the killing of newborn children.

C. *Infanticide Penalties as Discrimination Against Women*

Captive to feminist ideology, the judgment condemned "preconceived ideas with regard to the role of women and maternity," stating that women should not have "the responsibility of prioritizing the well-being of their children, even over their own well-being, regardless of the circumstances," and solemnly declared that "such gender stereotyping is incompatible with international human rights law."¹⁰² The Court called reporting Manuela's crime to law enforcement "an act of violence against women,"¹⁰³ condemned El Salvador's "patriarchal system," based on traditional and "androcentric values," and reached the absurd and entirely unfounded conclusion that Manuela was convicted on the basis of "gender stereotypes," "because [she] was a woman."¹⁰⁴

The enforcement of national norms against the killing of one's own children does not constitute discrimination against women: El Salvador's Criminal Code's language on aggravated homicide is gender neutral and applies equally to any parent, mother or father, that kills a child, regardless of the parent's gender.¹⁰⁵ In this case, in fact, the domestic trial court noted "the paternal irresponsibility noticed on the part of the biological father," even though he had no participation in the crime nor was a party to the case.¹⁰⁶

100. *Id.* at art. 137.

101. *See* CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE EL SALVADOR [POLITICAL CONSTITUTION OF THE REPUBLIC OF EL SALVADOR] Dec. 15, 1983, art. 1 (recognizes "as a human person every human being from the moment of conception").

102. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 144-45 (Nov. 2, 2021).

103. *Id.* at paras. 155, 259.

104. *Id.* at paras. 155, 159.

105. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 129, sec. 1 (El Sal.).

106. *See* Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco de Gotera], Case No. TS066/2008, Aug. 11, 2008, V (El Sal.).

Alluding to a mother's duty not to kill her child and to protect him from death does not render a trial court judgment discriminatory on the basis of gender, no matter how unpalatable any mention of motherhood and its obligations may be to feminist sensitivities. Yet, the Inter-American Court characterized a trial judge's language about the "maternal instinct" to protect a child from death, as "gender stereotypes" that promote "preconceived ideas with regard to the role of women" such as the idea that "women must respond to the maternal instinct and sacrifice themselves for their children at all times," that "women who decide not to be mothers have less worth than the others, or are undesirable persons," and that "Manuela should have placed the possible life of her own son before her own"¹⁰⁷

Contradicting its own rejection of paternalistic and patriarchal stereotypes about women, the Court adopted another set of patronizing stereotypes of its own by assuming that poor, uneducated, rural area women (as a class) always lack the mental capacity required for criminal responsibility for infanticide, and going so far as suggesting that, under this stereotype, Manuela may have been innocent and entirely lacking in capacity.¹⁰⁸ The Court also stated that, because these women would be unable to contact and obtain protection from feminist organizations, then that would be another factor in excusing the crime of infanticide.¹⁰⁹

Some of the case facts were knowingly misrepresented by the judgment as discrimination, such as the statement that Manuela was discriminated against because of her low educational background,¹¹⁰ which was in fact weighed in her favor as a mitigating factor. In addition, the Court's assertions that the trial court "criticize[d] [Manuela's] sexual conduct" and judged based on the "stereotype that a woman who has sexual relations outside her marriage is dishonorable and immoral" were entirely false: no language to that effect is cited by any parties, merely a passing reference to Manuela's desire to conceal her infidelity as a potential *motive* for the crime, as the judgment itself indicates.¹¹¹

107. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 144, 146, 152, 153 (Nov. 2, 2021).

108. *Id.* at paras. 165-70.

109. *Id.* at para. 168.

110. *See* Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, VI(4) (El Sal.) (author translation).

111. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 154, 155 (Nov. 2, 2021).

None of the government employees or judges that dealt with Manuela expressed any moral judgment on her sexual conduct or her extramarital affair. Statements about marital infidelity actually came from Manuela herself and were cited at trial to prove that (a) she was aware of her pregnancy resulting from the extramarital affair,¹¹² and (b) the female judge that quoted the statement merely cited it as a possible motive for the crime, and not to morally judge Manuela or discriminate against her on the basis of gender.¹¹³

The Commission and the pro-abortion plaintiff organizations submitted no evidence that the abortion statute had a discriminatory effect on women.¹¹⁴ While the fiction of women being penalized for suffering obstetric emergencies in El Salvador was humored by the Inter-American Court, a supposed discriminatory effect of abortion bans was not proven, nor was any gendered impact of infanticide bans argued since the plaintiffs did not admit that Manuela's case or any other contextual cases presented actually involved infanticide, but instead claimed they involved miscarriages.

In any case, the number of women convicted for infanticide alone does not constitute evidence of a discriminatory impact on the basis of gender without any reference to the total number of charges, investigations, and convictions for other types of aggravated homicide such as parricide or the killing of an older child. The judgment does not argue that the aggravated homicide statute's application is discriminatory against women either; instead, it argues "the criminal court convicted Manuela using gender stereotypes as grounds for its decision."¹¹⁵ In fact, however, Manuela's guilt was proven by medical and forensic evidence, by witness testimony, and by her own statements, not by gender stereotypes.

IV. VIOLATION OF THE SUBSIDIARITY PRINCIPLE AND THE FOURTH INSTANCE DOCTRINE

Dictating criminal penalties for a State's national jurisdiction is a violation of the Convention's principle of subsidiarity. The American

112. *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. para. 75 (2018).

113. *Id.* at paras. 154, 156-57.

114. *Manuela and Family v. El Salvador*, Petition 424-12, Inter-Am. Comm'n H.R., Report No. 29/17, OEA/Ser.L./V/II.161, doc. 36 rev. sec. V, para. 11 (2017).

115. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 159 (Nov. 2, 2021).

Convention Preamble establishes that “the essential rights of man . . . justify international protection in the form of a convention *reinforcing or complementing* the protection provided by the *domestic law* of the American states”¹¹⁶

Historically, the Inter-American Court has held that its role is not meant to replace that of national legislators: “The Inter-American Court cannot, and does not intend to, stand in for national authorities upon establishing the penalties applicable to the crimes contemplated in domestic law,”¹¹⁷ and that “it cannot substitute for the domestic authorities in the individualization of the penalties corresponding to offenses established in domestic law”¹¹⁸ In *Manuela*, the judgment disingenuously admitted that “it is not for this Court to substitute for the domestic authorities in the individualization of punishments for offenses established in domestic law”¹¹⁹

The only justification given to depart from this rule was a broad exception that would allow the Court to recalibrate penalties that it finds disproportionate: “in exceptional cases, such as this one, the Court must rule on the proportionality of the punishment because, as already indicated, a punishment that is evidently disproportionate is contrary to . . . the Convention.”¹²⁰ The cases cited in support of this proposition were the *Case of Mendoza et al. v. Argentina*, involving juvenile life imprisonment, and the *Case of Cepeda Vargas v. Colombia*, involving eleven year sentences for first degree murder, the latter indicating that “the State made an insufficient effort to prosecute and punish adequately serious human rights violations, such as those committed in this case.”¹²¹

The *Manuela* case, on the other hand, presented the much more controversial issue of infanticide, which no international human rights law instrument or court has determined to be a crime deserving lighter penalties or no penalties at all. In fact, the Court cited no national law anywhere in the

116. American Convention on Human Rights, *supra* note 25, at pmb1. (emphasis added).

117. Vargas-Areco v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 155, para. 108 (Sept. 26, 2006).

118. Mévoli v. Argentina, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 265, para. 144 (Aug. 22, 2013).

119. Manuela et al. v. El Salvador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 165 (Nov. 2, 2021).

120. *Id.*

121. Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, para. 154 (May 26, 2010); *see also* Mendoza et al. v. Argentina, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am Ct. H.R. (ser. C) No. 260 (May 14, 2013).

world that had the type of penalty that it recommended for infanticide. Ironically, the *Cepeda Vargas* judgment that the Court cited found that a penalty of eleven years for first degree murder, a crime similar to aggravated homicide, was too low and violated the State's obligation to properly sanction crimes against the right to life.¹²²

Attempting to carry out criminal reform at the national level in the name of creating "Inter-American standards" on human rights is probably the clearest show of the Inter-American Court's aspirations to become a supraconstitutional Latin American court of sorts, one that would also have self-given regulatory powers, as noted by Professor Juana Acosta of La Sabana University.¹²³ The degree of specificity that the Court applied in this case, ordering a new penalty of "one to four years imprisonment," "or less,"¹²⁴ also violates article 2 of the Convention on domestic legal effects, which leaves it up to "States Parties . . . to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."¹²⁵ The judgment's order that national judges and authorities "have the obligation to apply a control of conventionality in their decisions" and, if necessary, must ignore national laws that are incompatible with the *Manuela* judgment's "standards,"¹²⁶ also violate this provision on domestic legal effects.

The Commission and the Court also violated their own fourth instance doctrine, according to which Inter-American human rights bodies should not hear requests to retry matters of fact or domestic law.¹²⁷ Neither body has the capacity, in terms of resources, to reassess forensic and other criminal evidence presented at trial, especially in this case, where the Court was

122. *Cepeda Vargas v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, paras. 150-54 (May 26, 2010).

123. Juana Inés Acosta-López, *Corte Interamericana y política criminal: ¿Quién tiene la última palabra?* [*Inter-American Court and criminal policy: who has the last word?*], IBERICONNECT (Feb. 9, 2022), <https://www.ibericonnect.blog/2022/02/corte-interamericana-y-politica-criminal-quien-tiene-la-ultima-palabra/>.

124. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 171, para. 35 n.82 (Nov. 2, 2021).

125. See American Convention on Human Rights, *supra* note 25, at pt. I, ch. I, art. 2.

126. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 296 (Nov. 2, 2021).

127. *Genie-Lacayo v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 30, para. 94 (Jan. 29, 1997); *Perozo et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 195, para. 64 (Jan. 28, 2009).

missing its main witness, “Manuela,” who passed away in 2010, two years before the petition was filed before the Commission.¹²⁸

The Inter-American Court’s unprincipled rejection of the evidence and the witness testimony submitted to the trial court, and its rejection of the trial court’s conclusions, violate the fourth instance doctrine, according to which “the international jurisdiction is of a *subsidiary, reinforcing and complementary nature*, and therefore it does not perform the role of a court of ‘*fourth instance*’”;¹²⁹ that is, the Inter-American Court cannot act as a higher court or as an appellate court in settling disputes between parties, on some aspects of the assessment of evidence, or of the application of the domestic law to certain matters not directly related to compliance with international human rights obligations. Both the Commission and the Court have recognized this procedural principle of international human rights law holding that it is “*the courts of the State are called upon to examine the facts and evidence* submitted in particular cases.”¹³⁰

For the Court to reject evidence and testimony simply because it did not prove Manuela’s innocence as desired by the plaintiffs violates the fourth instance doctrine’s principle that it is improper for the Commission to voice an opinion “concerning the guilt or innocence of the applicant, a matter outside the jurisdiction of this Commission and solely within that of the competent national courts,” as recognized in *Lopez Aurelli v. Argentina*.¹³¹ Likewise, as expressed by Judge Manuel Ventura Robles, the Inter-American

128. See *Manuela and Family v. El Salvador*, Petition 424-12, Inter-Am. Comm’n H.R., Report No. 29/17, OEA/Ser.L./V/II.161, doc. 36 rev. sec. V, para. 6 (2017).

129. See *García y Flores v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, para. 16 (Nov. 26, 2010) (emphasis added); *Atala Riffo v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 254, para. 66 (Feb. 24, 2012); see also *Wright v. Jamaica*, Case 9260, Inter-Am. Comm’n H.R., Resolution No. 29/88, OEA/Ser.L./V/II.74, doc. 10 rev.1 (1988) (“That it is not the function of the Inter-American Commission on Human Rights to act as a quasi-judicial fourth instance and to review the holdings of the domestic courts of the OAS member states.”); Brief of Amici Curiae, *Manuela v. El Salvador*, Inter-Am. Comm’n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 (Mar. 8, 2021) (Case No. 13.069) (amicus by International Human Rights Law Professor Alvaro Paul of Pontifical Catholic University of Chile submitted to the Inter-American Court during the *Manuela v. El Salvador* proceedings, cited in the judgment).

130. *García y Flores v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, para. 16 (emphasis added).

131. *Aurelli v. Argentina*, Case 9850, Inter-Am. Comm’n H.R., Report No. 22/88, OEA/Ser.L./V/II.79, doc. 12 rev. para. 21 (1988).

Court's jurisdiction "was not established so that *all cases* would be heard by it, or so that *alleged victims win all cases* under any circumstances."¹³²

A. *Rewriting of Proven Facts and Reweighing of Evidence*

The trial court finding by a three-judge panel was of central importance to any examination of the actual facts of the case and should have been given substantial weight accordingly. The trial court in Cacaopera, El Salvador, was uniquely well-placed to assess the circumstances surrounding the birth and subsequent killing of the newborn child, Dolores Gabriel. The three judges heard and saw each of the witnesses giving evidence, and most importantly, were able to assess the credibility of Manuela's testimony itself, whom the Commission, the Inter-American Court, and the plaintiff pro-abortion organizations never actually met.¹³³

With that benefit, the trial judges heard the submissions by Manuela's public defenders,¹³⁴ and that of Manuela's father, who voluntarily reported the crime, as indicated by the IACHR itself, expressing regret over his daughter's actions.¹³⁵ Court records indicate that he cooperated with law enforcement authorities in providing evidence about the baby's death.¹³⁶ Ten years after the crime occurred and eight years after Manuela's death, however, pro-abortion groups that litigated the lawsuit filed an appeal (*recurso de revisión*) on his behalf, arguing that his report and statements had been forged; that appeal was denied due to the statute of limitations.¹³⁷

The significance of trial court findings in this sort of criminal trial should not have been undermined by the Inter-American Court, which had no contact with the expert witnesses that examined the evidence and no objective reason to doubt their findings. The forensic expert witness's

132. *Duque v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310, 2 (Feb. 26, 2016) (Ventura Robles, J., dissenting) (emphasis added).

133. See generally Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008 (El Sal.).

134. Corte Interamericana de Derechos Humanos, *supra* note 20 (indicating that Manuela had at least two different public defenders that worked on her case).

135. See Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, V (El Sal.).

136. Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, V(i) (El Sal.); *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. para. 44 (2018).

137. *Manuela v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 paras. 15, 87 (2018).

testimony, for example, rejected the possibility of an instantaneous expulsion of the child in the latrine, and his accidental death, indicating that the child's birth could have never occurred as a quick, instantaneous expulsion of the child in a torpedo-like fashion, as described by the mother, since the child's head and shoulders need to be rotated and expulsion from the vaginal canal can take several minutes.¹³⁸

Even if expulsion had been immediate, the forensic doctor indicated the child would have remained "hanging from the umbilical cord and [he] could well have been removed with the same cord since the placenta [detaches] about ten minutes after the expulsion of the child"; even if the placenta detached at once, "the placenta and the umbilical cord would have been found next to the child," and evidence showed that the umbilical cord had been ripped at the base and cut with a sharp object at a higher point, while the placenta was not found in the crime scene.¹³⁹

Testimony of the fireman who fished Dolores Gabriel's body out of the septic tank also contradicted the argument that the child had been accidentally expelled into the latrine. Rafael Antonio Zelaya Castillo, a fireman in the town of Cacaoopera, indicated that when he descended into the septic tank, he "grabbed the baby by the left leg and observed that he was wrapped in a cloth."¹⁴⁰ Clearly, if the child had been accidentally expelled into the septic tank at birth, there would have been no time to wrap him in a cloth. So, this fact indicates that the child may have been born somewhere else, wrapped in a cloth and then brought into the latrine to be thrown into the septic tank.

The three-judge panel concluded that it had achieved a degree of "positive certainty" (*certeza positiva*) that Manuela had directly authored and participated in the commission of the crime, and unanimously reached a guilty verdict of aggravated homicide, giving her the lowest possible penalty of 30 years incarceration due to mitigating factors relating to her low educational socio-economic level.¹⁴¹ Neither the Court nor the Commission, nor the plaintiff pro-abortion organizations argued that the verdict itself was unreasonable or unsubstantiated. Instead, they argued a multitude of other due process violations by law enforcement, defense attorneys, and one judge,

138. See Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.).

139. *Id.*

140. *Id.*

141. See Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, VI(4) (El Sal.) (author translation).

all of whom agreed that Manuela was guilty of the crime of infanticide against her son, Dolores Gabriel.¹⁴²

The Inter-American Court chose to believe any version of the facts except that proven at trial through scientific, forensic, medical and testimonial evidence. It selectively picked and chose only some of the statements that Manuela gave law enforcement authorities, giving contradictory versions of her story: on one hand, she said that she did not know that she was pregnant, on the other that the pregnancy resulted from an extramarital affair and the baby's father did not want to acknowledge paternity, and that her husband, with whom she had procreated two children, was in the United States.¹⁴³ Likewise, when she went into the emergency room at the public hospital, she said: (1) that she had an abortion; (2) that she had been pregnant, but did not how far along; (3) that she did not know she was pregnant, had an accident while washing in the river and had then miscarried the child in the latrine; and (4) that her child had accidentally died when she delivered him in the latrine—all inherently contradictory versions of the facts.¹⁴⁴

The trial court, having examined the evidence at hand, found that Manuela's statements were "inconsistent and implausible versions in the light of logic and medicine."¹⁴⁵ Her physical exam revealed that she had given birth to a full-term child because "the placenta showed [clear] signs of maturity," and she suffered postpartum preeclampsia and anemia, conditions that occur upon childbirth and not miscarriage.¹⁴⁶ In addition, the female doctor who treated Manuela stated that the patient did not show signs of the serious fall that she reported, and that her statement that she had "pushed" to give birth to the child while unconscious was clinically impossible.¹⁴⁷

Pro-abortion organizations suing El Salvador literally reinvented the ghastly facts to characterize them as the wrongful conviction of a poor woman who did not know she was pregnant, miscarried a fetus during an

142. *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. para. 12 (2018).

143. *See* Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.).

144. *Id.*

145. *Id.* at V.

146. *Id.* at IV.

147. *Id.* at IV, V.

obstetric emergency, and was denied due process rights,¹⁴⁸ and the Court showed unreasonable bias in supporting this fiction. The judgment's analysis deliberately ignored all of the factual evidence that the child had been killed—not accidentally delivered—that the baby had been partially wrapped in a cloth and then thrown in the latrine, where he survived for at least ten to fifteen minutes before he died a slow, painful and horrific death.

In its obvious desire to find for the pro-abortion organizations and the Commission, the Court gave credence to irrational arguments that clearly had no basis in the case facts. For instance, it accepted the argument that Manuela, a thirty-year old adult woman who had already given birth to two children would not know that she was pregnant, or that she was going through labor pains at the end of a full-term pregnancy.¹⁴⁹ That argument, alone, could not be reasonably believed especially in light of Manuela's own statements to domestic authorities that she knew about the pregnancy, her whole family knew about the pregnancy, and about the identity of the child's biological father. The Court, however, endorsed the fictional account of an unknown pregnancy, and on that basis ordered that El Salvador create comprehensive sexual education programs as a form of reparation,¹⁵⁰ the implication being that Manuela had committed the crime because she had been lacking sexual education.

In clear contradiction with the fourth instance doctrine, the Inter-American Court substituted the domestic trial court's reasoning and appreciation of facts for its own, with no apparent basis other than sympathy for the pro-abortion organizations' subjective, unsubstantiated claims. Throughout, the Manuela judgment second-guessed the national trial court, accusing it of prejudice, lack of analysis in deciding on temporary incarceration and other fictitious due process violations that failed to meet the pro-abortion organizations' irrational belief that, regardless of the actual facts, Manuela should have been acquitted.¹⁵¹

148. *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 para. 8 (2018) (pro-abortion organizations claimed that the child's gestational age was only 18 weeks, while forensic evidence determined that he had completed 40 weeks gestation).

149. *Id.* at paras. 8, 72, 77; *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 70, 80, 83, 152 (Nov. 2, 2021).

150. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 296-97 (Nov. 2, 2021).

151. *See id.* at paras. 147, 152-53.

B. *The Inexistent “Criminalization of Obstetric Emergencies”*

Manuela’s obstetric emergency could not possibly have rendered her non-culpable for the crime against her child because she suffered from preeclampsia at least one hour *after birth*, not during childbirth, as proven by the witness testimony of multiple medical personnel who repeatedly testified at trial.¹⁵² Multiple witnesses testified that Manuela suffered “severe . . . *postpartum* preeclampsia”, i.e., a dangerous increase in her blood pressure, *subsequent* to childbirth.¹⁵³ The medical doctor that cared for her declared that “moments *after the placenta was extracted*, [Manuela] presented a hemorrhage and severe preclancia (sic) which [elevated] her blood pressure levels.”¹⁵⁴ The placenta was extracted in the hospital, at least a couple of hours after she delivered Dolores Gabriel and after he was thrown in the septic tank.¹⁵⁵

Manuela was not rendered unconscious or mentally incompetent by preeclampsia at the time of childbirth or at the time the crime was committed; therefore her obstetric emergency was entirely irrelevant to the crime of aggravated homicide against her child.¹⁵⁶ In fact, Manuela was found mentally competent in two psychological evaluations performed by mental health professionals.¹⁵⁷ Her own statements during this period, recorded in court records, indicate that she knew that her child was probably dead and told hospital authorities about it.¹⁵⁸ One of the psychological evaluations that she underwent concluded that she “was depressed, but did not suffer from an altered mental state or incapacity that would prevent her from understanding the illegal nature of her actions.”¹⁵⁹

Manuela was stabilized and received full medical services within an hour and a half of her hospital admission,¹⁶⁰ an ordinary wait period for a public

152. See Tribunal de Sentencia de San Francisco de Gotera [Sentencing Tribunal of San Francisco of Gotera], Case No. TS066/2008, Aug. 11, 2008, IV (El Sal.).

153. *Id.* (containing multiple references to “*preclansia grave post-parto*”) (emphasis added).

154. *Id.*

155. *Id.*

156. Manuela et al. v. El Salvador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 75, 218 (Nov. 2, 2021).

157. *Id.* at para. 75.

158. Manuela v. El Salvador, Case 13.069, Inter-Am. Comm’n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 para. 61 (2018).

159. *Id.* at para. 67.

160. Manuela et al. v. El Salvador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 195 (Nov. 2, 2021).

hospital in El Salvador. Health services were never conditioned on her criminal guilt or her cooperation with law enforcement; therefore the Court's repeated statements that medical personnel prioritized investigation of the crime over Manuela's health care are entirely unfounded.¹⁶¹ No evidence was presented at trial that medical care was withheld from her or other pregnant women suffering obstetric emergencies in El Salvador either.¹⁶²

The Manuela judgment nevertheless characterized Manuela's conviction as part of a broader situation of "criminalization of women who have suffered obstetric emergencies in El Salvador,"¹⁶³ and mischaracterized El Salvador's law as "automatically" leading to criminal penalties in situations of "obstetric emergencies" such as Manuela's.¹⁶⁴ The judgment supported the plaintiff pro-abortion organizations' argument that infanticide convicts in El Salvador are really victims of wrongful prosecutions for miscarriages or infant deaths occurred during the course of obstetric emergencies,¹⁶⁵ and ordered El Salvador to "take the necessary measures to ensure comprehensive care in cases of obstetric emergencies. . . ."¹⁶⁶ In particular, it ordered that El Salvador "take forthwith the measures required to ensure comprehensive medical attention for women who suffer obstetric emergencies."¹⁶⁷

The plaintiff pro-abortion organizations and the Commission attributed the alleged convictions for obstetric emergencies and miscarriages to El Salvador's *abortion* ban, seeking the Court's pronouncement against it.¹⁶⁸ Pro-abortion organizations were allowed to present, as evidence, unproven stories about infanticide convictions in El Salvador other than Manuela's, which the Court accepted as "contextual information," and found that the narrative demonstrated "structural disadvantages" that would create exculpatory justifications for poor women convicted for infanticide in El Salvador.¹⁶⁹ Judge Ricardo Perez Manrique, in his concurring vote, referred to both "structural discrimination" and "intersectionality of vulnerabilities"

161. *Id.* at paras. 175, 195, 215, 255.

162. *Id.* at paras. 18, 299, (operative para. 18, p. 89).

163. *Id.* at para. 41.

164. *Id.* at paras. 161, 166.

165. *Id.* at paras. 91, 140, 153, 161.

166. *Id.* at paras. 18, (operative para. 18, p. 89).

167. *Id.* at para. 299.

168. *Id.* at paras. 1, 6, 25-30, 41.

169. *Id.* at paras. 25, 253.

that, in his understanding, would also acquit Manuela and make her a victim of the Salvadorian legal system that prosecuted her.¹⁷⁰

Assuming the facts presented were true, which they were not, the majority holding could have been more narrowly confined to situations involving infant deaths during an “obstetric emergency,” as it sometimes seemed to do.¹⁷¹ The Court, however, ordered sweeping impunity for infanticide that would apply regardless of whether the mother experienced an obstetrical emergency during childbirth or not, and simplistically opined that the punishment was always “disproportionate” to the degree of culpability that any mother may have in the perinatal period, obstetric emergency or not.¹⁷² On the other hand, in regards to the Commission’s arguments on abortion, Judge Vio Grossi found that they were “not . . . applicable, especially when [the arguments] 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*.”¹⁷³ In that regard, the majority itself said that it would only admit contextual information insofar as it related to infanticide, since “therapeutic abortion” was not at issue in this case.¹⁷⁴ Ultimately, the Court did not say that abortion should be decriminalized as part of El Salvador’s measures to ensure comprehensive care in obstetric emergencies, even though plaintiff pro-abortion organizations and the Commission expressly requested that it do so, and after the judgment came out, asked for an interpretation of the relevant operative paragraph probably hoping for that result.¹⁷⁵

C. *Fictitious Due Process Violations*

Manuela’s due process rights were not violated merely because she was found guilty. They were not violated simply because public defenders did not characterize facts, file appeals or plan defense strategies according to the preferences of pro-abortion non-governmental organizations, as the Commission’s pleadings and the judgment suggested.

170. *Id.* at paras. 2, 8 (Pérez Manrique, J., concurring).

171. *Id.* at para. 166 (majority opinion) (referring to due process violations “in this case”).

172. *Id.* at paras. 165, 170.

173. *Id.* at para. 14 (Vio Grossi, J., dissenting in part) (emphasis added).

174. *Id.* at para. 92 (majority opinion).

175. *See* Manuela et al. v. El Salvador, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 461, paras. 2, 4 (July 27, 2022).

The judgment's reasoning second-guessed the defense attorneys' choices on how to defend Manuela, finding that El Salvador had violated Manuela's right to a defense because her attorneys chose not to have her take the witness stand, even though the State showed that public defenders had made this choice as a strategy in her favor.¹⁷⁶ The judgment also found that Manuela's right to a defense was violated because her public defenders chose not to appeal the verdict through the writ of *casación* or *revisión*,¹⁷⁷ while admitting that appeals are not always in a client's best interests,¹⁷⁸ and that some of the defense attorneys' strategies could have been appropriate to the circumstances.¹⁷⁹

The Court likewise engaged in speculative second guessing of medical choices made in treating Manuela's terminal, metastatic cancer, debating whether or not a full physical examination should have been done when Manuela was seen for preeclampsia in the emergency room,¹⁸⁰ and whether regular chemotherapy in her last four months of illness would have saved her life despite her terminal condition.¹⁸¹

These irregularities were not lost on dissenting Judge Vio Grossi, who pointed out that Inter-American Court jurisdiction is complementary and subsidiary, and therefore not meant to review the entire domestic court's proceedings.¹⁸² Not all State actions should be scrutinized; to do so, he said, would be to transform the Inter-American Court into a fourth instance tribunal, substituting national for international human rights protection.¹⁸³

The Inter-American Court's jurisdiction, he indicated, is only meant to review a State's "most recent act" (*último acto*), whether that act gave rise to the violation of an international obligation, unless the Court is examining continuous violations or an omission.¹⁸⁴ State acts that precede the facts at hand, he said, should not be scrutinized since the State could not have possibly amended them before the Inter-American Court's review.¹⁸⁵

176. Corte Interamericana de Derechos Humanos, *supra* note 20.

177. Manuela et al. v. El Salvador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 4, 113, (operative para. 4, p. 87) (Nov. 2, 2021).

178. *Id.* at para. 124.

179. *Id.* at para. 128.

180. *Id.* at para. 196.

181. *Id.* at paras. 238-39.

182. *Id.* at para. 12 (Vio Grossi, J., dissenting in part).

183. *Id.*

184. *Id.*

185. *Id.*

The sole explicit request of the plaintiff pro-abortion organizations rejected by the Court was the demand that El Salvador redefine “in flagrante delicto” detentions so that a mother who commits infanticide could only be arrested if found *in the act* of taking the baby’s life, and not within 72 hours of committing the crime as Salvadorian law provided.¹⁸⁶ The Inter-American Court found that it did not have enough elements to conclude that a definition including 72-hour period violated the woman’s right to be presumed innocent and therefore did not rule on the matter.¹⁸⁷

V. COURT’S ORDER TO DISCOURAGE REPORTING AND INVESTIGATION OF DEATHS BY ABORTION AND INFANTICIDE

Abortion and infanticide can go hand-in-hand according to the Inter-American Court in *Manuela*. The criminal code reforms that eliminated all exceptions to abortion and increased penalties for infanticide in 1998 in El Salvador were considered together as part of the relevant facts in the case.¹⁸⁸ Throughout, the Commission treated the *Manuela v. El Salvador* case as an abortion rights case, even though no claim was made that Manuela should have been allowed to have an abortion.¹⁸⁹ During the Inter-American trial’s only public hearing, Judge Eduardo Ferrer Mac-Gregor asked the State for information on legislative bills to overturn the country’s abortion ban.¹⁹⁰

Both the Inter-American Court and the Commission admitted that Manuela was convicted for aggravated homicide of her child and not abortion.¹⁹¹ The Court acknowledged that “the instant case *does not relate to the occurrence of an induced abortion*.”¹⁹² Nevertheless, it indicated that

186. *Id.* at paras. 35, 94-95, 98 (majority opinion).

187. *Id.* at paras. 35, 312, 314.

188. *Id.* at para. 35.

189. *Manuela and Family v. El Salvador*, Petition 424-12, Inter-Am. Comm’n H.R., Report No. 29/17, OEA/Ser.L./V/II.161, doc. 36 rev. sec. V, paras. 1, 3 (2017); *Manuela v. El Salvador*, Case 13.069, Inter-Am. Comm’n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 paras. 74, 119-20, 134, (operative para. 3, p. 33) (2018); *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 1, 28-30, 35-36, 41-45, 53, 195, 197, 210, 214, 222-23, 253-54, 283, 286, 292-96 (Nov. 2, 2021).

190. Corte Interamericana de Derechos Humanos, *supra* note 20.

191. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 25, 41 (Nov. 2, 2021).

192. *Id.* at para. 92 (English version of the judgment states: “this case does not refer to the occurrence of a therapeutic abortion,” but Spanish version states: “el presente caso no se refiere a la ocurrencia de un aborto voluntario” [this case does not refer to the occurrence of a voluntary abortion]) (emphasis added); see also *id.* at para. 41 (admitting that abortion law was not applied in this case).

Manuela was initially investigated for abortion and therefore expanded on the need to deter mandatory reporting statutes' applicability to abortion.¹⁹³

Judge Eduardo Vio Grossi pointed out that the fact that Manuela's crime was initially reported as abortion was irrelevant because she was never investigated, tried or convicted for abortion, but for aggravated homicide instead.¹⁹⁴ The Court thus ignored its own findings for the sake of promoting abortion rights, Judge Vio Grossi said, finding the Court's orders on abortion to be "an unresolvable contradiction" with the order to abolish mandatory reporting of abortion.¹⁹⁵

A. *Abolition of Mandatory Reporting of Abortion*

The State of El Salvador has indicated that, in recent years, no woman has served a prison sentence for induced abortion. In 2022, the General Prosecutor's Office (*Fiscalía General de la República*) published information indicating that the total number of prosecutions of mothers who aborted their children from 2019 to 2022 was seven.¹⁹⁶ Only two of those seven women were convicted, and none of them actually served prison time,¹⁹⁷ probably because penalties for mothers who abort in El Salvador are commutable to non-incarceration penalties.

The inexistence of women imprisoned for abortion may explain the pro-abortion organizations' choice to pass infanticide convictions as miscarriage and abortion cases. They probably could not find a single legitimate case involving a woman's conviction and imprisonment for abortion, otherwise it would have been sure to become public and taken to international human rights bodies.

In the lawsuit, the Commission made no explicit recommendation on the decriminalization of abortion,¹⁹⁸ but it suggested that it do so at the public hearing.¹⁹⁹ The Inter-American Court stopped short of making that

193. *Id.* at paras. 92, 286.

194. *Id.* at para. 12 (Vio Grossi, J., dissenting in part).

195. *Id.* at para. 9.

196. Solicitud No. 296-UAIP-FGR-2022, FISCALÍA GENERAL DE LA REPÚBLICA, UNIDAD DE ACCESO A LA INFORMACIÓN PÚBLICA [OFFICE OF THE ATTORNEY GENERAL OF THE REPUBLIC, UNIT FOR ACCESS TO PUBLIC INFORMATION] 4 (2022), <https://portaldetransparencia.fgr.gob.sv>.

197. *Id.*

198. *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. para. 160 (2018).

199. *See* Corte Interamericana de Derechos Humanos, *supra* note 20 (where Commissioner Margaret Macaulay and IACHR attorney Marisol Blanchard deny that they are seeking

recommendation. However, the Court did order the State of El Salvador to create unique legal exceptions to mandatory reporting statutes to inhibit reporting of abortion,²⁰⁰ an order that, if implemented, could inhibit investigation and prosecution of abortion, thereby limiting enforcement of the country's abortion ban on abortion providers, since enforcement against women is virtually non-existent.

Specifically, the Court held that El Salvador must pass medical "confidentiality" legislation that would dissuade reporting of induced abortion to law enforcement by health care personnel.²⁰¹ In an illustration of further supraconstitutional aspirations, the Court explicitly ordered El Salvador "to refrain from applying the current laws concerning the obligation of health personnel to report possible cases of abortion,"²⁰² meaning that reporting would now be *optional*, not *mandatory*.

El Salvador's current law on medical confidentiality, the Court said, was ambiguous and vague, without pointing to any specific language to that effect.²⁰³ Judge Eugenio Raul Zaffaroni indicated that the said ambiguity lacked any practical effects or consequences,²⁰⁴ but nevertheless the Court said, with no factual support whatsoever, that "[t]he 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."²⁰⁵ The judgment orders that El Salvador pass "clear regulations" on medical confidentiality and its exceptions "in accordance with "the standards described in this judgment", giving El Salvador a deadline of two years to comply with the order.²⁰⁶

The Inter-American Court judgment orders the State of El Salvador to pass a medical protocol that would restrict reporting of abortion in instances of obstetric emergencies, and declares that: (1) "medical and nursing staff do not have an obligation to report women who have received medical attention

decriminalization of abortion in El Salvador, but invite the Court to make a pronouncement on decriminalization of abortion its own initiative).

200. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 286, 293, (operative paras. 12, 15, p. 88) (Nov. 2, 2021).

201. *Id.* at paras. 286, (operative para. 12, p. 88).

202. *Id.* at para. 286 (emphasis added).

203. *Id.* at paras. 215-16, 254, 259, 286, (operative para. 12, p. 88).

204. *Id.* at paras. 2-3, 15 (Zaffaroni, J., concurring).

205. *Id.* at para. 286 (majority opinion).

206. *Id.* at paras. 286, (operative para. 12, p. 88).

for possible abortions”; (2) “that, in such cases, health personnel must observe medical professional secrecy when questioned by the authorities”; (3) that there should be no administrative or legal penalty for failing to report; and (4) that exceptions to medical confidentiality regulations be clearly established and limited to necessary information in individual cases, obtainable only “as the result of a reasoned order from a competent authority”²⁰⁷

Unlike the legal reform ordered to create impunity for infanticide, which the Court said should be done by whatever “legal channel determined by the State”,²⁰⁸ this reform, the Court dictated, “may be executed directly by the State’s Executive Branch.”²⁰⁹ Remarkably, in anticipation of El Salvador’s reasonable resistance to amend its criminal procedure through executive decrees or regulations, the Court warned the State of El Salvador not to invoke Article 2 of the Convention itself to defend the right of its legislature to reform its national criminal law statutes: “Compliance with the measures ordered herein cannot be obstructed by use of the principle of legal reservation that undermines women’s rights.”²¹⁰

Judge Vio Grossi indicated that the Court had no authority to order the abolition of this mandatory reporting requirement for abortion, since the judgment itself acknowledged that the case did not relate to abortion, but to aggravated homicide, and regretted the way that “the judgment introduces the issue of abortion repeatedly and without any need. . . .”²¹¹ The allusions to abortion, Judge Vio Grossi said, were “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.”²¹²

Judge Vio Grossi also made emphatic statements about the inexistence of a right to abortion under the American Convention. Specifically, he indicated that “it is undeniable that, as indicated in one of my separate opinions, 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

207. *Id.* at paras. 286-87.

208. *Id.* at paras. 170-71.

209. *Id.* at para. 288.

210. *Id.*

211. *Id.* at para. 11 (Vio Grossi, J., dissenting in part); *see also id.* at paras. 7, 10.

212. *Id.* at para. 17.

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.”²¹³

B. *Restrictions on Reporting of Suspected Infanticide*

While the Court does not order the abolition of mandatory reporting requirements for infanticide, as it does for abortion, it orders the creation of reporting restrictions for it, also within a period of two years, via executive regulation.²¹⁴ On one hand, the judgment conceded that in a case such as this, where the crime could not have been known without the health personnel’s report, the restriction on medical confidentiality could be deemed “necessary” and therefore proper and suitable to investigate a crime against a child.²¹⁵ It also clarified that non-medical personnel are not bound by medical confidentiality and were therefore free to report statements made to them by criminal suspects.²¹⁶

The judgment also held that Manuela’s statement that the child was dead could be properly reported by the attending physician to law enforcement, because it was a “suitable” measure to “comply with the international obligation to investigate, prosecute and, as appropriate, punish offenses committed against children, which is in conformity with the Convention.”²¹⁷ On the other hand, the Court indicated that statements on a woman’s health or medical history should be protected by medical confidentiality, even if they relate to the potential commission of a crime, and should only be accessible via formal order by competent authorities.²¹⁸ In addition, the Court suggested that mandatory reporting of infanticide or abortion could never apply in instances of obstetric emergencies, where a woman would have to choose between treatment and “going to a hospital for fear of being criminalized, which jeopardizes their right to health, personal integrity and

213. *Id.* at para. 13 (in the author’s opinion, a more accurate translation of his statements would be as follows: “[i]t is indisputable that . . . there is *no existing Inter-American or international legal norm*, whether treaty-based or customary or general principle of law, *that recognizes abortion as a right*. There are mere resolutions by international bodies, most of which are integrated by international officials and not State representatives, that are not only *non-binding* but are *not interpretative* of valid international law and instead reflect *aspirations* that the latter will *change* in the sense that they desire”) (emphasis added).

214. *Id.* at paras. 225-28, 286 (majority opinion).

215. *Id.* at para. 219.

216. *Id.*

217. *Id.* at para. 218.

218. *Id.* at paras. 225-27.

life.”²¹⁹ “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,” the Court said.²²⁰

To that effect, El Salvador is ordered to adopt a “protocol on attention for women who require urgent medical care for obstetric emergencies”, applicable to all health care personnel of El Salvador, whether in the public or private sector.²²¹ As in the regulation for abolition of mandatory reporting of abortion, the Court dictated the contents of the protocol or regulation on obstetric emergencies, indicating that the protocol shall: (1) ensure medical confidentiality, (2) ensure that access to health services will not be “conditioned” by the alleged participation in a crime or cooperation with law enforcement, and (3) health care personnel shall abstain from interrogating patients with the purpose of reporting them or obtaining a confession.²²²

If the said protocol were passed, its requirements should not be difficult to comply with, since none of the conduct sanctioned under the protocol actually occurred in Manuela’s case or any of the other cases reported at the public hearing. First, health care personnel did not breach medical confidentiality; second, they did not try to interrogate or elicit a confession from Manuela. In fact, the information given by medical personnel to law enforcement agents came, not from interrogations to Manuela, but from information that she willingly provided herself.²²³ The Court suggested, however, that criminal law provisions on mandatory reporting of infanticide should “indicate clearly” the duty to protect medical confidentiality as an exception to the reporting obligation.²²⁴

The Commission and plaintiff pro-abortion NGOs had requested that the State actively sanction those who report potential abortion or infanticide cases, but the Court stopped short of ordering such a prohibition.²²⁵ In particular, the Commission and pro-abortion organizations repeatedly called for criminal, professional, and disciplinary sanctions against the female medical emergency room doctor, Dr. Johana Mata Herrera, who reported

219. *Id.* at para. 228.

220. *Id.* at para. 224.

221. *Id.* at paras. 283, 287, (operative para. 13, p. 88).

222. *Id.* at para. 287.

223. *Id.* at para. 218 (indicating that Manuela told hospital authorities that she knew her child was dead).

224. *Id.* at para. 215.

225. Corte Interamericana de Derechos Humanos, *supra* note 20.

Manuela for suspected infanticide to Salvadorian authorities.²²⁶ The judgment did not go as far as ordering sanctions against her but condemned her reporting of the crime and held that her actions caused State responsibility for violations against the American Convention.²²⁷

Should El Salvador implement the Court's suggested statute, the regulation would only apply to health care workers that have a duty of confidentiality and in cases where the mother is suffering from a life-threatening obstetric emergency.²²⁸ Absent these conditions, mandatory reporting would still apply, but only to information about the child. Information about the woman's health or medical history would only be available through an order from an authorized State agent.²²⁹

In other infanticide cases mentioned at the public hearing, however, the Supreme Court of El Salvador has found that medical reports of suspected infanticide to authorities are not covered under professional confidentiality statutes for the purposes of aggravated homicide investigations where they derive from their own conclusions on a patient's physical exam, and not from the revelation of confidential information provided by an infanticide suspect.²³⁰ This common sense finding would be incompatible with the Inter-American Court's order.

C. *Reform of Pretrial Detention Rules for Infanticide Suspects*

The *Manuela* judgment orders El Salvador to abolish pretrial detention for infanticide suspects on the basis of the Court's perceived non-gravity of the criminal offense.²³¹ The decision mandates that El Salvador abolish pretrial detention (called *detención preventiva* in Spanish) for infanticide suspects on the basis of public alarm due to the gravity of the crime, and any other factors relating to the crime itself and not to the suspect's personal circumstances.²³² Accordingly, the judgment orders the State to "amend its

226. *Id.* at para. 311; *see also* *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L./V/II.170, doc. 175 rev. para. 160 (2018).

227. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 195, 224, 228, 314, (operative para. 12, p. 88) (Nov. 2, 2021).

228. *Id.* at para. 287.

229. *Id.* at para. 286.

230. Corte Suprema de Justicia [Supreme Court of Justice] Jan. 20, 2015, 21-IND-2014, III (El Sal.).

231. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 289, (operative para. 14, p. 88) (Nov. 2, 2021).

232. *Id.*

procedural legislation in order to make it compatible with the standards for pretrial detention” established in the judgment, giving it a deadline of two years to amend it to that effect, apparently conceding that the legislature should do it²³³ since primary laws such as a criminal procedure code cannot be amended through the executive branch.

Domestic courts may *not* examine the “public alarm” caused by the gravity of the crime of infanticide, the Inter-American Court said: according to the judgment, giving any weight to the “public alarm” as a factor would give way for “subjective and political assessments”; criminal courts should *only* examine “particular circumstances of the person who has been accused . . .”²³⁴ Other factors for pretrial detention allowed in Salvadorian law, such as crimes with higher penalties or pervasiveness of the crime, should not be allowed consideration in infanticide cases heard by national judges either, according to the judgment.²³⁵ The judgment reasoned that El Salvador had violated Manuela’s “right to the presumption of innocence” because “*arbitrary* pretrial detention may result in a violation of the presumption of innocence,” and the order had been arbitrary here because it took into account the gravity of the crime and public alarm caused by it, the Court held.²³⁶

By making it unlawful for trial courts to consider or give weight to the gravity of the crime committed against the newly born child, the Inter-American Court thus seems to be fully embracing a feminist theory of infanticide promoted by the pro-abortion organizations in this case, according to which the newly born child’s lethal sufferings are not only unimportant, but unmentionable. Even assuming that the rationale was appropriate here, which it is not, the holding ignored the trial Court’s judgment showing that the judges did take into account multiple factors related to Manuela’s particular circumstances, such as the likelihood that she might run away, that she might destroy evidence or attempt to conceal the crime if released.²³⁷ These facts were before the Court and mentioned in the judgment itself, but the Court seems to have chosen to omit them,

233. *Id.* at para. 289.

234. *Id.* at para. 106, 109; *see also id.* at paras. 111-12, 289, (operative para. 14, p. 88).

235. *Id.* at para. 109.

236. *Id.* at paras. 111-12 (emphasis added).

237. *Id.* at paras. 68, 71 (“[T]he existing evidence leads to the presumption that the accused may evade the action of justice by flight. . .”).

misrepresenting that the trial court had looked at the seriousness of the crime as the *only* factor to convict Manuela,²³⁸ when it did not.

D. *Re-education of Law Enforcement to Suppress and Discourage Reporting of Suspected Abortion and Infanticide*

Historically, the Court has held that the state duty of prevention and protection implies “training programs on international human rights standards” for “law enforcement agents” on the “duty to give special protection to the rights of *children and adolescents*.”²³⁹ It has ordered that states implement or continue to carry out these trainings on children and adolescents’ rights in cases such as *García Ibarra and others v. Ecuador*.²⁴⁰

In *Manuela*, the Inter-American Court orders El Salvador to carry out re-education trainings for public defenders, employees of the judiciary, and health care personnel, to teach that inhibiting and suppressing reporting and prosecution of abortion and infanticide are international human rights obligations for El Salvador according to the judgment’s new “standards,” including the abolition of mandatory reporting for abortion.²⁴¹ Sensitivity trainings and professional trainings for public defenders, employees of the judiciary, and health care personnel in the largest public hospital in the country should teach the “standards” created in the *Manuela* judgment, to re-train these individuals on how to treat suspected infanticide differently from any other homicide.²⁴²

Again in violation of the subsidiarity principle, the judgment dictates the contents of the said training, indicating that they should include teaching against the use of “presumptions and gender stereotypes” of a “discriminatory nature” in the course of criminal investigations and prosecution of women accused of these crimes, and in favor of giving “credibility” and proper “weight” to the accused woman’s “voices, arguments and testimony.”²⁴³ Throughout, the Court suggests that public officials be trained in a way that would minimize the seriousness of existing

238. *Id.* at paras. 110-12.

239. *García Ibarra et al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 306, para. 211 (Nov. 17, 2015).

240. *Id.*

241. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 293 (Nov. 2, 2021).

242. *Id.*; *see id.* at para. 8 (Vio Grossi, J., dissenting in part).

243. *Id.* at para. 293 (majority opinion).

crimes of abortion and infanticide in Salvadorian law, and instead focus on infanticide suspects' rights to medical confidentiality.²⁴⁴ If implemented, such trainings would probably inhibit or suppress reporting and investigation of these crimes.

VI. IMPUNITY FOR INFANTICIDE: A VIOLATION OF THE AMERICAN CONVENTION ON HUMAN RIGHTS' PROVISION ON CHILDREN'S RIGHTS

The Court has held that Article 19 of the CRC requires States to *combat*, not *ignore*, violence against children, as stated in the *Manuela* judgment: "Article 19 of the Convention on the Rights of the Child requires States Parties to take all appropriate measures to 'protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.'"²⁴⁵ The Commission has likewise advocated for special measures to protect children from physical forms of violence, such as laws against corporal punishment of children by their parents.²⁴⁶ Needless to say, it is highly inconsistent for the Commission to advocate against corporal punishment of children by their parents and on the other hand also advocate for impunity for infanticide.

The Inter-American Court has previously held that Article 19 of the American Convention should be read in conjunction with the Convention on the Rights of the Child (CRC), which explicitly contains an international obligation to legally protect the child's right to life, both before and after birth.²⁴⁷ Article 19 of the American Convention establishes that "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State."²⁴⁸ The

244. *Id.* at paras. 293-94.

245. Guzmán Albarracín et al. v. Ecuador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 405, para. 114 (June 24, 2020).

246. Inter-American Commission on Human Rights [Inter-Am. Comm'n H.R.], *Report on Corporal Punishment and Human Rights of Children and Adolescents*, at paras. 23-24, OEA/Ser.L/V/II.135 (Aug. 5, 2009), <https://www.cidh.oas.org/Ninez/CastigoCorporal2009/CASTIGO%20CORPORAL%20ENGLISH%20FINAL.pdf>.

247. *See* Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, para. 15 (Aug. 28, 2002).

248. American Convention on Human Rights, *supra* note 25, at pt. I, ch. II, art. 19.

CRC, to which El Salvador is a party, stipulates that “*the child*, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate *legal protection, before as well as after birth.*”²⁴⁹ No global or regional international treaty contains a woman’s right to take the life of her newly born child with impunity.

The Inter-American Court has held that principle as “Article 6 of the Convention on the Rights of the Child recognizes the child’s *inherent* right to life and the States parties’ obligation to *ensure to the maximum extent possible the survival and development* of the child, in its broadest sense as a holistic concept”²⁵⁰ It has also identified “the principle of respect for the right to life, survival and development” as one of four key children’s rights established in the CRC, along with the principle of non-discrimination, the best interests of the child, and respect for the child’s views in any proceedings that affect him or her.²⁵¹

A. *Infanticide as a Human Rights Violation Under International Human Rights Law and the American Convention*

The human rights norm that prohibits the killing of children by their own parents is universally recognized under international human rights law; the killing of one’s own child, newborn or not, is also a crime in every nation. States have recognized an international obligation to adopt and enforce laws that protect the life of all children and sanction crimes committed against it. The American Convention on Human Rights protects the human person’s right to life both from the moment of conception and immediately after birth.

The Inter-American Court has condemned infanticide as a “form of violence” in at least one occasion, in the *Village of Chichupac Case v. Guatemala*.²⁵² In that decision, the Court took note of children conceived in rape during the country’s internal armed conflict and indicated that they were “especially vulnerable due to the possibility of facing stigmatization,

249. G.A. Res. 1386 (XIV), Declaration of the Rights of the Child, at 19 pmbl. (Nov. 20, 1959) (emphasis added); Convention on the Rights of the Child pmbl., *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added).

250. V.R.P. v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 350, para. 155 & n.199 (Mar. 8, 2018) (emphasis added).

251. *Id.*

252. Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal v. Guatemala [Members of Chichupac Village and Neighboring Communities of Rabinal Municipality v. Guatemala], Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 328, para. 202 (Nov. 30, 2016) (author’s translation, no English version available).

discrimination, abandonment, *infanticide* and other forms of violence.”²⁵³ Violence against children has been condemned also in non-lethal scenarios, for instance, in the *Case of the Ituango Massacres v. Colombia*.²⁵⁴

The *Manuela* Court’s indifference to Dolores Gabriel’s death and sufferings is inconsistent with prior Inter-American Court decisions where it has recognized a child’s gruesome death and exposure of their remains as grave human rights violations. For example, in the *Servellón García v. Honduras* case, the Court held that “[t]he extreme cruelty with which the victims were killed, depriving them of their life in a humiliating manner, the marks of physical torture present in the four bodies, and the manner in which their bodies were abandoned out in the open, were *serious assaults against the right to life, to humane treatment, and personal liberty*.”²⁵⁵

The Court’s lack of sensitivity to the abandonment of Dolores Gabriel’s body after drowning in a septic tank, with signs of violence and in a state of partial decomposition among human waste and vermin also contrasts with previous cases, such as *Velásquez Paíz* and *Bámaca Velásquez*.²⁵⁶ In those judgments, the Court has held that “the care accorded to a person’s mortal remains is a form of respecting the right to human dignity.”²⁵⁷ Likewise, in *Villagrán Morales*, the Court found that “the treatment of the corpses of the youths . . . victims of extreme violence . . . abandoned in an uninhabited spot, they were exposed to the inclemency of the weather and the action of animals, [where] they could have remained thus during several days . . . constituted cruel and inhuman treatment” under the Convention.²⁵⁸

Under the American Convention, the distinction between an unborn child and a newborn child is irrelevant for the purposes of right to life legal protection: for both, article 4(1) establishes that this protection must be

253. *Id.* (emphasis added).

254. *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, para. 246 (July 1, 2006).

255. *Servellón García et al. v. Honduras*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 152, para. 99 (Sept. 21, 2006) (emphasis added).

256. *Velásquez Paíz et al. v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 307, para. 220 (Nov. 19, 2015); *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, para. 161 (Nov. 25, 2000).

257. *Velásquez Paíz et al. v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 307, para. 220 (Nov. 19, 2015); *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, para. 161 (Nov. 25, 2000).

258. *Villagrán-Morales et al. (Street Children) v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, para. 174 (Nov. 19, 1999).

enacted “by law and, in general, from the moment of conception,”²⁵⁹ yet the *Manuela* judgment seems to suggest that such a distinction exists. Denial of legal recognition of children as persons before the law has, in the past, been rejected by the Inter-American Court as a human rights violation, e.g., in the *Yean and Bosico Case v. Dominican Republic*: “[t]he Court considers that the *failure to recognize juridical personality harms human dignity*, because it denies absolutely an individual’s condition of being a subject of rights and renders him *vulnerable* to non-observance of his rights by the State or other individuals.”²⁶⁰ The Court’s refusal to recognize Dolores Gabriel’s live birth and his legal personhood before the law²⁶¹ is inconsistent with that interpretation of the American Convention.

B. *The International Duty to Investigate and Prosecute Homicides Against All Children*

The *Manuela* judgment acknowledged that when it comes to the right to life of children, States parties to the American Convention have an “international obligation to *investigate, prosecute* and, as appropriate, *punish offenses committed against children*, which is in conformity with the Convention,”²⁶² yet it entirely ignored that duty in the *Manuela* case. Per Article 19 of the American Convention, as a result of “his condition as a minor” every minor child has the right to protection not only by the State but also by his family, the Court has said.²⁶³ Similarly, Articles 7, 9 and 19 of the CRC recognize a child’s right to be cared for by his parents from the time of his birth—unless there is physical violence, maltreatment, abuse, or neglect.

Historically, the Inter-American Court has emphasized the “particular gravity” of violations of the right to life against children.²⁶⁴ The Court has

259. American Convention on Human Rights, *supra* note 25, at pt. I, ch. II, art. 4, sec. 1.

260. *Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, para. 179 (Sept. 8, 2005) (emphasis added).

261. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 127 (Nov. 2, 2021).

262. *Id.* at para. 218 (emphasis added).

263. See American Convention on Human Rights, *supra* note 25, at pt. I, ch. II, art. 19.

264. *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, para. 59 (Aug. 28, 2002) (Cançado Trindade, J., concurring) (quoting Villagrán-Morales et al. (*Street Children*) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, para. 191 (Nov. 19, 1999)); see also *Coc Max et al. (Xamán Massacre) v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 356, para. 115 (Aug. 22, 2018).

held that, due to their age, children are in a special situation of “vulnerability and risk,”²⁶⁵ and has found “*aggravated* [State] responsibility” since “the alleged victims in this case . . . were *children*.”²⁶⁶ The Commission has likewise emphasized that, due to their particular “vulnerability” and “dependence on adults in order to exercise certain rights,” and in light of their “unawareness of his or her human rights and of the means by which to demand observance of those rights,” “the situation of children cannot be likened to that of adults and thus warrants the adoption of *special measures*.”²⁶⁷ El Salvador committed no violation of international human rights law, therefore, by sanctioning infanticide as *aggravated* homicide, and taking into account the newborn child’s complete dependence on her parents or caretakers for survival as an aggravating factor.

Criminal punishments adopted by El Salvador’s legislature to sanction infanticide and other practices that involve the killing of one’s own child are compatible with the American Convention, as are statutes that require mandatory reporting and investigation of crimes against children. The Inter-American Court has held that the convention’s article 4(1), which states that the right to life shall be “protected by law . . . from the moment of conception” requires not only legislative action, but also public health measures, investigation of deaths, identification of perpetrators, punishment of offenders, victim compensation and the prevention of certain forms of violence and life-threatening situations.²⁶⁸ El Salvador’s existing laws on infanticide do just that.

The Supreme Court of El Salvador has emphasized its international obligation to ensure that medical doctors report potential crimes against children, especially against those situated in a particular state of vulnerability

265. *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, para. 155 (Oct. 25, 2012).

266. *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, para. 246 (July 1, 2006) (emphasis added).

267. *Report on Corporal Punishment and Human Rights of Children and Adolescents*, *supra* note 246, at para. 23.

268. See *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, paras. 160-62, 176 (June 17, 2005); *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 174 (July 29, 1988); *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287, para. 496 (Nov. 14, 2014); *García Ibarra et al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 306, para. 98 (Nov. 17, 2015); *Landaeta Mejía Brothers et al. v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 281, paras. 181, 217 (Aug. 27, 2014).

and defenselessness, such as newborn children.²⁶⁹ During the *Manuela* trial, the State's representative argued that creating a right to medical confidentiality would violate the State's duty to report crimes against children and impose on health care personnel a new "duty to conceal" crimes against children, which would be a perverse distortion of confidentiality duties.²⁷⁰

The aggravated homicide of newborn children should not be treated differently from crimes against the life of other children or other persons under the American Convention. If an adult were injured and thrown into a septic tank without the ability to escape, and drowned in the waste, everyone would unquestionably find it to be a horrific crime and a violation of his human rights. Not many would deny that it is just as or more horrific to do the same to an innocent and helpless baby with his or her entire life yet to be lived. Indeed, Article 19 of the American Convention stresses that "[e]very minor child has the right to the *measures of protection* required by his condition as a minor on the part of his family, society, and the state."²⁷¹

A domestic law that would grant practical impunity for the killing of a newly born child by his own mother would constitute discrimination and unequal protection of the law in clear violation of Articles 1 and 24 of the American Convention on Human Rights. Article 24 states: "All persons are equal before the law. Consequently, they are entitled, *without discrimination*, to *equal protection* of the law."²⁷² The treaty's non-discrimination clause in Article 1(1) provides that States ought 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 . . . *birth*, or any other social condition."²⁷³ Impunity for infanticide as ordered by the Court would lead to a denial of legal protection for a particular class of persons: newborn infants killed by their own mothers shortly after birth.

The Inter-American Court has ordered El Salvador to create a unique statutory category, under which infanticide, considered today as aggravated homicide in El Salvador, would be treated either as a lesser crime or as no homicide at all.²⁷⁴ The newborn child, however, holds an equal right to life

269. Corte Suprema de Justicia [Supreme Court of Justice] Jan.20, 2015, 21-IND-2014, III (El Sal.).

270. Corte Interamericana de Derechos Humanos, *supra* note 20.

271. American Convention on Human Rights, *supra* note 25, at pt. I, ch. II, art. 19 (emphasis added).

272. *Id.* at pt. I, ch. II, art. 24 (emphasis added).

273. *Id.* at pt. I, ch. I, art 1, sec. 1 (emphasis added).

274. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, para. 35 n.82, paras. 170-71 (Nov. 2, 2021).

as any other person under the American Convention. Decriminalization and procedural reform aimed at inhibiting the investigation and prosecution of crimes against newly born children when committed by their mothers, constitute not only a violation of Article 4(1) on the right to life from conception, but also a violation of Article 19 on the rights of the child.²⁷⁵

C. *Enforcement of Penalties Against Infanticide in International Human Rights Law*

Criminal bans on the killing of newly born children and their enforcement are directly related to the American Convention's duty to legally protect, investigate, punish offenders and prevent future violations of the child's right to life.²⁷⁶ States parties are not only legally permitted but expressly required to enforce their criminal laws on any practice that intentionally causes the death of a newly born child, such as the aggravated homicide at issue in this case.²⁷⁷ They are also legally permitted to discourage those practices and to encourage non-violent alternatives for parents facing an unplanned pregnancy, such as financial assistance, psychological support, and adoption placement services, as part of their duty of prevention.

Enforcement of criminal bans on infanticide makes investigation and prosecution possible, while prohibitions on enforcement such as those ordered by the Inter-American Court would make it *impossible*. The Inter-American Court has interpreted Article 4(1) to contain both a negative State duty to ensure that no one is arbitrarily deprived of their right to life, and a positive State obligation to "adopt all the appropriate measures to protect and preserve the right to life," to "adopt a normative framework that dissuades any threat to life," and to "establish an effective legal system to investigate,

275. See American Convention on Human Rights, *supra* note 25, at pt. I, ch. II, art. 4, sec. 1.

276. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 218-19 (Nov. 2, 2021).

277. See *Ortiz Hernández et al. v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 338, para. 100 (Aug. 22, 2017); *García Ibarra et al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 306, para. 97 (Nov. 17, 2015); *Gómez-Paquiyaury Brothers v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, para. 129 (July 8, 2004); *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, paras. 145-46 (Oct. 25, 2012); *Barrios Family v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, para. 48 (Nov. 24, 2011); *Zambrano Vélez et al. v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, para. 81 (July 4, 2007).

punish, and redress deprivation of life by State officials or private individuals.”²⁷⁸

Forcing health care providers to conceal potential crimes against newly born children, according to the Court’s proposed redefinition of *secreto profesional* (professional confidentiality), would be a perverse interpretation of the American Convention and would violate the treaty duty to prevent and protect children. Neither the American Convention nor international human rights law require prohibiting medical doctors to report possible instances of infanticide. In the case of *Gonzales Lluy v. Ecuador*, the Court held that the State has an “obligation to monitor and supervise the provision of health care services . . . and of the *obligation not to endanger life*, which violates Article[] 4”²⁷⁹

Under the American Convention, States parties have an international legal obligation to “establish training programs” for law enforcement and health care employees, on “respect for the rights of children and adolescents”;²⁸⁰ they do not have a legal obligation to train them in impunity for crimes against children’s lives and human dignity. The Inter-American Court has found that the duty to respect the right to life obligates States and all of their agencies to refrain from engaging in collaboration, acquiescence, or tolerance thereof.²⁸¹ The Court has also found State responsibility where private parties carried out violations of the right to life, for failure to comply with its duty to protect and respect the right to life, while preventing violations thereof.²⁸² Trainings such as those ordered by the Court would

278. See *Ortiz Hernández et al. v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 338, para. 100 (Aug. 22, 2017); *García Ibarra et al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 306, paras. 97-98 (Nov. 17, 2015); *Gómez-Paquiyaury Brothers v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, para. 129 (July 8, 2004); *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, para. 145 (Oct. 25, 2012); *Barrios Family v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, para. 48 (Nov. 24, 2011); *Zambrano Vélez et al. v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, para. 81 (July 4, 2007).

279. *Gonzales Lluy et al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 298, para. 191 (Sept. 1, 2015) (emphasis added).

280. *García Ibarra et al. v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 306, paras. 117, 209 (Nov. 17, 2015).

281. See *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134 para. 120 (Sept. 15, 2005).

282. See *Ximenes-Lopes v. Brazil*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, paras. 88-90, 150 (July 4, 2006); *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 paras. 166, 176 (July 29, 1988).

promote collaboration with, acquiescence and tolerance of infanticide and would violate the State duty to protect the child's right to life and prevent violations against it.

VII. CONCLUSION

The American Convention and international human rights law do not require impunity for infanticide, as was acknowledged in the *Manuela* judgment itself.²⁸³ The American Convention and international human rights law do not require that homicidal crimes against newly born children be left in practical impunity simply because the perpetrator is the mother. As the CRC recognizes, parents have an obligation under international human rights law to protect their children from physical harm.²⁸⁴ Enforcing penalties against aggravated homicide of a child by any perpetrator, including her mother or father, does not violate international human rights law. El Salvador's prosecution of Manuela for the aggravated homicide of her own child, Dolores Gabriel, did not violate international human rights law.

The Inter-American Court's orders to create new confidentiality (*secreto profesional*) requirements for abortion and aggravated homicide of a newborn child are manifestly directed to inhibit investigation and prosecution of crimes against unborn and newborn children, and to create a duty to conceal the commission of such crimes.²⁸⁵ These orders are contrary to international human rights law, which requires investigation, prosecution and punishment of homicidal crimes against children, as established in Articles 4 and 19 of the American Convention.²⁸⁶

In light of its nature as an impartial judicial body, the Court should avoid lending political support to the promotion of impunity for infanticide and decriminalization of abortion. In *Manuela*, the Inter-American Court has shown unreasonable support for abortion rights advocacy, choosing to go beyond its radical demands by ordering a significant reduction of infanticide penalties and other legislative reforms that would substantially inhibit

283. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 218-19 (Nov. 2, 2021).

284. *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, para. 15 (Aug. 28, 2002).

285. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441, paras. 283-87 (Nov. 2, 2021) (see official Spanish version of judgment).

286. See American Convention on Human Rights, *supra* note 25, at pt. I, ch. II, art. 4(1), art. 19.

investigation and prosecution of infanticide and abortion. Having all evidence before it, the Court should have entertained serious doubts as to the truth of many contradictory statements about the facts on the part of the petitioning organization. Instead, it imprudently chose to support calculated efforts to distort and deliberately misrepresent the case's proven facts and law.

The Court's complete disregard for children's rights in this lawsuit and its order to carry out regressions in legal protection for children's right to life undermine its credibility as a human rights tribunal. The judgment's indifference over the death and indescribable suffering of Dolores Gabriel Hernandez, a newborn baby boy who died in the most horrific and undignified manner, and its bias for pro-abortion feminist causes casts doubt on the Court's impartiality and professionalism.

As of early 2023, El Salvador has not complied with the Court's order to revert infanticide penalties, which would need to be approved by its legislative body, the *Asamblea Legislativa* (legislative assembly). This may be unlikely to happen any time soon due to the lack of public support for infanticide decriminalization in El Salvador, as in the rest of the world. In addition, in the month prior to the issuing of the *Manuela* ruling, October of 2021, El Salvador's national legislature rejected a bill to legalize abortion on demand, finding it contrary to its constitution and its supreme court constitutional decisions.²⁸⁷

El Salvador's government, however, has apparently complied with the order to "take the necessary measures to ensure comprehensive care in cases of obstetric emergencies"²⁸⁸ by approving the "Growing Together Act" (*Ley Crecer Juntos*), which contains a provision emphasizing an obligation of health care providers to provide medical care to women and children in "emergency" situations that pose an "imminent danger to life" or an "immediate risk of irreparable [medical] harm."²⁸⁹

287. Centro UC Derecho y Religión, Boletín Jurídico Observatorio de libertad religiosa de América Latina y El Caribe, Comisión de Legislación y Puntos Constitucionales (Asamblea Legislativa)- Dictamen N° 15- Informe que rechaza la incorporación de norma al Código Penal que despenaliza el aborto, por considerar inconstitucional dicha iniciativa [Commission on Legislation and Constitutional Law (Legislative Assembly), Opinion N. 15 – Report that rejects the incorporation in the criminal code of a norm that decriminalizes abortion, due to its unconstitutionality] (Nov. 3, 2021) (El Sal.), <http://ojs.uc.cl/index.php/bjur/article/view/44161>.

288. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441 (operative para. 18, p. 89) (Nov. 2, 2021).

289. LEY CRECER JUNTOS [Growing Together Act] art. 25 (El Sal.), https://www.crecejuntos.gob.sv/dist/documents/DECRETO_LEY.pdf.

The language recommended by the Court on obstetric emergencies and abortion, however, is notably absent from the law. The law refers to emergency health situations in general and includes a right of children to comprehensive sexual education, primarily from the parents and the family, and charges the Executive with devising strategies to that effect,²⁹⁰ which partially addresses the Inter-American Court's order to "design and implement an education program on sexuality and reproduction."²⁹¹

El Salvador's pro-life roots run deeper than some may believe and a judgment by the Inter-American Court may not produce the outcomes desired by pro-abortion organizations and may even be given a prolife interpretation. A provision in the Growing Together Act, for instance, recognizes the "right to life from the moment of conception,"²⁹² which would make it very difficult to interpret the law as favoring elective abortion or infanticide.

In addition, in some of the "contextual cases" presented during the *Manuela* trial, the Supreme Court of El Salvador has already rejected the existence of a right to medical confidentiality that would restrict or prohibit doctors to report abortion or infanticide cases to law enforcement, finding that "medical personnel do not violate professional confidentiality" when reporting crimes against newborn children to law enforcement authorities.²⁹³ The Salvadorian Supreme Court has also found that, under Salvadorian constitutional law, medical personnel are often the first to find out about a potential crime against a child, and therefore have a duty to report crimes against children, including aggravated homicide against infants, and that failure to do so would violate their duty to report under national statutes.²⁹⁴

Pro-abortion organizations involved in the *Manuela* litigation have brought six other petitions to the Commission arguing human rights violations against infanticide convicts, none of which involve an individual's

290. *Id.* at art. 33.

291. *Manuela et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 441 (operative para. 17, p. 89) (Nov. 2, 2021).

292. LEY CRECER JUNTOS [Growing Together Act] art. 16 (El Sal.), https://www.crecejuntos.gob.sv/dist/documents/DECRETO_LEY.pdf.

293. Corte Suprema de Justicia [Supreme Court of Justice] Jan. 20, 2015, 21-IND-2014, III (El Sal.) (author translation).

294. *Id.*

actual imprisonment for abortion or obstetric emergency.²⁹⁵ After the *Manuela* judgment was issued, pro-abortion NGOs were emboldened in their national campaigns demanding that El Salvador legalize abortion, release infanticide convicts, reverse their convictions and leave the crime of infanticide in impunity.²⁹⁶ Having court documents available to them, pro-abortion NGOs must know their claims to be false but choose to disregard the true facts of each case for the sake of advancing abortion rights in traditional countries, such as El Salvador, that morally oppose abortion.

The United States is a signatory but not a party to the American Convention on Human Rights: it signed the Convention in 1977 but has not ratified it.²⁹⁷ The United States has never, however, withdrawn or expressed an intent to withdraw its signature. Under international treaty law, that means that the United States is not bound by the treaty but is supposed to refrain from violating the “object and purpose of [the] treaty.”²⁹⁸ As a signatory to the American Convention, the United States Senate should be mindful of this judgment before making any decision to ratify the treaty and submit its sovereignty to the jurisdiction of an international court such as the Inter-American Court of Human Rights, one that is willing to sacrifice children’s rights protection for political advocacy for abortion rights.

295. Corte Interamericana de Derechos Humanos, *supra* note 20 (where State representative argues that evidence about these six other petitions is inadmissible in the *Manuela* case, and the Court is not allowed to make a prior judgment on them).

296. See Alessia Genoves, *CIDH rechaza condenas por homicidio contra Esme y Lesly. Alegan que tuvieron “emergencias obstétricas”* [IACHR Rejects Murder Convictions Against Esme and Lesly. They Allege They Had “Obstetric Emergencies”], DIARIO DIGITAL CONTRA PUNTO (July 12, 2022), <https://www.contrapunto.com.sv/cidh-rechaza-condenas-por-homicidio-contra-esme-y-lesly-alegan-que-tuvieron-emergencias-obstetricas/>.

297. See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

298. See Vienna Convention on the Law of Treaties art. 18, May 22, 1969, 1155 U.N.T.S. 331.